

# Is There Still a Great Future in Plastics? California and New York Race to Ban Microbeads Typically Used in Personal Care Products

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As scrutiny on the use of bisphenol-A (“BPA”) continues, the California and New York legislatures last week introduced bills that would ban microbeads – the small, round plastic beads typically found in personal care products such as face wash and toothpaste and used as exfoliants. Although most microbeads are less than one-third of a millimeter in size, environmental groups allege that these polyethylene or polypropylene pieces contribute to waterway pollution, as they avoid capture by water treatment plant filters. Some studies suggest that fish and birds may be harmed after ingesting the tiny plastic pieces. Concern also has been expressed that chemicals in the microplastics could work their way up the food chain and have an adverse impact on human health. Although several large personal care product manufacturers have agreed to remove microbeads from their products, the proposed legislation would require widespread industry compliance on a specified timetable for any plastic five millimeters or less in size.

The [New York bill](#) – the Microbead-Free Waters Act – was proposed by Attorney General Eric Schneiderman and Assemblyman Robert K. Sweeney and coincided with the Attorney General’s announcement of L’Oréal’s decision to discontinue the use of microbeads in its cosmetic products. The proposed law, which would take effect December 31, 2015, would prohibit the production, manufacture, sale, or offer for sale of any personal care product containing intentionally-added microbeads, defined as “any plastic component of a personal cosmetic product measured to be five millimeters or less in size.” The bill defines “personal cosmetic product” as any product intended to be applied to the human body for cleansing, beautifying, promoting attractiveness, or altering the appearance, excluding prescription drugs. Violators would be liable for a civil penalty up to \$2,500 per day.

The [California bill](#), introduced by Assemblyman Richard Bloom, would amend the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as Proposition 65) to prohibit the selling or offering for promotional purposes of any cleaning product or personal care product containing 1 part per million (ppm) or greater of microplastic – defined as any plastic five millimeters or less in size. Cleaning products and personal care products are defined as mixtures and solutions used for bathing and cleaning, and include, but are not limited to, hand and body soap, exfoliates, shampoos, toothpastes, and scrubs. This bill would not become effective until January 1, 2016, but would also impose a civil penalty of \$2,500 per day per violation.

The bills are an outgrowth of an effort by various environmental groups to restrict or eliminate the use of microbeads. The efforts of such groups follow a pattern of seeking action at the state level to address perceived environmental concerns in advance of federal government regulation. The patchwork of state responses to address toxic substances (*e.g.*, bisphenol-A, phthalates, *etc.*) has sparked legislative activity in Congress to amend the Toxic Substances Control Act (TSCA), as well as U.S. Environmental Protection Agency (EPA) efforts to better utilize existing TSCA authority. The concern over microbeads invokes federal and state authority to regulate water pollutants under the federal Clean Water Act and similar state legislation. Increased state regulation of these materials may spur regulatory action by the U.S. EPA. In fact, last November, a coalition of Great Lakes mayors recently petitioned EPA to address microbead pollution. Should the bills get traction, their introduction could prompt action by other states or broader voluntary industry action. Even if other states do not act, few companies will have the resources to produce different product formulations to meet varying state requirements. Additionally, if companies opt to reformulate, they may need to make labeling and advertising changes to remove existing statements regarding the benefits of microbeads, particularly on products positioned as “natural” – a term that has become a lightning rod for litigation. We will continue to monitor and keep you apprised of any legislative or regulatory developments in this area, but recommend that companies evaluate the effect that these bills could have on the products they offer. In addition, companies wishing to negotiate with legislatures may want to consider partnering with a non-governmental organization to help forward their policy objectives.

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