Top Five Compliance Challenges Facing Chemical Companies

By JAMES KOSCH

For executives in the U.S. chemical industry whose responsibilities include regulatory compliance, life can seem like a bowl of acronyms. After all, much of their time is spent absorbed in meditations on the likes of TSCA (the Toxic Substances Control Act), EPCRA (the Emergency Planning and Community Right-to-Know Act), CERCLA (the Comprehensive Environmental Response, Compensation and Liability Act), FIFRA (the Federal Insecticide, Fungicide and Rodenticide Act) and RCRA (the Resource Conservation and Recovery Act).

This is only the beginning, of course, as there are manifold other federal, state and local regulations and agencies (another set of acronyms entirely) to consider.

No. 1: Complying with the letter of the law—even the fine print

When it comes to the top five corporate-compliance challenges facing chemical companies, No. 1 is simply staying on top of the formal requirements—layer upon layer of them—put forth in this thicket of regulations.

Naturally, smart companies pay extremely close attention to both the broad, overarching goals of such regulations (what we might call their spirit), as well as to the specific ways in which this acronym soup might affect company operations (the letter). Ironically, however, companies that actually do go above and beyond on protecting workers or reducing toxic emissions often pay a steep price for making what might seem like relatively insignificant compliance mistakes. They might be sticklers for getting the right emissions permits, for example, but then fail to read the fine print on the permit obligations. Even simple things like failing to fill out the required forms for waste disposal can land an otherwise-compliant company in regulatory hot water.

Plant explosions and chemical spills tend to dominate the headlines, but the fines and penalties for failing to comply with the paperwork associated with regulatory compliance can often be just as expensive and ensnaring as major violations of the primary, operative points of a particular federal act. For example, our firm handled the case of a company with an exemplary environmental record that was

nonetheless targeted by EPA's Multimedia Enforcement Program, which focuses on comprehensive audits of potential pollution of the air, water or land. Effectively, this environmentally responsible company failed to dot a few i's and cross a few t's in its regulatory paperwork. As a result, it faced a penalty demand of about $1 million.

These were minor infractions, in a certain sense, because they resulted in neither pollution nor an employee injury. Nonetheless, the penalties associated with such documentation errors can stack up quickly. For example, a company might dutifully record its emissions levels in parts per billion, when the pertinent regulatory act stipulates that those emissions be logged in parts per million. Though not a violation of the spirit of the regulation, this technical flub could easily translate into penalties of approximately $1,000 a day, retroactively enforced for the three years in which the documentation errors occurred.

The basic message here is simple enough, though it might be somewhat counterintuitive: For chemical companies, maintaining accurate and compliant documentation deserves just as much attention as big-picture compliance goals like cutting emissions or running a safer workplace.

No. 2: Following your own rules

Formal compliance with state, local and federal regulations always translates into stated company policy. However, drafting clear policies is just the first step. For chemical companies, making sure employees at all levels actually follow those stated policies can be a big challenge. The regulations themselves, after all, tend to be technically complex and highly specific, affording little or no leeway for deviation. Moreover, the high stakes involved in failure to comply with chemical regulations—fouled waterways, sickened or burned employees and the like—creates an unforgiving regulatory atmosphere in which employee behavior is more likely to come under close scrutiny.

Thus the second-biggest compliance challenge facing chemical companies is to make sure they actually follow their own rules and procedures. From a liability standpoint, this is huge: The favorite smoking gun of any plaintiff's attorney is one that dramatically demonstrates a company's failure to abide by its own stated policies.

Communication is central to this effort. At many chemical companies, a senior-level risk-management executive will be focused—quite wisely—on the complexities related to insurance coverage. A good risk-manager will know the company's insurance policies inside and out, and will make sure those policies are always the right ones for the company's particular footprint of exposure. Sometimes, this risk-manager also doubles as the company's environmental health-and-safety (EHS) officer. This is fine—so long as the risk-manager/EHS is equally well-versed in the insurance landscape and the considerable technical complexities associated with running a safe and compliant chemical company.

At companies that have a risk-manager on the one hand, and an EHS on the other, communication between these two executives must be clear and strong. Make sure

they talk to one another frequently and are in the plant on a regular basis. They need to know what is going on in those facilities and be up-to-date on the requirements of both company policy and applicable regulations.
Likewise, compliance with right-to-know laws is a matter of communication, pure and simple. Nearly every chemical company has a clearly written policy designed to make sure employees are informed about the risks of, and proper techniques for, handling and working around certain chemicals. However, making sure these policies are followed can be particularly challenging, and companies should be clear-eyed about certain realities, like the veteran floor manager who takes a wink-and-a-nod approach to, say, uncomfortable safety equipment or time-consuming safety procedures. Ultimately, employees at all levels must get a strong sense that the company places a top priority on compliance with all of its internal policies. Forgetting to fill out those safety data sheets, in other words, will not result in a slap on the wrist. It might well get you fired.

No. 3: Anticipating compliance-related trends

When it became clear that there would be a change in the federal administration—including a new EPA administrator—there was a lot of talk in the chemical industry about the arrival of a new sheriff in town, so to speak, and a newly aggressive enforcement climate. In many ways, these predictions were true enough. However, the much-discussed aggressiveness on the regulatory front has not taken shape in quite the way many observers expected.

Rather than a massive increase in environmental audits or a rash of new regulations, the new administration seems most focused on reinterpreting regulations in ways that will expand its regulatory authority. (In December 2009, for example, the EPA issued two distinct findings regarding greenhouse gases under section 202(a) of the Clean Air Act. In the so-called endangerment finding, the EPA declared that current and projected concentrations of six greenhouse gases “threaten the public health and welfare of current and future generations.” In the second finding, it pointed the finger for this health threat at the combined emissions of these gases from motor vehicles.

These findings imposed no specific requirements on industry, but their implications, particularly for emissions standards, are broad indeed.) Anticipating changes in the regulatory environment, in other words, is always a guessing game. From a strategic standpoint, however, playing that guessing game is important. If a particular chemical is in the headlines—perhaps as a result of toxicology studies pointing to its harmful effects—a company that produces that chemical might well face a greater risk of being audited by regulators. Are there easy solutions to this challenge? No. But there are efficient, and inefficient, approaches to reading the tea leaves.
Smart companies rely on multiple sources, including news “clipping services,” consultants, industry associations and their own lobbyists and attorneys—to gather the best possible information with which to make these guesses. Today, for example, proactive firms are already sketching out how they will adjust their business models based on which provisions of the proposed Safe Chemicals Act of 2010 might eventually become law.

No. 4: Knowing your company's history—and the risks associated with it

One of the more interesting compliance challenges facing chemical companies is the trend for governments to make wide-reaching cleanup claims for urban rivers and other bodies of water polluted during the industrial age. (At the federal level, the EPA's well-publicized Urban River Restoration Initiative is a good example of the high priority now being placed on these efforts.) Suddenly, companies that thought they were no longer located along a water of body, or believed that all their waterfront assets had been sold, are being hauled to account for pollution caused by their predecessor entities decades ago.

In the most extreme examples, these cases date back to the Civil War. Given the scope and scale of the pollution that occurred during America's many unregulated decades of industrial development, these cleanups are always staggeringly expensive. As a result, implicated companies now face huge liabilities for natural resource damage claims. This is a "compliance" challenge in the sense that companies with significant longevity must look far back into their histories and try to figure out when, where and how they might have violated regulations that came into existence long after the deed was done.
Even if a company does not currently produce a particular banned chemical or chemical byproduct, one of its predecessor entities might have done so in the past. Thus compliance officers, risk-management experts and maybe even a hired-gun historian should work together in planning for historical legacy claims.

No. 5: Avoiding compliance myopia

Given the aforementioned "acronym soup" involved in regulatory compliance, chemical companies can hardly be blamed for being narrowly focused on the specific challenges faced by this particular industry (and its various sub-sectors). However, compliance-related changes are afoot in a host of other areas, and in some cases these changes hold the potential to be every bit as significant for chemical companies as revisions to a particular federal act.

Indeed, the pace of change for modern corporations—touching on everything from electronic discovery, to green building, to immigration, to the privacy and liability implications of employee use of social-networking sites like Twitter and Facebook—has never been more frenetic. The seismic shifts now occurring in our society and business culture have far-reaching consequences for compliance, and a myopic "old school" approach simply will not do.

With a view toward staying ahead of the curve on compliance trends, chemical industry executives must look, not just outside the confines of their own particular companies and industries, but also past their own national borders. Fortunately, the same technologies that are driving many of these trends make staying informed about them easier than ever.

And in any case (with apologies to the authors of TSCA, CERCLA, FIFRA, RCRA and the like) almost anything is more fun to read than federal regulations.

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