

Memorandum

To: Halogenated Solvents Industry Alliance

From: Squire Patton Boggs (US) LLP

Date: July 12, 2019

Subject: Questions & Answers Regarding Compliance with EPA Ban on Consumer Uses of Methylene Chloride

Introduction

On March 27, 2019, the Environmental Protection Agency (“EPA”) issued a final rule regulating the use of methylene chloride for consumer paint and coating removal.¹ The rule prohibits the manufacture, processing, and distribution in commerce of methylene chloride for consumer paint and coating removal (including the distribution of methylene chloride to and by retailers). Specifically, the rule prohibits the following conduct, effective November 22, 2019:

- 1) all persons are prohibited from manufacturing, processing and distributing in commerce methylene chloride for consumer paint and coating removal;
- 2) all persons are prohibited from distributing in commerce methylene chloride, or products containing methylene chloride, for paint and coating removal to retailers; and
- 3) all retailers are prohibited from distributing in commerce methylene chloride, or products containing methylene chloride, for paint and coating removal.

See 40 C.F.R. 751.105 (to be codified). The term “retailer” is broadly defined by the rule to include any “person who distributes in commerce or makes available a chemical substance or mixture to consumer end users, including e-commerce internet sales or distribution.” *Id.* § 751.103. Importantly, “any distributor with at least one consumer end user customer is considered a retailer.” *Id.* Only “a person who distributes in commerce or makes available a chemical substance

¹ *Methylene Chloride; Regulation of Paint and Coating Removal for Consumer Use Under TSCA Section 6(a)*, 84 Fed. Reg. 11420 (Mar. 27, 2019) (to be codified at 40 C.F.R. pt. 751), <https://www.govinfo.gov/content/pkg/FR-2019-03-27/pdf/2019-05666.pdf>.

or mixture solely to commercial or industrial end users or solely to commercial or industrial businesses is not considered a retailer.” *Id.*

The rule also requires that, effective August 26, 2019, all manufacturers, processors, and distributors of methylene chloride for *any* use (excluding retailers) must provide downstream notification of the prohibitions in the rule by adding the following language to sections 1(c) and 15 of their Safety Data Sheets (SDS):

This chemical/product is not and cannot be distributed in commerce (as defined in TSCA section 3(5)) or processed (as defined in TSCA section 3(13)) for consumer paint or coating removal.

In addition, the rule requires that each person or entity that manufactures, processes, or distributes methylene chloride in commerce must retain documentation showing: (1) the name, address, contact, and telephone number of companies to whom methylene chloride was shipped; (2) a copy of the downstream notification provided to each company; and (3) the amount of methylene chloride shipped. This documentation must be retained for 3 years from the date of shipment, and must be retained at the headquarters of the company, or at the facility for which the records were generated.

Frequently asked questions and answers regarding the application of the rule to market participants and distribution channels are set forth below.

Questions & Answers

1. What constitutes a consumer use of methylene chloride for paint and coating removal?

The rule defines paint and coating removal generally to mean the application of a chemical or use of another method to remove, loosen, or deteriorate any paint, varnish, lacquer, graffiti, surface protectants, or other coating from a substrate, including objects, vehicles, architectural features, or structures. *Consumer* paint and coating removal is then defined as that which is performed by a natural person using a paint and coating removal product for personal use without receiving any form of payment or remuneration. Therefore, for example, a homeowner’s use of methylene chloride to refinish his own bathtub constitutes a consumer use.

2. What constitutes a professional/industrial use of methylene chloride for paint and coating removal?

Any use of methylene chloride for paint and coating removal for non-personal use, where the user expects to receive compensation or other commercial benefit, constitutes a non-consumer use. For example, the use of methylene chloride by an auto-body shop, painting contractor, or antique furniture restorer for paint and coating removal on behalf of a client or with the expectation of future commercial benefit would constitute non-consumer uses.

3. What types of distribution of methylene chloride does the rule prohibit?

The rule prohibits the “distribution in commerce” of methylene chloride for consumer paint and coating removal. The rule defines distribution in commerce as “to sell in commerce, to introduce or deliver for introduction into commerce, or to hold after introduction into commerce.” The term “commerce” is broadly defined to include practically any trade, transportation, traffic, or other form of interstate commerce. Therefore, the rule effectively prohibits any sale, trade, transportation, or other distribution of methylene chloride, or products containing methylene chloride, for consumer paint and coating removal.

The rule also prohibits the distribution in commerce of methylene chloride in paint and coating removal products to and by retailers. As explained above, the rule defines retailers as any person or entity that sells *any* product—not just methylene chloride—to at least one consumer end user. For example, the rule prohibits the distribution of methylene chloride to or by a paint store that sells products to both professional and consumer users. For a distributor not to be considered a retailer, it must distribute or make available methylene chloride-containing paint and coating removal products solely to commercial or industrial end users or businesses.

4. To what extent does the rule prohibit the manufacture and processing of methylene chloride?

The rule broadly prohibits the manufacture and processing of methylene chloride for consumer paint and coating removal. The rule does not prohibit the manufacture or processing of methylene chloride for non-consumer paint and coating removal. However, manufacturers should be aware that the rule prohibits the distribution of all paint and coating removal products containing methylene chloride to retailers, including products that are not intended for consumer use.

The rule also does not limit the manufacture or processing of methylene chloride for uses other than paint and coating removal, including, for example, the use of methylene chloride for adhesives, pharmaceuticals, metal cleaning, chemical processing, and feedstock in the production of refrigerants.

5. How does the rule apply to mixed retail outlets and distributors that sell to both commercial and consumer users?

A mixed retail outlet that sells to both commercial and consumer users is considered a “retailer” under the rule, and is prohibited from distributing in commerce methylene chloride, or products containing methylene chloride, for paint and coating removal. Furthermore, a mixed retail outlet cannot work around the rule by restricting its sales of methylene chloride containing products to only commercial end users, because the rule defines “retailers” as entities with at least one consumer end user, regardless of whether that end user in fact purchases methylene chloride paint and coating removal products from that store.

Distributors are also prohibited from selling, transporting, or otherwise distributing in commerce methylene chloride, or products containing methylene chloride, for paint and coating removal to mixed retail outlets. The only distribution of paint and coating removal products containing

methylene chloride that is not prohibited by the rule would be the distribution of such products solely to professional and industrial, non-retail outlets or users.

6. How does the final rule impact professional and industrial users who currently purchase methylene chloride, or products containing methylene chloride, from mixed retail outlets?

Professional and industrial users will no longer be able to purchase methylene chloride, or products containing methylene chloride, for paint and coating removal from mixed retail outlets. The rule prohibits all retail outlets from stocking or selling methylene chloride for paint and coating removal. After the effective date of the rule, paint and coating removal products that contain methylene chloride will only be available from distributors that sell solely to professional or industrial end users or businesses.

7. Can a manufacturer be liable under the rule for selling methylene chloride to a prime distributor that then sells the product to another distributor or retailer that sells to a consumer end-user?

The rule prohibits a manufacturer from selling methylene chloride, or a product containing methylene chloride, for paint and coating removal to a distributor that then sells to a consumer end-user, since any distributor that sells to at least one consumer end-user is considered a “retailer” under the rule and the rule prohibits distribution to retailers. The final rule does not specifically address whether a manufacturer can be liable for selling methylene chloride to a distributor who in turn sells the chemical to a retailer. In such a case, the manufacturer may wish to obtain legal advice to evaluate the manufacturer’s liability risk in light of the specific facts and circumstances. The manufacturer may also consider obtaining written assurance from its downstream customers that the methylene chloride, or product containing methylene chloride, for paint and coating removal will not be sold or otherwise made available to retailers or consumer end-users.

8. Does the rule apply to products that contain small amounts of methylene chloride in a mixture?

Yes. The prohibitions under the rule apply equally to mixtures of methylene chloride. Nor does the rule contain an exception for products that contain only a *de minimis* amount of methylene chloride. EPA may decide to provide guidance regarding the application of the rule to products containing a *de minimis* amount of methylene chloride, but no such guidance has been issued to date.

9. Does the rule allow the distribution of methylene chloride for paint and coating removal in containers greater than 55 gallons?

In the proposed rule, EPA considered prohibiting the distribution of methylene chloride for paint and coating removal in containers with a volume of less than 55 gallons. In the final rule, EPA abandoned this approach in favor of a complete ban on sale for consumer use (illogically, as the reason EPA gave for abandoning the volume restriction was to maintain supply for small business

users, which was curtailed anyway by the retailer distribution restrictions described above). There is no volume restriction on sale for commercial use that otherwise complies with the rule.

10. Does the rule affect the use of paint removal products containing N-methylpyrrolidone?

The rule does not apply to paint and coating removal products containing N-methylpyrrolidone (“NMP”) and not methylene chloride. EPA proposed making an unreasonable risk determination for the use of NMP in paint and coating removal. In the final rule, however, EPA declined to make an unreasonable risk determination for NMP, stating that the Agency will evaluate the risks of NMP use in paint and coating removal as part of the the risk evaluation currently being conducted for NMP use generally under TSCA §6(b).