Considerations for Complying With CONEG Packaging Limitations

We are often asked to advise companies on the applicability of state heavy metal concentration limits to packaging and packaging components that may contain lead in trace quantities or as an impurity. These limits are based on model legislation proposed by the Source Reduction Council of the Coalition of Northeastern Governors (CONEG), and have been enacted, in one form or another, in 19 states: California, Connecticut, Florida, Georgia, Illinois, Iowa, Maryland, Maine, Minnesota, Missouri, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin.

These laws ban the intentional introduction of any amount of four heavy metals—cadmium, lead, hexavalent chromium and mercury—into packaging or packaging components. In addition, the sum total concentration of the incidental amount of the four metals cannot exceed 100 parts per million (ppm) (0.01%). In particular, the following questions often arise:

(1) Do the CONEG limits on heavy metals content apply to the package as a whole or to the individual components?
(2) Would the CONEG limits still apply to a component that was packaged separately from the package?
(3) Do any exemption to the CONEG requirements apply?

For purposes of this article, we have focused on California’s version of the CONEG limits, as the importance of the state’s market tend to make California requirements de facto national standards. Moreover, California’s law generally follows the CONEG model legislation and is similar to the other state statutes, except that California imposes some fairly detailed documentation requirements.

I. CONEG Limits Apply to Packaging Components Individually

Applicability of the CONEG limits often turns on whether part of a package could properly be deemed “packaging components” under the CONEG model legislation or the various state analogues. In this regard, a “packaging component” is generally defined as:

[A]ny individual assembled part of a package that is produced either domestically or in a foreign country, including, but not necessarily limited to, any interior or exterior blocking, bracing, cushioning, weatherproofing, exterior strapping, coatings, closures, inks, labels, dyes, pigments, adhesives, stabilizers, or any other additives. Tin-plated steel that meets the ASTM specification A623 shall be considered as a single package component. Electrogalvanized coated steel and hot dipped coated galvanized steel that meet the ASTM qualifications A591, A653, A879, and A924 shall be treated in the same manner as tin-plated steel.

Cal Health & Safety Code § 25214.12(h).

Our experience is that the states interpret the “any individual assembled part” language as broadly as possible to provide a cause of action under the CONEG laws. Indeed, recent enforcement actions by the Toxics in Packaging Clearinghouse (TPCH), which administers the CONEG laws on behalf of the 19 states, illustrates the elasticity of this language as applied by
the states. For example, a vitamin supplements company was forced to withdraw a package from the market because the product package included a battery-powered blinking light, which contained lead-based solder on the circuit board.

Whether these and similar items are properly “packaging components” is an issue that has yet to be litigated. It is possible that a court might disagree with the states’ interpretation, but courts generally give great deference to an Agency’s interpretation of the statute it is authorized to administer, particularly where the statute is in furtherance of the state’s police power to legislate on matters of public safety and health.

II. Separate Packaging of a Component

This issue often comes up in the context of a product dispenser which may contain lead or other heavy metal, while the product container does not. One option often raised is whether the dispenser would be considered a packaging or a packaging component for purposes of the CONEG statutes if it was packaged separately from the product to be dispensed. This question involves a package as a “container providing a means of marketing, protection or handling of a product.” Cal. Health & Safety Code § 25214.12(q) (emphasis added) and raises issues of first impression which have yet to be litigated.

Again, however, state regulators have indicated they interpret the term "packaging" broadly to extend beyond the proximate enclosure of a product to include items used to manipulate that product. A case in point is that of a novelty candy manufacturer which was ordered to recall a “candy light” lollipop necklace; the “lollipop” part of the necklace included a candy holder which contained a battery-powered blinking light containing lead solder. Individual packages of the lollipop were displayed on retail shelves in a box with a blinking pumpkin, which also contained lead-based solder on the circuit board. According to the TPCH, even though the retail display box was not sold with the lollipop, the circuit board in the blinking pumpkin violated the prohibition against the intentional addition of lead in a packaging component. The TPCH also noted the presence of lead-based solder in the lollipop holder that children put in their mouths, arguably implying that the “necklace” was a device for handling the food and thus “packaging” within the meaning of the CONEG statutes.

Consider also, the more publicized recall of thousands of children’s lunch boxes from New York because they allegedly contained high levels of lead, although a U.S. Consumer Product Safety Commission evaluation showed no excessive available lead. The lunch boxes, which were manufactured in China, used lead plasticizers to soften the plastic. Although sold separately and without contents, some TPCH members suggested that the lunch boxes might be considered “packages” rather than products for purposes of the CONEG statutes.

We are mindful that these strained interpretations of the law likely would not survive judicial review. However, a critical aspect of the enforcement strategy of the CONEG states is the strong aversion of businesses to protracted litigation, adverse publicity, or any potential damage to brand recognition. Thus, state prosecutors expect to settle these enforcement cases quickly, and to our knowledge, have yet to go to trial on any of these issues.
III. Availability of Possible Exemptions from the CONEG limits

Depending on the source of the lead, packaging and packaging components may qualify for an exemption from the CONEG limits for a “package or packaging component [that] contains no intentionally introduced regulated metals, but exceeds the applicable maximum concentration level...only because of the addition of a recycled material.” Cal. Health & Safety Code § 25214.14(c) (internal citations omitted). CONEG guidance explains that recycled materials, for purposes of the recycling exemption are:

those materials generated by a business or a consumer which have been separated from solid waste for the purpose of recycling as a secondary material feedstock. For purposes of this legislation, recycled materials include paper, plastic, wood, glass or ceramics, metals such as steel, aluminum, stainless steel or copper, and other materials. However, recycled materials under the toxics-in-packaging law do not include the four regulated metals (lead, cadmium, hexavalent chromium and mercury) which have been separated into their elemental or other chemical state for recycling as a secondary material feedstock.

There are two limitations to this exemption, however. First, it expires January 1, 2010. Second and more importantly, a packaging manufacturer seeking to avail themselves of this exemption must comply with some fairly onerous documentation and notification requirements.

Under California’s version of the CONEG law, a package or packaging component will qualify for the recycling exemption only if the manufacturer prepares, retains, and updates every two years a document containing the following information:

• A statement that the documentation relates to an exemption from the CONEG limits.
• The name, position, and contact information for the person who is the manufacturer's or supplier's contact person on all matters concerning the exemption.
• A statement identifying the exemption being claimed as the recycling exemption and including a citation to the legislative provision providing the exemption.
• A description of the type of package or packaging component, in this case the ball bearing and spring, to which the exemption applies.
• Identification of the type of heavy metal and concentration present in the package or packaging component, and a description of the testing methods used to determine the concentration.
• The reason for the exemption.

The manufacturer also would be required to clearly demonstrate that the package or packaging component is eligible for the recycling exemption by providing:

• The type and percentage of recycled material or materials added to the package or packaging component.
• The type and concentration of each regulated metal contained in each recycled material added to the package or packaging component.
• The manufacturer’s efforts to minimize or eliminate the regulated metals in the package or packaging component.
A description of the manufacturer’s past, current, and planned future efforts to seek or develop alternatives to minimize or eliminate the use of the regulated metal in the package or packaging component.

Cal. Health & Safety Code § 25214.15(a), (d)

We have yet another problem with California’s CONEG exemptions. Typically, the CONEG states require packaging manufacturers or suppliers to issue a Certificate of Conformity to the packaging purchaser certifying that the package at issue complies with the CONEG limits. Manufacturers are typically required to retain copies of the Certificates on record for inspection purposes. See e.g., Cal. Health & Safety Code § 25214.16. Since January 1, 2006, however, California has required manufacturers or suppliers claiming an exemption from the CONEG limits to submit to the state:

[A] copy of the certificate of compliance for each package or packaging component for which an exemption is claimed under Section 25214.14 at the time when a certificate of compliance for that package or packaging component is first furnished to a purchaser. If no exemption is claimed for a package or packaging component, the manufacturer or supplier shall provide to the department upon request a copy of the certificate of compliance for that package or packaging component.

Cal. Health & Safety Code § 25214.16(c). Such a submission by a company at this juncture could well lead to suspicion in California about the use of lead in their packaging or packaging component prior to January 1, 2006. In this regard, it is important not to underestimate the level of cooperation between California and other TPCH members whose statutes imposed CONEG limits significantly earlier.

Another possible exemption is available under Cal. Health & Safety Code § 25214.14(d), for lead and other heavy metals that have “been added to the package or packaging component in the manufacturing, forming, printing, or distribution process for a use for which there is no feasible alternative.” It is important to note that the exemption is provided for the essential use of lead or the other heavy metals, not the packaging or packaging component:

For purposes of this subdivision, "a use for which there is no feasible alternative" means a use, other than for purposes of marketing, for which a regulated metal is essential to the protection, safe handling, or function, of the package's contents, and technical constraints preclude the substitution of other materials.

Hence the essential use argument is unlikely to succeed unless a manufacturer can demonstrate that lead or the other heavy metals are essential to obtaining a specific function or other unique characteristics of the package.

In closing, we note that most of the CONEG states do not specify, and the TPCH does not recommend, a test method for determining the levels of lead and other heavy metals in packaging. In a question and answer document, however, the TPCH recognized:

[T]he use of x-ray fluorescent (XRF) analysis, as well as traditional analytic procedures that measure total concentration of metals. Test methods that measure “leachable”
metals are not appropriate (except under the permanent glass exemption.) Particular attention should be paid to the sample preparation methods to determine whether the metals of interest are properly solubilized prior to testing. The selected sample preparation and test methods should be documented in the laboratory test report.

Testing should be performed and reported on individual packaging components (e.g., inks, resin, paperboard, adhesives). Analytic laboratories must have appropriate certifications by recognized certification organizations or authorities (e.g., National Environmental Laboratory Accreditation Program). As many analytical laboratories are not accustomed to testing the variety of package materials available in the market, it is critical to ensure the laboratory follow strict quality assurance/quality control procedures (QA/QC). TPCH recommends requesting QA/QC data to be provided with analytical reports.

Under a grant from the U.S. EPA, the TPCH testing program to this point has focused on products that the states consider suspect and are chosen randomly from grocery, hardware, and other stores. The TPCH testing program has been facilitated by use of a portable X-Ray Fluorescence (XRF) Analyzer, which allows regulators to analyze packaging contents in minutes, as opposed to time-consuming and expensive laboratory tests. Companies may wish to consider testing their packaging using this method, although some flaws have been identified with this approach.

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