

A Rising Tide Of Proposed Chemical Disclosure Laws

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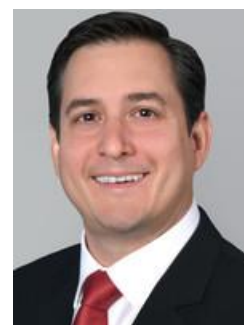
For the third time in seven years, California is considering a chemical disclosure bill for cleaning products. Senate Bill 258, the Cleaning Product Right to Know Act of 2017 introduced by Sen. Ricardo Lara, D-Bell Gardens, is intended to require manufacturers to disclose the ingredients in their cleaning products. Due to a number of proposed consumer product disclosure bills throughout the country and an increasingly coordinated lobbying campaign, legislative interest in required chemical disclosures for cleaning products in California — and elsewhere — is on the rise.

As introduced, SB 258 would amend California's Health and Safety Code to require cleaning product manufacturers to include the following information on their product labels:

- A complete list of ingredients and contaminants of concern in descending order (except for ingredients present at less than 1 percent concentration, which may be listed without respect to order);[1]
- A pictogram developed by the California Environmental Protection Agency communicating potential health impacts of ingredients or contaminants of concern;
- A "Quick Response" barcode readable by mobile devices if a product contains a candidate chemical;[2] and
- A statement directing consumers to the manufacturer's website for more information on certain ingredients.

Additionally, manufacturers would be required to post online a list of all ingredients and contaminants of concern contained in their products, with the Chemical Abstract Service numbers and the functional purpose served by each ingredient, and links to external websites regarding candidate chemicals and allergenic fragrances.[3]

SB 258 contributes to the increasing legislative trend of consumer product right-to-know initiatives. In the first six weeks of 2017 alone, there were proposed bills restricting or requiring disclosure of chemicals in 16 states, including at least 14 measures in nine states involving consumer products.[4] And



Thomas A. Manakides



Krista deBoer

New York's Gov. Andrew Cuomo announced in January that the state's Department of Environmental Conservation (DEC) would commence enforcement of a household cleaning product disclosure law that was passed in the 1970's but which went largely ignored for over 40 years.[5] If the DEC enforces this law as Cuomo has proposed, New York will be the first state to require manufacturers' websites to disclose a product's first 95 percent of ingredients by weight and any research performed by the manufacturer concerning effects on human health and the environment of such ingredients.[6]

On the federal front, Rep. Steve Israel, D, N.Y., introduced the federal Cleaning Product Right to Know Acts of 2014 and 2016 which would have required on-label and website disclosures of product ingredients. Though the bill failed to get out of committee both times, it appears the bill will be reintroduced again in 2017.[7]

Even absent legislation, some level of voluntary disclosure is quickly becoming more commonplace. Reflecting — and promoting — this trend toward voluntary disclosures, the primary trade association representing cleaning product manufacturers, the Consumer Specialty Products Association (CSPA), launched a voluntary consumer product ingredient communications initiative in 2012 whereby manufacturers list ingredients on the product label, the manufacturers' website, via a toll-free phone number, or through some other nonelectronic means.[8]

And of course, SB 258 is itself part of a renewed effort to get cleaning product disclosure legislation passed in California. SB 258 comes on the heels of AB 708, a similar measure which failed on the Assembly floor last year, and SB 928, the 2010 cleaning products disclosure bill, which never made it out of the Assembly Appropriations Committee.

The prior failed efforts to pass legislation in California indicate that in order for SB 258 to become law, revisions may be necessary, particularly with respect to its labeling requirements. California's previous two measures, New York's regulation, retailer initiatives, and voluntary disclosure guidelines all have in common that manufacturers need not disclose product ingredients on their labels — online disclosure suffices. Indeed, last year's AB 708 was initially drafted to include on-label disclosures, but the version of the bill that went to the Assembly floor for a vote provided only for website publication.[9]

The SB 258 requirement that all ingredients be listed on the product label — as well as the additional imposition of a pictogram and Quick Response code — is a primary focus of the bill's opposition, according to the legislative analysis conducted by California's Senate Committee on Environmental Quality.[10] Those opposed to SB 258 argue that providing a list of 50 to 200 ingredients using chemical nomenclature along with a pictogram and Quick Response code would result in a crowded label and increased consumer confusion, thereby failing to achieve the measure's stated goals.[11] Critics further argue that manufacturers would be at constant risk of noncompliance and would have to perpetually update labels.[12] Some opponents therefore argue for a web-based disclosure requirement as a more effective and efficient means of disclosure, which also permits manufacturers to update, in real time, changes to product ingredients and the scientific information available about those ingredients.[13] Thus, what is now drafted as a labeling law may be amended to fall in line with what is becoming a more common practice in the industry — online disclosure.

Before SB 258 is ready for a floor vote, those tracking the measure may also see amendments beefing up trade secret protections. In 2010, SB 928 was initially modeled after the CSPA's voluntary model disclosure protocol, with the exception that the voluntary model limited disclosure of trade secrets, fragrances and dyes, whereas SB 928 did not.[14] In response to push-back by the bill's critics, SB 928 was ultimately amended to include protections for ingredients that could be considered trade secrets,

including that a manufacturer “shall not be required to disclose ingredients falling within the definition of a trade secret.”[15] Although the amendments were not enough to get SB 928 out of committee, the evolution of the bill indicates that trade secret protection was a necessary component of the proposed legislation.[16]

Similarly, opposition comments to 2015’s AB 708 focused on the failure of the bill to provide for protection of confidential business information and intellectual property.[17] Unlike its predecessor, AB 708 was not amended to include trade secret or confidential business information protections; and like 2017’s SB 258, AB 708 required full ingredient disclosure. AB 708 was voted down on the Assembly floor.

SB 258 tries to address this concern by providing that it “shall not be construed to require a manufacturer to disclose the weight or amount of an ingredient or how a cleaning product is manufactured.”[18] But based on the prior failed legislation, this may be a point of dispute, especially when — as opponents to AB 708 noted — other state and federal statutes and regulations applicable to consumer product manufacturers protect disclosure of certain ingredients altogether.[19] Thus, lawmakers may revisit the idea of an approval process for trade secret protections like that written into amended versions of SB 928 in 2010.[20]

As of the date of this article, SB 258 garnered a 5-2 up vote from the Environmental Quality Committee and was referred to the Labor and Industrial Relations Committee; its expected evolution will be worth watching in the coming months.

—By Thomas A. Manakides and Krista deBoer, Gibson, Dunn & Crutcher LLP

Thomas Manakides is an environmental litigation partner and Krista deBoer is an associate in Gibson Dunn’s Irvine, California, office.

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[1] S.B. 258 defines “Contaminant of concern” as a “chemical present in the product at or above the practical limit of detection that has no functional or technical effect in the finished product and is included in the list of candidate chemicals [which exhibit a hazard trait or an environmental or toxicological endpoint and that meets a specified criteria], is included among the allergenic fragrances that appear on the list in Annex III of EU Cosmetics Regulation 1223/2009, or is included in subsequent updates to either list.” CA Legis. Sen. SB 258. Reg. Sess. 2017-2018 (Feb. 8, 2017).

[2] S.B. 258 defines “List of candidate chemicals” as “the list of chemicals identified as candidate chemicals that exhibit a hazard trait or an environmental or toxicological endpoint that meets the criteria specified in [certain] regulations...” CA Legis. Sen. SB 258. Reg. Sess. 2017-2018 (Feb. 8, 2017).

[3] S.B. 258 refers to Annex III of EU Cosmetics Regulation 1223/2009. CA Legis. Sen. SB 258. Reg. Sess. 2017-2018 (Feb. 8, 2017).

[4] In addition to SB 258, the following states introduced bills restricting or requiring disclosure of chemicals in consumer products: (1) Alaska (HB27, flame retardants); (2) Massachusetts (S539, flame retardants; H439/SD866, children’s products); (3) Minnesota (SF716/HF727 children’s products); (4)

Mississippi (SB2637, food and liquid containers); (5) Montana (LC2066, cosmetics labeling; HB519, cosmetics); (6) New York (S1454, children's products; A4345, decorative lighting products; S4465, labeling of seasonal decorative lighting; A5117, cosmetics); (7) Vermont (H268/S103, dental floss and food substances); (8) Washington (HB1596, electronic products).

[5] Gov. Andrew M. Cuomo. "New York State: Ever Upward, 2017 State of the State." 252-253 (2017) available at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2017StateoftheStateBook.pdf>.

[6] *Id.*; 6 NYCRR Part 659.

[7] Pat Rizzuto. "Seventh Generation to Lobby for Chemical Ingredient Disclosure." *Chemical Regulation Reporter*, Bloomberg BNA (Jan. 12, 2017) available at <https://www.bna.com/seventh-generation-lobby-n73014449734/>.

[8] Consumer Specialty Products Association. "Ingredient Communication Initiative." (2017) available at <https://www.cspa.org/sustainability/ingredient-communication-initiative/>.

[9] CA Legis. Assemb. AB 708. Reg. Sess. 2015-2016 (As Amended Jan. 27, 2016); Note that even a compromise amendment to AB 708 requiring the inclusion of only the 20 most prevalent ingredients did not make it into the final amended version of the bill last year. *Id.*.

[10] CA Senate Committee on Env'l Quality, Bill Analysis of SB 258, 16-17 (March 27, 2017).

[11] *Id.*

[12] *Id.*

[13] CA Senate Committee on Env'l Quality, Bill Analysis of SB 258, 17 (March 27, 2017) (also noting that the opposition believes that the labeling requirements of SB 258 could conflict with existing federal and state labeling laws).

[14] CA Assembly Committee on Env'l Safety and Toxic Materials, Bill Analysis of SB 928, 3 (June 29, 2010).

[15] Compare CA Legis. Sen. SB 928. Reg. Sess. 2009-2010 (Feb. 1, 2010) and CA Legis. Sen. SB 928. Reg. Sess. 2009-2010 (As Amended June 17, 2010).

[16] California Legislative Information. "SB-928 Consumer products: content information. Compare Versions." (2009-2010) available at https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=200920100SB928.

[17] See, e.g., CA Assembly Third Reading, Bill Analysis of AB 708, 7 (As Amended June 2, 2015).

[18] CA Legis. Sen. SB 258. Reg. Sess. 2017-2018 (Feb. 8, 2017).

[19] See, e.g., Assembly Third Reading, Bill Analysis of AB 708, 7 (As Amended June 2, 2015).