

Flame Retardants: A Guide to Current State Regulations

Insight

06.14.2016

By Michelle Corrigan

The Massachusetts Senate became the latest state legislative body to pass a bill that would ban at least eleven flame retardants from children's products sold in the state. An Act to protect children and families from harmful flame retardants, S. 2293 (the Act), which passed the Senate by a remarkable 39-0 margin, now moves to the Massachusetts House of Representatives. For the Act to become law, the House will need to approve it before the 2016 Massachusetts legislative session ends on July 31, 2016.

If passed, the Massachusetts Act would prohibit (as of January 1, 2017) the sale of children's products and residential upholstered furniture that contain more than 1,000 ppm of the following substances: 1) tris (1,3-dichloro-2-propyl) phosphate (TDCPP), 2) tris (2-chloroethyl) phosphate (TCEP), 3) decabromodiphenyl ether (decaBDE), 4) antimony trioxide, 5) hexabromocyclododecane (HBCD), 6) bis (2-ethylhexyl)-3,4,5,6- tetrabromophthalate (TBPH), 7) 2-ethylhexyl-2,3,4,5- tetrabromobenzoate (TBB), 8) chlorinated paraffin, 9) tris (1-chloro-2-propyl) phosphate (TCPP), 10) pentaBDE, and 11) octaBDE (and potentially other PBDEs). The Act would also provide the Massachusetts Department of Environmental Protection (MassDEP) with authority to review and identify other chemical flame retardants that should be prohibited or restricted on a triennial basis. MassDEP would analyze such factors as developmental and reproductive toxicity, as well as carcinogenicity, in determining whether any additional chemical flame retardants should be banned in the state.

A GROWING TREND

If passed, the Act will make Massachusetts the 14th state in the country to pass at least one law restricting or banning the sale of products within its borders that contain one or more types of chemical flame retardants. This year so far, the State of Washington and the District of Columbia both passed laws banning the use of certain flame retardants above *de minimus* levels in children's products and residential upholstered furniture sold within their jurisdictions. Washington state's law ESHB 2545 mandates that after July 1, 2017, no children's products

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containing more than 1,000 ppm of TDCC, TCEP, decaBDE, HBCD and tetrabromobisphenol (TBBPA) may be sold within the state. Washington D.C.'s law, the [Carcinogenic Flame Retardant Prohibition Amendment Act \(B21-143\)](#), prohibits the manufacture, sale or distribution of children's products containing TDCPP and TCEP at concentrations above 0.1% by mass in the district after January 1, 2018.

Prior to 2016, eleven states had already enacted legislation banning or restricting certain flame retardants in products sold within their borders. Children's products manufacturers and sellers should be aware of the following states' laws restricting or banning the use of chemical flame retardants:

- **California** – bans products containing more than 1/10 of 1% of the flame retardants pentaDBE or octaBDE by mass, and requires that products sold within the state warn whether they contain any added flame retardants.
- **Hawaii** - bans products containing more than 0.1% of the flame retardants pentaDBE or octaBDE.
- **Illinois** - bans products containing more than 1/10 of 1% of the flame retardants pentaDBE or octaBDE, and restricts the use of decaBDE.
- **Maine** – bans products containing added brominated flame retardants.
- **Maryland** – a) bans the sale of mattresses, residential upholstered furniture and electronic equipment containing decaBDE, b) bans the sale of all products containing flame retardants pentaBDE and octaBDE, and c) bans TDCPP and TCEP from children's products sold in the state.
- **Michigan** - bans products containing more than 1/10 of 1% of flame retardant pentaDBE.
- **Minnesota** - bans products containing flame retardants pentaDBE or octaBDE, and bans other specific flame retardants from children's products, mattresses and residential upholstered furniture.
- **New York** – a) prohibits the use of pentaDBE and octaBDE in any consumer product, b) bans the sale of children's products containing TCEP, and c) bans TDCPP in children's products marketed for children three years of age and younger.¹
- **Oregon** – bans products containing pentaDBE, octaBDE or decaBDE.
- **Rhode Island** – restricts the manufacturing and distribution of products containing pentaBDE or octaBDE.
- **Vermont** – a) bans flame retardants octaBDE and pentaBDE from all products, b) bans the sale of mattresses and furniture containing decaBDE, and c) bans TCEP and TDCPP from children's products and furniture.

THE ABSENCE OF FEDERAL REGULATION OF FLAME RETARDANTS, SO FAR

In addition to the 13 jurisdictions that have already passed legislation restricting or banning chemical flame retardants from products sold within their borders, another seven states (including Massachusetts through its Act discussed above) currently have legislation governing

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flame retardants proposed in their respective congressional houses. Each of the State flame retardant laws and proposed legislation is similar, but each contains various nuances that may make uniform compliance difficult for a company selling products across state lines.

Currently, there is little to no regulation of chemical flame retardants at the federal level. The [Toxic Substances Control Act](#)² was enacted in 1976, but has since placed very few restrictions on chemicals found in interstate commerce. However, the U.S. Congress has recently passed the Frank R Lautenberg Chemical Safety for the 21st Century Act (HR 2576), which would reform and overhaul TSCA. The Lautenberg Act is currently awaiting signature by President Obama before it becomes law. The passage of the Lautenberg Act will no doubt have a significant impact on the children's products industry, and will likely raise a variety of federal preemption questions with regard to the flame retardant regulations of various states.³ While these issues are being fleshed out (which may take a considerable amount of time), it is important for manufacturers and sellers to continue to be aware of the existing and pending regulations of chemical flame retardants at the state and local levels in various jurisdictions.

For more information about the regulation of chemical flame retardants in various states, and the potential impact of TSCA reform at the federal level, please contact [Michelle Corrigan](#) or the Stinson Leonard Street attorney with whom you regularly work.

¹ As discussed in *New York, New York: The Status of Regulation of Children's Products in the Empire State*, Corrigan, Stinson Leonard Street (May 24, 2016), the New York Assembly passed the Child Safe Products Act earlier this year, which would place severe restrictions on the sale of children's products in the state that contain benzene, lead, mercury, antimony, formaldehyde, asbestos, arsenic, cadmium and cobalt, in addition to TDCPP, and would ban the sale of all children's products (even those marketed for children over the age of three years) containing these substances after January 1, 2019. The Child Safe Products Act is now before the New York Senate, which is set to adjourn later this month.

² See, 15 U.S.C. §2601, et seq.

³ The Stinson Children's Products Group will provide readers with a thorough analysis of the *Lautenberg Act*, and the effect of TSCA reform on the children's products industry, as soon as the *Lautenberg Act* is signed into law.