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The growing spectre of chemical product cancellations, and what to do about it

BY LYNN L. BERGESON

Effective 1 January 2022, household cleaning, cosmetic and personal care products containing quantities of 1,4-dioxane over specified trivial levels will be prohibited from sale in the state of New York. The law imposing these restrictions, signed by governor Andrew M. Cuomo on 9 December 2019, is intended to protect drinking water supplies from contamination by the chemical. This product ban falls on the heels of the 15 March 2019 final rule issued by the US Environmental Protection Agency (EPA) banning the manufacture, import, processing and distribution, including e-commerce, of methylene chloride for consumer paint and coating

removal. The EPA's determination that the use of methylene chloride in consumer paint and coating removal presents an 'unreasonable risk' of injury to health prompted this decision. These commercial bans are not anomalies; they are the new normal. This article explains why, and the reasons corporate leaders, brand managers, investors and others in this commercial space need to understand this trend and plan accordingly.

Background

Concern with the human and environmental impacts of chemicals in everyday products is not new. *The Wall Street Journal*, among other mainstream publications,

was reporting 15 years ago on industrial chemical compositions and their probable commercial impact on consumer products. The concern has, however, intensified, perhaps more than product manufacturers, corporate financiers and brand managers appreciate. A few points help explain why this is so.

First, the complexity of international and domestic chemical regulation has evolved considerably. The pace correlates directly with global interest in the effects of chemical exposure, the explosion of scientific data on the effect of chemicals on biological systems, an amped-up public health activist community sharing information with increasingly sympathetic

consumers and social media's unique ability to amplify those messages. The transformative 2006 European Union (EU) Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regulation set a new precaution-based standard for the identification, evaluation and regulation of industrial chemical substances, regulating the consequences of human health and environmental exposure to these chemicals. Implementation of the REACH programme has resulted in the curtailment or elimination in the EU of many industrial chemicals and uses of industrial chemicals, particularly consumer uses. REACH's impact has been global and not limited to the EU, as a governmental determination of 'unacceptable risk' knows no geographic boundary. REACH-like programmes are now in effect in South Korea and Turkey, ramping up in Eurasia and emerging elsewhere.

The US industrial chemical law, the risk-based Toxic Substances Control Act (TSCA), was significantly amended in 2016. The EPA is in the early days of its implementation. Provisions in the new law have prominently placed the risk evaluation of 'high priority' existing chemicals directly before the public, greatly heightening the public's perception of risk from chemical exposures. As several of the first tranche of 10 high-priority substances are well known – asbestos, perchloroethylene, carbon tetrachloride – the EPA's highly interactive and public risk evaluation process has captured the public's imagination. The relentlessly demanding and repetitive nature of the law's mandate to evaluate all high-priority existing chemicals, thousands of them, guarantees a decades-long obsession with industrial chemicals, their uses and their potential to cause harm. Private industry advocates and public health enthusiasts may celebrate

the full-employment benefits of the law. Everyone else is left to address the legal, regulatory and optical impacts of the non-stop streaming of health effects information that can make or break a product line and inflict significant reputational injury on manufacturers and others caught unaware.

Second, a handful of states have been exceedingly forward thinking in initiating a broad range of chemical-specific and chemical product-related restrictions, bans, alternative assessments and green chemistry or sustainability initiatives to address the gap left by the TSCA's widely perceived ineffectiveness before it was modernised. California, Maine, Massachusetts and New York have been active in implementing comprehensive chemical management programmes. More broadly, half of the states have considered measures to reduce their residents' exposure to certain targeted chemicals, including flame retardants, bisphenol A, perfluoroalkyl and polyfluoroalkyl substances (PFAS) and others.

Third, an array of private-sector initiatives has been instrumental in recalibrating consumer, stockholder and retailer expectations with respect to ingredient disclosure and communication, raw material selection and deselection, transparent value-chain communications, safer product design and related initiatives, particularly in the consumer product industry. These standards are not compelled by law, but rather act as de facto codes of conduct that manufacturers, distributors and others ignore at their peril. For example, Lowe's, a large US retailer, disallowed the stocking of paint and coating removal products with methylene chloride for consumer uses well before the EPA compelled this result, effectively imposing a mini product ban before the EPA acted. These 'soft law' standards extend to

and include the financial sector, which has a long history of considering social responsibility factors in decision making.

The new normal and what to do about it

The seismic changes occasioned by these trends have irrevocably altered the design, formulation and marketing of new chemical products, and product manufacturers need to reassess product lines containing existing chemicals and their applications with a view to the future. The pace of TSCA implementation will reinforce and accelerate the focus on chemical components and their potential for human health and environmental harm. The methylene chloride and 1,4-dioxane bans test this observation. Other initiatives are on the horizon. The European Green Deal seeks to achieve a non-toxic environment strategy that eliminates 'harmful chemicals' and restricts endocrine-disrupting chemicals, a regulatory trend far more robust in Europe than in the US. Closer to home, Congress is considering legislation to broaden the Food and Drug Administration's (FDA's) oversight of the \$80bn cosmetics industry, long claimed to be underregulated. These are merely two examples of the shape of things to come.

Interested stakeholders must be prepared to address the consequences of the new normal. A few suggestions are below.

Whether you are a chemical manufacturer, product manufacturer, chief executive, board member, brand manager or financier, you need to know what chemical substances are critical to your portfolio, your company and your brand. For most product manufacturers, many chemicals are compositionally relevant. Not all are critical, however. Essential chemical substances should be identified and checked against the EPA's TSCA Work Plan for Chemicals Assessment. The 90 existing

industrial chemicals listed constitute a road map for signalling the chemicals that the EPA believes are most in need of risk evaluation, and perhaps regulatory measures curtailing a product's commercial life. The first 10 high-priority substances now being evaluated under TSCA were all drawn from this list, and at least half of the future high-priority substances must come from this list. If your company's critical path chemicals are found on this list, you should be taking steps now to prepare for EPA action and to align business projections accordingly.

Companies should review product labelling. The public appreciates candour, and to some extent the law rewards it. Ensuring that product labelling is clear and accurate can go a long way in both ensuring honesty and transparency and providing clear notice to downstream customers and end users that your product contains chemicals that they may wish to avoid. Transparency shifts the legal burden a bit and allows the customer to make informed decisions.

Parties should also consider product reformulation in earnest. Companies

complain about reformulation. The process is time consuming and costly, and success is not guaranteed. That said, it may well be the least costly option with respect to certain product ingredients, given the adverse legal and commercial consequences that some chemicals are certain to invite. Management may need to push hard for reformulation and overcome the temptation to avoid the challenges associated with it. If reformulation is a standard business practice, it would be unwise not to include sustainability considerations in new product design. Forward-thinking design will serve a business line well and will likely avert unplanned measures, including product bans and other measures required by law, mandated down the road.

Companies should monitor regulatory developments globally and advocate. How regulatory and product stewardship initiatives will evolve is unclear; that they will is a certainty. Close global legal and regulatory monitoring and product advocacy are essential. Reading the tea leaves is not as hard as people think. It is no secret that work plan chemicals are in the EPA's crosshairs. Similar lists

informing regulatory advocacy exist in other jurisdictions. Acquire, read and react to such lists as necessary. Develop a plan. If a targeted chemical is essential to your business, advocacy supported by robust data is essential. If misinformation prevails, correct it. Be proactive. Develop data where gaps exist and the product or use is important and defensible. Collaborate with like-minded competitors to leverage resources and speak with a unified, information-based voice. Hoping for the best and doing nothing are not strategies; they are precursors to failure.

Conclusion

Commercial restrictions on chemical product ingredients are the new normal. A proactive, strategic approach to brand management that is relentlessly aligned with global chemical scientific and regulatory trends will avert reputational damage and other business injuries and will competitively serve a business's bottom line. ■

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