



Whirlwind History of Animal Testing

Ensuring the safety of cosmetics products is a mandatory regulatory requirement to ensure cosmetics products are safe for human use and not toxic or pose a danger to public health.

In the past, animal testing was common place in the cosmetics industry. Tests include the LD50 test; draize test; eye irritancy tests. All of which result in suffering and death on the part of the animal test subjects. Over the years growing public pressure resulted in international cosmetic companies to decide to stop animal testing by investing extensively in developing alternative testing methods that could be substituted for animal testing. Law makers turned against animal testing with many jurisdictions dropping mandatory animal testing and some restricting or banning testing (such as Israel, UK, EU, Australia, India, Turkey, New Zealand, Norway and certain USA states such as California, Nevada and Illinois).

China was the main exception to the global trend against animal testing. China still required mandatory animal testing subject to only narrow exemptions (i.e. cross border ecommerce and limited locally manufactured products with an exemption). As a result for many animal rights organizations and ethical beauty bloggers this meant that selling in China was short hand for animal testing.

What is “Cruelty Free”?

“Cruelty-Free” is not a defined legal term. Some cosmetic companies promote their products with such claims provided their finished cosmetic products are not subject to animal testing. Others only make the claim if no animal testing is conducted on raw materials. In addition, time is a factor as many raw materials would have been tested on animals years ago when first introduced. Accordingly, many organizations will apply a time frame when considering whether a cosmetics brand can claim to be “cruelty-free” – some may make the claim based on the materials or products not being “currently” tested on animals.



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What do the provisions change?

On 26 February, 2021, China National Medical Product Administration (“**NMPA**”) officially promulgated the Provisions which exempted imported ordinary cosmetics from animal testing as of May 1, 2021. Special cosmetics are not exempt.

In order to avoid animal testing these ordinary cosmetics need to meet the below pre-requisites and avoid the exceptions:

Pre-requisites

- Ordinary cosmetics manufacturers need to obtain certification of the manufacturing quality management system (QMS – similar to GMP) that is issued by the government authorities or certification organizations of its country;
- Provide a product safety assessment that can fully confirm the safety of the products. (The assessment results will be reviewed by NMPA based on the risk management materials submitted by the applicants.)

Exceptions

However, the exemption will not be available to ordinary cosmetics manufacturers if:

- Products claims to be used for children or infants;
- Products which contain any new cosmetic raw materials or new ingredients that are still under the safety monitoring period;
- Any of the brand applicant, its Chinese responsible agent or manufacturer has been listed as being subject to supervision (i.e. the NMPA has such watch list).

Article 16 of *Regulations on the Supervision and Administration of Cosmetics*, cosmetics that are used for hair coloring, hair perming, freckle removal, whitening, anti-suntan and anti-hair loss and those that claim new efficacy are special cosmetics. Cosmetics other than special cosmetics are ordinary cosmetics.

Multiple manufacturers

For products exported to China which have multiple manufacturing sites globally, the Provisions require all manufacturers supplying the Chinese market to obtain the above-mentioned QMS issued by their relevant home country authorities in order to be exempt from submitting toxicological test reports. This means that international brands may need to move the production of goods for China to countries of origin which have a bilateral agreement in place with the Chinese authorities.

What does this mean?

It is good news for animals. From May 1, 2021 international cosmetics companies can apply to sell ordinary cruelty-free cosmetics in mainland China through general import and general trade. However, there are other considerations one must bear in mind:

Physical stores and distribution

In a best case scenario this will open up the opportunity for distribution of cruelty free brands through physical stores or distributors (which despite the hype about online remains crucial in China) after being registered/filed to NMPA and imported via general trade according to the Provisions.

Online sales

Presently cruelty free brands are effectively excluded from the mass online market (i.e. can only sell T-Mall Global rather than T-Mall). In our experience, consumer facing companies will sell far more on T-Mall than on T-Mall Global. T-Mall Global will be likely dramatically affected over time as sales migrate to T-Mall and also offline channels. Indeed international brands can establish their own shopping websites in China to sell products directly.

Tax and customs

PRC tax and customs authorities will

likely be delighted as this will lead to more sales in China and therefore attract customs and VAT. Rather than buying on overseas shopping sprees much more of the Chinese consumer's spend on cosmetics will be spent at home.

Outsourcing production

In recent years, a number of international cosmetics brands transferred part of their manufacturing process to China in order to manufacture under a limited animal testing exemption which could be applied for in respect of domestically manufactured ordinary cosmetics. This change in regulation may make such practice less attractive.

Timeframe

We anticipate the roll out may be time-consuming and much will depend on the land of origin and the status of its negotiations with the Chinese authorities.

Points to consider

International cosmetics companies will embrace the ability to export cosmetics to China without animal testing. However, it is important to note that this loosening is coupled with increasingly strict regulations, introduction of a trusted manufacturer concept, improved health and safety standards and also an expanded role and potential liability for the domestic representative. Importing cruelty free will now be possible but it will be coupled with greater obligations and paperwork.

In addition, it should be noted that a crucial issue is that the recognition of the QMS is on a bilateral basis between China and the relevant manufacturing country. This may mean that brands may need to outsource manufacturing to countries that are recognized. This may be an issue for countries that are politically out of favor with China.

Time will tell but it is likely that for international cosmetics companies will find that they will not need to test on animals for most products whether exported to China or domestically manufactured. However, it is possible that China will similar to infant formula that the market access will depend upon overseas manufacturing sites being inspected by the Chinese authorities. The result of the greater restrictions upon infant formula did lead in time to the major manufacturers localizing production within China. It would not be farfetched to see a similar dynamic in respect of cosmetics. As is often is the case if you wish to supply the China market in a meaningful way you will likely need to manufacture in China.



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A sample of our experience

SEPHORA

Advised Sephora on potential construction contract dispute

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L'ORÉAL

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Johnson & Johnson

Advised Johnson & Johnson on its 100% acquisition of Beijing Dabao Cosmetics Co., Ltd.

L'OCCITANE EN PROVENCE

Advised L'Occitane on opening its flagship T-Mall store, contract review, and other legal issues



Advised Percy & Reed on distribution contracts

NU SKIN®

Advised Nu Skin on sales contracts and foreign direct investment and real estate issues

ALAIN DELON

Advised Alain Delon on patent infringement case



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Mergermarket, 2019

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✓ Ranked law firm in PRC and AU by Chambers and Partners, 2019

Awards and recognition

#1 in Acritas Asia Pacific Law Firm Index

Acritas, 2020

Strategy and Changing Behaviours

Accessing New Markets and Capital

Financial Times Asia-Pacific Innovative Lawyers Awards 2019

Restructuring and Insolvency Law Firm of the Year

ALB Award 2019

Asia Pacific Law Firm of the Year

Chambers Asia-Pacific Awards 2018

Regional Law Firm of the Year

IFLR Asia Awards, 2017/2016/2013/2011

North Asia Firm of the Year

AsiaLaw Awards, 2017

Hong Kong Firm of the Year

AsiaLaw Awards, 2017

Innovation in Legal Expertise

Financial Times Asia-Pacific Innovative Lawyers Awards, 2017

Innovation in the Business of Law

Financial Times Asia-Pacific Innovative Lawyers Awards, 2017/2016

Best International Firm in China Practice

Euromoney Asia Women in Business Law Awards

M&A Legal Adviser of the Year

mergermarket, 2017

Best Law Firm (Revenue over \$200m)

AFR Client Choice Awards, 2017

Commercial Team of the Year

Lawyers Weekly Australian Law Awards, 2017

Transaction Team of the Year

Lawyers Weekly Australian Law Awards, 2017

Most Innovative Firm of the Year

China Law & Practice Awards, 2017

#1 Asia-Pacific Legal Brand

Acritas, 2016

Most Innovative Law Firm in China

Financial Times Asia-Pacific Innovative Lawyers Awards, 2016

China Law Firm of the Year

Who's Who Legal, 2016/2015/2013/2011/2010/2009/2007/2006

National Firm of the Year – China

IFLR Asia Awards, 2016/2014/2012/2010/2008/2007

Firm of the Decade (10 Year Anniversary Special)

China Law & Practice Awards, 2016

China Law Firm of the Year

ALB China Awards, 2016

Most Innovative Law Firm Asia-Pacific

Financial Times Asia, 2015/2014

International Law Firm of the Year

Australasian Law Awards, 2015

Business Excellence Award for Services

AustCham-Westpac Australia China Business Awards, 2015

#1 for M&A in Asia Pacific (excl Japan) by deal count and deal value

Bloomberg, Thomson Reuters, Mergermarket, 2016

Structured Finance and Securitisation Team of the Year

IFLR Asia Awards, 2016/2015/2014

Law Firm of the Year in Asia (Fund Formation)

Private Equity International Annual Awards, 2015

Law Firm of the Year in Asia – Private Equity

Private Equity International's Infrastructure Awards 2015



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