The District of Columbia and Washington State Pass Back-to-Back Bans on Flame Retardants

**Summary:** The District of Columbia and the state of Washington recently enacted laws banning the use of listed flame retardants in certain products, ranging from children’s products and residential upholstered furniture in Washington to eventually all products in the District of Columbia.

The District of Columbia (DC) and Washington state have both recently passed legislation banning the use of listed flame retardants in certain products. After these provisions come into force, no one may manufacture, distribute, sell, or offer for sale covered products that contain listed flame retardants above 1,000 part per million in these jurisdictions. Both laws initially target children’s products and upholstered furniture, but DC’s law will eventually cover all products, except for a list of exempt products.

State-by-state and chemical-by-chemical restrictions present a significant challenge for regulated entities along the supply chain as new requirements continue to emerge in different states across the country. Every company involved in the production and sale of covered products—from the original manufacturer to distributors and retailers—should ensure it is aware of the impending effective dates in DC and Washington and understand its compliance obligations, while keeping an eye on other states that may soon adopt similar bans.

The following provides a detailed look at the two new laws:

### District of Columbia

On March 17, 2016, DC’s Mayor Muriel Bowser signed into law the Carcinogenic Flame Retardant Prohibition Amendment Act (the Amendment) restricting the use of the following flame retardants in certain products in the District:

- Tris(1,3-dichloro-2-propyl) phosphate (TDCPP), CAS No. 13674-87-8
- Tris(2-chloroethyl) phosphate (TCEP), CAS No. 115-96-8

This Amendment revises the Human and Environmental Health Protection Act of 2010, which also restricts certain uses of bisphenol-A, pentabromodiphenyl ether (pentaBDE), octabromodiphenyl ether (octaBDE), decabromodiphenyl ether (decaBDE), perchloroethylene, and n-propyl bromide. Under the amended Act, no one may manufacture, sell, offer for sale, or distribute children’s products or residential upholstered furniture in the District that contain the flame retardants TDCPP or TCEP at concentrations above 0.1% by mass in any component of the product, effective January 1, 2018. The Amendment defines “children’s products” as consumer products marketed for use by children under 12 years of age or “[t]he substantial use of which by a child under 12 years of age is reasonably foreseeable.” “Residential upholstered furniture” is defined as “furniture intended for use in a home or other dwelling that includes cushioning material covered by fabric or similar material.”

After January 1, 2019, the scope of the prohibition will expand to include the manufacture, sale, offer for sale, or distribution of “any product” that contains TDCPP or TCEP above 0.1% by mass in any product component. There are exemptions for certain kinds of products, however, including motor vehicles and parts; building insulation and wiring that comply with DC’s building codes; and listed electronics such as computers, audio and visual equipment, calculators, telephones, game consoles, handheld devices, and cables and adaptors. Retailers are also exempt from the amended Act’s requirements for products purchased or acquired before publication of the Amendment in the DC Register, which is expected to occur following a 30-day period of Congressional review.

According to the amended Act, manufacturers may not replace TDCPP or TCEP (or mixtures of pentaBDE, octaBDE, and decaBDE) with a chemical that is classified as a carcinogen, or identified as causing birth defects, hormone disruption, neurotoxicity, or harm to reproduction or development.

Finally, the amended Act now authorizes the Mayor of DC to request a certificate of compliance from manufacturers that sell or distribute products subject to the requirements of the Act in DC. After receiving a request from the Mayor, a manufacturer must respond within 45 days by either: (a) providing the Mayor with a certificate of compliance declaring that its products comply with the requirements of the Act; or (b) notifying anyone in the District that sells or distributes the products that the product does not comply with the Act, and its sale or distribution is prohibited.

Manufacturers who do not provide a certificate of compliance must provide the Mayor with a list of the names and addresses of all the downstream sellers that have been notified.

### Washington State

On April 1, 2016, Washington’s Governor, Jay Inslee, signed into law a bill that will restrict the use of the following five flame retardants in children’s products and residential upholstered furniture in Washington:

- Decabromodiphenyl ether (decaBDE), CAS No. 1163-19-5
- Hexabromocyclododecane (HBCD), CAS No. 25637-99-4
- Tetrabromobisphenol A (TBBPA), CAS No. 79-94-7
- Tris(2-chloroethyl) phosphate (TCEP), CAS No. 115-96-8
- Tris(1,3-dichloro-2-propyl) phosphate (TDCPP), CAS No. 13674-87-8

This legislation amends Washington’s Children’s Safe Products Act of 2008, which also restricts...
the levels of lead, cadmium, and phthalates in children’s products, and requires manufacturers to notify the Washington Department of Ecology (DoE) if any of their products contain a high priority chemical identified by the Department.

According to the updated statute, no one may manufacture, sell, offer for sale, or distribute for use in that state any children’s products or residential upholstered furniture that contain decaBDE, HBCD, TBBPA, TCEP, or TDCPP in amounts greater than 1,000 parts per million beginning July 1, 2017. "Residential upholstered furniture” is defined as:

residential seating products intended for indoor use in a home or other dwelling intended for residential occupancy that consists in whole or in part of resilient cushioning materials enclosed within a covering consisting of fabric or related materials, if the resilient cushioning materials are sold with the item of upholstered furniture and the upholstered furniture is constructed with a contiguous upholstered seat and back that may include arms.

“Children’s products” include toys; children’s cosmetics; children’s jewelry; children’s clothing; child safety seats; and any products designed to help a child with sucking or teething, to facilitate sleep, relaxation, or feeding. The definition does not include certain exempt products, such as batteries, video toys, chemistry sets, consumer and children’s electronic products, interactive software, and certain sporting gear.

Under the statute, manufacturers of restricted products are required to notify anyone selling these products in the state of the impending restrictions at least 90 days prior to the effective date of the restrictions, which is July 1, 2017 for children’s products and residential upholstered furniture containing listed flame retardants. After July 1, 2017, manufacturers are also required to recall from Washington all restricted products, and reimburse retailers, distributors, or other purchasers for the recalled products.

The amended statute establishes a process for making further policy recommendations to the Washington legislature to ban, restrict, or replace other flame retardants. The legislation first requires DoE to consider listing the following flame retardants as chemicals of high concern for children:

- Isopropylated triphenyl phosphate (IPTPP), CAS No. 68937-41-2
- 2-Ethylhexyl-2,3,4,5-tetrahydrobenzoic acid (THB), CAS No. 138365-27-7
- Bis(2-Ethylhexyl)-3,4,5,6-tetrabromophthalate (TBPH), CAS No. 29040-51-7
- Tris[1-chloro-2-propyl] phosphate (TCP), CAS No. 13674-84-5
- Triphenyl phosphate (TPP), CAS No. 115-86-6
- Bis(chloromethyl)propane-1,3-diylytrakis (2-chloroethyl) bisphosphate (V6), CAS No. 38501-10-4

DoE’s listing any of these flame retardants would trigger the notification requirements for manufacturers under the existing Children’s Safe Products Act.

In addition, listing by DoE would trigger a new process under the revised provisions of the statute. For any of those flame retardants that DoE decides to list as a chemical of high concern for children, the Department of Health (DoH) would have to consider policy options or recommendations for ways to reduce exposure to, develop safer substitutes for, or otherwise restrict such flame retardant. DoH would have to establish a stakeholder advisory committee for each new listed flame retardant to provide stakeholder input, expertise, and additional information to DoE as it considers policy recommendations. Based on its evaluation and input from stakeholders, DoH could submit policy recommendations to the Washington legislature regarding ways to limit or restrict the flame retardant identified as a chemical of high concern for children.

Conclusion

DC and Washington could be the first of many states to enact such bans in 2016. Ten other states are currently considering bills that would curb the use of flame retardants in products ranging from furniture to children’s products. Meanwhile, dozens of states are considering legislation to restrict or ban other chemicals in products as well. For more information on these state bills, please see our alert: States Consider Over 60 Bills Regulating Chemicals in 2016 (March 18, 2016).

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