

Reports

USA

U.S. Consumer Product Ingredient Disclosure Measures Pick Up Momentum

*Lynn L. Bergeson**

The ‘right-to-know’ has been a foundational element of U.S. environmental law and policy for decades. As more information becomes known about the potential health and environmental impacts of chemical substances in industrial, commercial, and especially consumer products, the public’s interest in product ingredients has sharply increased. Recently this interest has taken a new direction, one targeting consumer cleaning products. Two state initiatives, originating in opposite sides of the country, reflect different approaches to compelling product ingredient disclosure, and portend similar state measures elsewhere. Consumer product manufacturers are bracing for renewed challenges in preserving consistent product labeling and maintaining confidential business information (CBI). Information-saturated consumers likely do not know what to think as they sort through ever more detailed product information. How these state measures might impact European manufacturers and trade and commerce in general remain to be seen. Here is an overview of the new measures and their implications.

I. California Cleaning Product Right-to-Know Act of 2017

On October 15, 2017, California Governor Jerry Brown (D) signed the Cleaning Product Right to Know Act of 2017 (S.B. 258). The new law requires manufacturers of cleaning products to disclose certain chemical ingredients on the product label and on the manufacturer’s website. It requires a manufacturer of a ‘designated product’ sold in California to disclose a list of all intentionally added ingredients contained in a covered product that are included on a designated list and a list of all fragrance allergens included on Annex III of the European Union (EU) Cosmetics

Regulation No. 1223/2009 as required to be labeled by the EU Detergents Regulation No. 648/2004 on January 1, 2018 (Annex III), when present in the product at a concentration at or above 0.01 percent (100 parts per million (ppm)).

The Act’s title is a bit misleading, as the law covers far more than cleaning products, and specifically references fragrance ingredients. A designated product is ‘a finished product that is an air care product, automotive product, general cleaning product, or a polish or floor maintenance product used primarily for janitorial, domestic, or institutional cleaning purposes.’ The law covers products sold for household, institutional, or commercial purposes. Excluded products include foods, drugs, and cosmetics, including personal care products such as toothpaste, shampoo, and hand soap; trial samples of designated products that are not packaged for individual sale, resale, or retail; and industrial products specifically manufactured for, and exclusively used in, oil and gas production, steel production, heavy industry manufacturing, industrial water treatment, industrial textile maintenance and processing other than industrial laundering, food and beverage processing and packaging; and other industrial manufacturing processes.

An intentionally added ingredient is ‘a chemical that a manufacturer has intentionally added to a designated product and that has a functional or technical effect in the designated product.’ A nonfunctional constituent is defined as one of several listed sub-

DOI: 10.21552/icrl/2018/2/6

* Lynn L. Bergeson is the Managing Partner of Bergeson & Campbell, P.C., a Washington, D.C. based law firm and President of The Acta Group, B&C’s international chemical consulting firm affiliate. For Correspondence: <lbergeson@lawbc.com>

stances that is an incidental component of an intentionally added ingredient, a breakdown product of an intentionally added ingredient, or a byproduct of the manufacturing process that has no functional or technical effect on the designated product.¹

CBI claims may be asserted with respect to any intentionally added ingredient or combination of ingredients for which a claim has been approved by the U.S. Environmental Protection Agency (EPA) for inclusion on the Toxic Substances Control Act (TSCA) Confidential Inventory, or for which the manufacturer or its supplier claim protection under the Uniform Trade Secrets Act. CBI excludes an intentionally added ingredient or combination of ingredients that is on a designated list; a nonfunctional constituent; or a fragrance allergen included on Annex III, or subsequent updates to those regulations, when present in the product at a concentration at or above 0.01 percent. A designated list is any of the more than 20 state, federal, and international lists identified (the so-called ‘list of lists’), including all the usual suspects, which some believe to be excessive and perhaps overly broad.

The online disclosure requirements will apply to designated products sold in California on or after January 1, 2020. The product label disclosure requirements will apply to designated products sold in California on or after January 1, 2021. A designated product manufactured before these dates will be deemed compliant if the designated product displays either the date of manufacture or a code indicating the date of manufacture. Manufacturers may, at their discretion, label designated products manufactured before January 1, 2021, in accordance with the requirements.

II. New York’s Household Cleansing Product Information Disclosure Program

In somewhat of a surprise announcement, the New York State Department of Environmental Conservation (DEC) on June 6, 2018, released its final policy and Disclosure Certification Form to facilitate manufacturer disclosures under the Household Cleansing Product Information Disclosure Program (Disclosure Program). The Program was first rolled out in April 2017. The Disclosure Program is similar to the California Cleaning Product Right-to-Know Act, but also quite different in key respects. The Disclosure Program requires most manufacturers of cleaning products sold in New York to disclose chemical ingredients and identify any ingredients that appear on authoritative lists of chemicals of concern on their websites by July 1, 2019,² much earlier than under the California law.

The Disclosure Program covers ‘soaps and detergents containing a surfactant as a wetting or dirt emulsifying agent and used primarily for domestic or commercial cleaning purposes, including but not limited to the cleansing of fabrics, dishes, food utensils and household and commercial premises.’ Similar to the California law, the Disclosure Program does not cover ‘foods, drugs and cosmetics, including personal care items such as toothpaste, shampoo and hand soap’; ‘products labeled, advertised, marketed and distributed for use primarily as pesticides’; or ‘cleansing products used primarily in industrial manufacturing, production and assembling processes.’ ‘Distributed, sold, or offered for sale in New York State’ is defined to include products offered for sale at retail and wholesale or distributed for promotional purposes, including products offered for sale via the telephone, a catalog, or the internet from the manufacturer, its authorized distributors or representatives, or authorized third parties. Similar to the California program, fragrance ingredients are specifically identified and are defined as any intentionally added substance or complex mixture of aroma chemicals, natural essential oils, or any other functional ingredient or ingredients for which the sole purpose is to impart an odor or scent, or to counteract an odor.

The Disclosure Program covers ‘industrial manufacturing, production, and assembling processes.’ These are defined to include oil and gas production,

1 1,4 dioxane; 1,1 dichloroethane; acrylic acid; benzene; benzidine; 1,3 butadiene; carbon tetrachloride; chloroform; ethylene oxide; nitilotriacetic acid; butyl benzyl phthalate; butyl decyl phthalate; di(2-ethylhexyl) phthalate; diethyl phthalate; diisobutyl phthalate; di(n-octyl) phthalate; diisononyl phthalate; dioctyl phthalate; butylparaben; ethylparaben; isobutylparaben; methylparaben; propylparaben; formaldehyde; 1-(3-chloroallyl)-3,5,7-triaza-1-azoniaadamantane chloride; dmdm hydantoin; diazolidinyl urea; glyoxal; imidazolidinyl urea; polyoxymethylene urea; sodium hydroxymethylglycinate; 2-bromo-2-nitropropane-1,3-diol; n-nitrosodimethylamine; and n-nitosodiethylamine.

2 DEC has posted the Household Cleansing Product Information Disclosure Program Certification Form and Program Policy on its website, it can be accessed here: <https://www.dec.ny.gov/docs/materials_minerals_pdf/cleansingprodin.pdf>. The DEC’s response to comments on the Household Cleansing Product Information Disclosure Program can be viewed here: <https://www.dec.ny.gov/docs/materials_minerals_pdf/responsecomments.pdf>.

steel production, heavy industry manufacturing, industrial water treatment, industrial textile maintenance and processing other than industrial laundering, and food and beverage processing and packaging.

Manufacturers must submit a Disclosure Certification Form to DEC, signed by a senior management official, certifying that the disclosed information is true, accurate, and complete to the best of their knowledge. Information to be disclosed should be 'posted on a manufacturer's website in a manner that is obvious, noticeable and readily accessible, via the internet, to the public.' The Disclosure Certification Form must be submitted to DEC online upon the effective dates of the Disclosure Program and every two years thereafter. In addition, an updated Disclosure Certification Form must be submitted online to DEC within two months of a new product entering the market, or a URL change for a current disclosure.

For purposes of the Disclosure Program, CBI is any record(s) that would be exempt from disclosure as either a trade secret or confidential commercial information pursuant to New York law. A manufacturer that withholds information as CBI should maintain the justification for withholding, and provide that justification upon DEC's request. Suppliers to manufacturers may also assert CBI claims.

The Disclosure Program states that each 'category' of information disclosed should be posted in close proximity to all other required categories on one web page, including but not limited to the manufacturer's name and contact information. Manufacturers should prove a link to the Disclosure Program to provide more information on the meaning of commonly used terms, such as 'Chemical Abstracts Service (CAS) number' or 'nanoscale material,' as discussed below.

The extent of disclosure is quite detailed under the Disclosure Program. The extent of disclosure should be indicated by providing the number and title, indicated in bold in the hierarchy noted below, of the level achieved:

- Hierarchy of Non-Fragrance Ingredients Disclosure Levels:
 - **Level 1: Full Disclosure of All Intentionally Added and Nonfunctional Ingredients.** All known intentionally added ingredients are disclosed, including those present in trace quantities. All known non-

functional ingredients are disclosed, including any present in trace quantities that appear on one or more of the lists of chemicals of concern named in Appendix B of the Disclosure Program;

- **Level 2: Full Disclosure of All Intentionally Added Ingredients.** All intentionally added ingredients are disclosed, including those present in trace quantities. One or more nonfunctional ingredients are withheld as CBI; and
 - **Level 3: Partial Disclosure of Intentionally Added Ingredients.** One or more intentionally added ingredients are withheld as CBI. All nonfunctional ingredients are disclosed, or one or more are withheld as CBI.
- Hierarchy of Fragrance Ingredients Disclosure Levels:
 - **Level 1: Full Disclosure of All Fragrances.** All fragrance ingredients are disclosed, including those present in trace quantities;
 - **Level 2: Partial Disclosure of Fragrances; Master List Provided.** One or more fragrance ingredients are withheld as CBI, but a master list of either all fragrance ingredients used by the manufacturer, or of all fragrance ingredients used in a category of the manufacturer's designated consumer products is provided that includes all ingredients withheld;
 - **Level 3: Partial Disclosure of Fragrances; No Master List Provided.** One or more fragrance ingredients are withheld as CBI, and no master list of fragrance ingredients used by the manufacturer is provided;
 - **Level 4: No Disclosure of Fragrances; Master List Provided.** All fragrance ingredients are withheld as CBI, but a master list of either all fragrance ingredients used by the manufacturer, or of all fragrance ingredients used in a category of the manufacturer's designated consumer products is provided that includes all ingredients withheld; and
 - **Level 5: No Disclosure of Fragrances; No Master List Provided.** All fragrance ingredients are withheld as CBI, and no master list of fragrance ingre-

dients used by the manufacturer is provided.

The Disclosure Program states that a link to the Program should also be provided ‘for the public to learn more about what each level of disclosure means.’ Additional rules apply to the disclosure of ingredients. Manufacturers may group ingredients separately in the following categories, provided all ingredients are included in one list, or may intermingle the categories as appropriate: intentionally added ingredients; fragrance ingredients; nonfunctional byproducts; and nonfunctional contaminants. Intentionally added ingredients and nonfunctional ingredients should be listed in descending order of predominance by weight in the product, except that intentionally added ingredients or nonfunctional ingredients present at a weight below one percent may be listed following the other ingredients without respect to the order of predominance by weight. The actual weight percentages of any ingredient need not be disclosed.

If an ingredient in a product is listed on one or more of the lists of chemicals of concern named in Appendix B of the Disclosure Program, such information must be disclosed, even if the specific name or other information about the ingredient is being withheld as CBI. The fact that an ingredient appears on such a list ‘must be clearly and unequivocally indicated where the ingredient appears on the list of ingredients,’ using one of the specified approaches, terms, or phrases set out under the Disclosure Program. The fact that an ingredient appears on the California Proposition 65 list need not be disclosed until January 1, 2023. Manufacturers must post information on their websites regarding the nature and extent of investigations and research performed directly by or at the direction of the manufacturer concerning the effects on human health and the environment of covered products or the chemical ingredients of such products.

For each ingredient that is a nanoscale material, a term describing the nanoscale material should be disclosed. According to the Disclosure Program, if the nanoscale material is carbon, the disclosure should use the term ‘nanoscale’ carbon. A nanoscale material ‘is a chemical substance that meets the TSCA definition of a reportable chemical substance manufac-

tured or processed at the nanoscale.’ The definition referenced by the Disclosure Program is the EPA’s definition under the TSCA Section 8(a) nano reporting rule.³

Manufacturers must post all required information for the following ingredients by July 1, 2019 (but manufacturers that are independently owned and operated and employ 100 or less people are not required to post such information until July 1, 2020): intentionally added ingredients other than fragrance ingredients and nonfunctional ingredients present above trace levels.

Manufacturers must post all required information for the following ingredients by July 1, 2020: fragrance ingredients; nonfunctional byproducts listed in Appendix D present at or above 100 parts per million (ppm), except for 1,4 dioxane, which should be reported at or above 350 parts per trillion (ppt); and perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), which should be reported at a combined level of at or above 70 ppt.

Manufacturers must post all required information for the following ingredients by January 1, 2023: nonfunctional byproducts that appear on one or more of the lists of chemicals of concern named in Appendix B and are present at or above the practical quantitation limit; and nonfunctional contaminants that appear on one or more of the lists of chemicals of concern named in Appendix B and are present at or above the thresholds described in the Disclosure Program. All other required information should be posted by July 1, 2019, with certain exceptions. Manufacturers should update their disclosures each time they change the ingredients in a product, introduce a new product to the market, or a list of chemicals of concern is changed to include an ingredient present in any of their products.

III. Discussion

These two new state programs are significant for several reasons. First, the compliance dates for the New York Disclosure Program are not far off, unlike the California law. Affected manufacturers are quite unhappy with this fact, the lack of alignment between New York and California, and the fact that the New York program, unlike the California law, was not extensively vetted among cleaning product manufacturers before its issuance. Some trade associations

3 See 40 C.F.R. § 704.20(a).

reportedly are considering judicially challenging the New York program, premised in part on what they claim is a shaky legislative basis - the Environmental Conservation Law - enacted back in the early 1970s.

Second, the scope of the New York program is somewhat open-ended, unlike the California law. The New York Disclosure Program may be just the beginning of many more products that could be subject to disclosure, including perhaps consumer or children's products, among others.

Third, the New York Disclosure Program is quite robust and compels a level of specificity and assessment significantly different from the California law. As cleaning product manufacturers generally market in all states, having to manage disparate disclosure programs and state labeling requirements that are quite different from each other make those subject to these provisions very concerned, particularly with the prospect of other states enacting similar measures down the road. The requirements specific to nanomaterials, under the New York Disclosure Program in particular, are likely to cause concern and invite confusion.

Finally, that these 'ingredient disclosure' programs are beginning to populate the commercial landscape is likely to be cause for concern by all product manufacturers. In general, these programs seek to achieve a key goal - ingredient disclosure, but they do so in ways that are considerably different on a state-by-state basis. The New York program and the California law are actually quite different, aside from the lists of chemicals of concern, and there is every reason to expect other states will enact similar (but different) laws in the years ahead. Aligning these programs could well become a commercial nightmare. The New York program and the California law's use of state, federal, and international lists of chemicals of concern increases the significance of being added to one of these lists, and product manufacturers should be aware of the implications of being added to these lists. Whether consumers will be the beneficiaries of what promises to be a heroic effort and relentless disclosure is unclear.

European product manufacturers can be expected to be concerned with these state ingredient disclosure measures as well, especially if no comparable ingredient disclosure is required in other jurisdictions. Legitimate issues of trade secrets and CBI may dampen interest in marketing products in the U.S. since the California and New York markets are substantial draws in terms of size, but now include disclosure requirements. European manufacturers may choose not to sell their products in the U.S. if the options are either to meet the specific requirements of the California and New York programs or to sell in all other states but California and New York, two of the largest consumer markets in the U.S.

The state programs present issues for U.S. product manufacturers, too. On June 6, 2018, bicameral, bipartisan legislation was introduced that would amend the federal Fair Packaging and Labeling Act to require that federal - and state - mandated information declarations and labeling requirements applicable to the chemical composition of, and radiation emitted by, consumer products meet minimum scientific standards.⁴ Under the legislation, declaration requirements would have to be risk-based and based on the best available science and appropriate weight of the evidence review. An industry coalition, the Coalition for Accurate Product Labels, was launched on June 7, 2018, that supports the legislation. The Coalition consists of more than 60 organizations representing manufacturers, farmers, small businesses, and retailers.

In summary, this is a continuously evolving area that merits further scrutiny. States have a tendency to adopt programs that are already fully baked in other states, and supporters of the right-to-know principle can be expected to promote broad adoption of such measures. It remains to be seen if enhanced ingredient disclosure promotes more discriminating purchasing decisions, increases costs, or otherwise enhances the safe selection and use of chemical substances.

4 See S 3019 and H.R. 6022.