

CLIENT ALERT

Trend Watch – Regulation By Retailer: The New Business Reality

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Consumer product makers, and those who supply the parts and ingredients that make up those products, face federal and state regulations aimed at addressing consumer safety issues. Several years ago, the 2008 Consumer Product Safety Improvement Act (CPSIA) spurred a flurry of activity, and today we see particular scrutiny on chemicals due to the California Green Chemistry Initiative and a spate of other state lists, labeling requirements and bans. While often controversial and heavily contested, federal and state regulations are generally subject to some public debate and input, whether through formal rulemaking, comment periods, lobbying efforts, public awareness campaigns, or votes. However, there is another power player in the regulatory game: the big box retailer.

How Retailers May Act Like Regulators

Retailers are asking for assurances as to the chemical content in products because they face increasing pressure from their consumers to provide safe, healthy and environmentally-friendly products. And who can fault them? For years, retailers have borne the brunt of Prop 65 enforcement suits in California involving chemical content labeling requirements. Over 65 bills are pending in the state legislatures this year alone focused on chemicals in consumer products. Responding to current consumer demands and this regulatory climate, retailers are heavily focused on chemical contents and labeling. Certain big box stores are demanding their suppliers to remove or disclose chemicals ahead of any such federal or state requirements. Here, the issue is not just one of timing, but one where the choice of the target substances may not align with regulatory regimes, and perhaps more concerning, may not align with scientific findings. When the perceived message from the purchasing public is "fewer chemicals are better"—or in some instances, an apparent fear of anything described as a "chemical"—retailers have a monetary and public relations incentive to remove them regardless of actual potential for harm. This is particularly true when retailers are in a position to shift the burden of doing so onto others—their suppliers. (Who, in turn, may shift the burden still further down the chain to component part, ingredient or raw material providers.)

This quasi-regulatory pressure from retailers in advance of federal or state regulatory action is not new just emerging in novel ways. In the past, retailers have sometimes required compliance with upcoming regulations ahead of schedule. This occurred during the implementation of the Consumer Product Safety Improvement Act (CPSIA), when state attorney generals were given the power to enforce violations of the new limits on lead and phthalates. To protect against enforcement activity for violations of the new law, certain large retailers demanded that their suppliers provide products certified to contain lower

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levels of lead in advance of the timeline provided for in the CPSIA, even though several stays of enforcement had been issued by the CPSC. Likewise, some retailers have adopted an expansive view of the definition of children's product or toy—beyond what rules and regulations may require—to ensure that school supplies or other products used by children do not contain heavy metals or phthalates. While such demands certainly may have caused logistical issues, they were primarily related to timing or scope of existing regulatory requirements. What is new in today's focus on chemicals is that the retailers are defining the very nature of what chemicals or ingredients a product will contain, whether it is their store brand or not.

What Can Suppliers Do?

If increased safety regulations, chemical disclosures and product warning requirements are here to stay, what are suppliers to do when faced with a demand from a powerful and desirable retailer? The answer will of course vary depending on the product, the severity of the impact the change will impose upon the business, and the relative contractual obligations and power position of the supplier vis-à-vis the particular retailer. That said, even if the answer to a retailer may generally have to be "yes," not all versions of "yes" may be the same.

Get Creative to Reduce Your Risk

- Engage in the Conversation Before it Arrives - Product makers know they should monitor trends and consider participation with trade associations or engagement with their elected officials on issues directly impacting their business, but the driving forces behind retailer action may not be *your* industry's key issues. By following trends several degrees up and downstream in your commercial chain, as well as broader consumer product trends, and being willing to engage in the discussion before an issue takes the form of a proposed rule or retailer request on your doorstep, you will be more likely to influence policy before it is too late. By the time retailers issued demands for chemical bans, the issue of chemical ingredients in consumer products had already reached fever-pitch. Big-box stores perceive public and regulatory support—even pressure—for their actions. Consider targeting the next potential trend if you want your viewpoint included in the end result.
- Defend your Confidential Information and Your Contractual Position - Disclosure of product chemical ingredients is a business reality. But ingredient disclosure does not mean a manufacture must abandon efforts to maintain the confidential nature of valuable trade secrets. Examine ways to meet both the retailers' and the regulators' need for disclosure, while maintaining a record of hard-fought protection for purposes of any later court actions. For instance, providing information in some format that expires, must be returned, or is otherwise limited in scope may help to establish a record of maintaining trade secrecy. In addition, consider examining—or renegotiating—contractual indemnity, recall reimbursement or corrective action coverage in your supplier agreements and insurance coverage. While these efforts may not help you avoid compliance with all of the current disclosure demands, they may help reduce your exposure in later lawsuits or government compliance or enforcement actions.
- Distinguish Yourself - If safety, labeling or ingredient bans are going to narrow the competitive field of products in your category because of how they will be made to meet the requirements, or because of disclosure of similar parts or ingredients, distinguishing your product in other ways may be necessary to maintain a competitive edge. Consider

whether you've obtained all of the patent and trademark protection that you can, especially if new disclosure requirements will render previously unknown information more public. Also, consider whether your current marketing and advertising differentiates you in a way that will remain "special" once retail requirements come to pass. Positioning your brand before the field narrows may permit you to set your product apart.

Quasi-regulation by retailers may be unavoidable, and simply a precursor to the myriad of state chemical regulations pending throughout the country. But consumer product makers still have an opportunity to be proactive using creative thinking to reduce risk and increase awareness of the issues impacting their particular industry segment.

The above are thoughts shared by the authors, and do not constitute an official position of the law firm or attorney legal advice.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Cheryl A. Falvey

Partner – Washington, D.C.

Phone: +1 202.624.2675

Email: cfalvey@crowell.com