

Analysis of Recent and Forthcoming State Legislation on Toxic Chemicals in Cosmetics and Personal Care Products and Preemptive Effects of Existing Federal Legislation

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1. Introduction

According to a report released in February 2021 by the organization Safer States, at least 27 US states will consider proposed legislation to regulate toxic chemicals in 2021. While a large driver of the proposed state laws is growing public concern over drinking water contamination from “emerging contaminants,” including PFAS (per- and polyfluorinated alkyl substances) and 1,4-dioxane, a secondary focus has been to minimize the risk of adverse human health effects from exposure to these toxic chemicals in cosmetics and personal care products. Two states—New York and California—are spearheading these efforts through recently enacted laws to limit or prohibit certain toxic chemicals in cosmetics and personal care products that are set to take effect in 2022 and 2025, respectively. As other states consider their own bills to enact similar regulation of chemicals in cosmetics and personal care products, heightened attention will likely be paid to what extent the existing federal regulation of these products may preempt this new wave of state legislation.

1. Federal Regulation of Chemicals in Cosmetics and Personal Care Products

At the federal level, chemicals used in cosmetics and other personal care products are primarily regulated by either the Toxic Substances Control Act (TSCA) or the Federal Food, Drug, and Cosmetic Act (FD&C Act). While TSCA broadly applies to any “chemical substance,” certain chemicals or uses of chemicals are exempt from TSCA if they are regulated by other federal statutes. Such products include “cosmetics” regulated by the FD&C Act, which are defined as “articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body...for cleansing, beautifying, promoting attractiveness, or altering the appearance.” While the distinction between a cosmetic and personal care product may not always be apparent to the consumer, the difference is crucial with respect to federal oversight of the chemicals contained in the product.

Non-cosmetic, personal care products are regulated under TSCA, as amended by the Frank R. Lautenberg Chemical Safety Act of the 21st Century, which requires the Environmental Protection Agency (EPA) to identify “high-priority chemicals” used in existing commerce and determine whether any current uses of the chemicals “present an unreasonable risk of injury to health or the environment.” Where an unreasonable risk is identified, the EPA has discretion to impose conditions on or outright ban the chemical use. Prior to introducing a new chemical or new use of an existing chemical into commerce, manufacturers are required to provide notice to the EPA so that the agency may assess whether the proposed chemical or use will pose an unreasonable risk. In contrast, chemicals used in cosmetic products are regulated by the Food and Drug Administration (FDA) pursuant to the FD&C Act and generally do not require registration or preapproval by the agency before being introduced into commerce. Moreover, the FDA does not have authority to require a recall where it identifies a potential health hazard in a cosmetic product. However, the FDA does have authority to regulate the labeling of cosmetic products and to outright ban specific ingredients from being used in cosmetics generally.

1. State Regulation of Chemicals in Cosmetics and Other Personal Care Products—Newly Enacted Laws and Anticipated Future Legislation

While the regulation of chemicals in cosmetic and personal care products has historically been left to the purview of the EPA and the FDA, in recent years a growing number of states have expressed interest in directly regulating chemicals in cosmetic and personal care products sold within their jurisdictions. In 2019 and 2020, state regulation of these chemicals took a significant step forward as New York and California signed into law two bills regulating chemicals used in cosmetic and/or personal care products. A brief description of both state laws is provided below.

- *New York:* On December 9, 2019, Governor Cuomo signed into law New York Senate Bill 4389-B/A.6295-A, making New York the first and only state to set a maximum contaminant limit of 1,4-dioxane in consumer products. While there are no direct consumer uses of 1,4-dioxane, the compound may be present in cosmetics and personal care products as a byproduct of the manufacturing process (according to one 2007 Study, approximately 22% of cosmetic and other personal care products may contain 1,4-dioxane). New York’s legislation, which takes effect on December 31, 2022, prohibits the sale of personal care products containing more than 2 ppm of 1,4-dioxane and the sale of cosmetic products containing more than 10 ppm of 1,4-dioxane.
- *California:* On September 30, 2020, Governor Newsom signed into law the Toxic-Free Cosmetics Act, California Assembly Bill 2762, banning 24 chemicals, including mercury, formaldehyde, and certain types of PFAS, from being used in cosmetic, beauty, and personal care products sold in California. California’s legislation is set to take effect in 2025 and will mark the first state-level prohibition on the various chemicals in cosmetic products.

In addition to New York and California’s recently enacted legislation, there are at least five bills currently being considered by various states that would further regulate chemicals in cosmetic

and/or personal care products sold within the respective jurisdictions. A brief summary of these state bills is provided below:

- *Connecticut: SB 404*—Prohibiting the sale or distribution of consumer products that contain PFAS (currently before the Joint Committee on Public Health).
- *Maryland: HB 0643*—Prohibiting the sale or distribution of cosmetic products that contain PFAS, mercury, and other chemicals in certain instances (currently passed in both chambers and before the Governor).
- *New Jersey: A 189 / S 1843*—Prohibiting the sale and distribution of nail salon products that contain dibutyl phthalates, toluene, or formaldehyde (currently before the Assembly Consumer Affairs Committee); *A 1720*—Prohibiting the sale of hand sanitizers and body cleaning products containing triclosan (currently before the Assembly Consumer Affairs Committee).
- *New York: A 143 / S 3331*—Creating a list of “chemicals of concerns” known to exist in personal care products, requiring manufacturers of such products to disclose any chemicals of concerns contained in their products and prohibiting the sale of personal care products containing chemicals of concerns after three years (currently referred to Environmental Conservation Committee).

1. Federal Preemption of State Laws

As more states continue to adopt new legislation to regulate chemicals in cosmetic and personal care products, manufacturers and/or trade organizations will likely bring preemption challenges to these state regulations. In the context of cosmetic products, the FD&C Act prohibits state or local governments from enacting “any requirement for labeling or packaging of cosmetics that is different from or in addition to, or that is otherwise not identical with” the federal rules. Thus, state laws that do not directly regulate the labeling or packing of cosmetics products but instead regulate the contents of these products will likely not run afoul of the FD&C Act’s preemption clause.

In contrast, state legislation governing chemicals in personal care products may be at a higher risk of being preempted by TSCA. TSCA broadly prohibits the enforcement of any state chemical regulation of a particular substance once the EPA completes a risk evaluation for the substance and either: (1) determines that the chemical will not present an unreasonable risk; or (2) concludes that the chemical presents an unreasonable risk under the circumstances of use, and promulgates a rule that restricts manufacturing or use of the chemical to mitigate the identified risks. Notably, the scope of TSCA’s preemption extends only to chemical uses examined in the EPA’s risk evaluation—meaning that the EPA’s failure to examine the use of a chemical in personal care products would make state regulation fair game. In addition, even where a risk evaluation of a particular chemical has been completed, TSCA will not preempt state laws that (1) only impose reporting, monitoring, or

information obligations; or (2) environmental laws that regulate air quality, water quality, or hazardous waste treatment or disposal.

Early insight into the full scope of TSCA's preemption provisions will likely be provided by anticipated challenges to individual state's regulation of 1,4-dioxane. As explained above, New York has already taken steps to regulate 1,4-dioxane in personal care products and other states may soon look to follow suit. However, on January 8, 2021, the EPA released its final risk evaluation for 1,4-dioxane under TSCA. *See* 86 Fed. Reg. 1495. The EPA's initial risk evaluation identified a number of "use conditions" in which 1,4-dioxane posed an unreasonable risk to occupational workers, but did not consider "use conditions" involving 1,4-dioxane's presence in consumer products. In response to protests from industry, EPA's final risk evaluation included a supplemental analysis of eight use conditions for 1,4-dioxane as a byproduct in consumer goods, including use in hobby materials; automotive care products; cleaning and furniture care products; laundry and dishwashing products; paints and coatings; and spray polyurethane foam. No unreasonable risks for these consumer uses were identified. Because the EPA's supplemental risk evaluation examined but did not find any unreasonable risks from 1,4-dioxane in consumer products, an argument could be made that states are preempted from enacting their own 1,4-dioxane limits in consumer products. However, because the EPA's risk evaluation did not specifically exclude cosmetic or personal care products, individual states may be able to argue that the preemption scope is limited only to the specific uses of 1,4-dioxane that were specifically examined during EPA's risk evaluation. The resolution of any challenges to New York and other states' regulation of 1,4-dioxane in consumer products will likely provide key insights into the scope of TSCA's preemption powers.

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