Proposed green chemistry legislation has proliferated since our last green chemistry report. While enacted legislation remains relatively rare and continues to focus principally on children's products, consumer product manufacturers, importers, and distributors should be aware of some significant changes and upcoming deadlines as of July 29, 2019. [1]

As we previously reported, the 2016 passage of the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Pub. L. 114-176) (commonly referred to as the Lautenberg Chemical Safety Act, or LCSA) was expected to slow or halt the expansion of new state-level green chemistry regimes or state laws restricting specific chemicals. To review, LCSA reformed the nation's primary chemical safety regulation, the Toxic Substances Control Act (TSCA), by providing the U.S. Environmental Protection Agency (EPA) with a consistent source of funding to carry out evaluations of health risks posed by specific chemicals. However, the amendments to TSCA did not establish a federal green chemistry reporting program. In addition, implementation of LCSA faces challenges. The D.C. Circuit, for example, recently ordered EPA to revisit rules it implemented under LCSA, which could change the way the agency conducts its chemical reviews.[2]

While LCSA's implementing rules could be revised in the future, states still exhibit interest in some type of regulatory framework for chemicals in consumer products. In the past two years alone, we have seen several bills that either limit or ban certain chemicals and, in Washington, a modification of the existing Children's Safe Products Act to expand its application to all consumer products containing specified chemicals. Interestingly, many new laws on chemicals in consumer products are outright bans or are consumer right-to-know laws, such as California's Cleaning Product Right to Know Act [3] and New York's proposed Consumer Right to Know Act.[4] Common chemicals targeted for regulation include organohalogen flame retardants (OFRs), phthalates, per- and polyfluoroalkyl substances (PFAS), and bisphenols.

In contrast, the “green chemistry” laws that are the focus of this report generally include laws that attempt to address the use of numerous chemicals in products – sometimes limited to children's products – typically by requiring public reporting to a state agency. Generally, green chemistry laws establish a list of chemicals of concern or high concern and associated requirements to report the presence of listed chemicals, whether they are added intentionally or are present as contaminants. State green chemistry regimes vary in some crucial respects, although many include common elements, particularly reporting. The goal of green chemistry reporting regimes is to encourage manufacturers to eliminate chemicals to avoid the burdens and possible negative reputation hit associated with reporting. In some cases, state laws also include mandatory obligations to conduct an alternatives assessment (AA) on certain chemicals, with possible regulatory authority to ban or further restrict those chemicals.

For a variety of reasons, then, despite enactment of the LCSA, state legislators are still considering and adopting laws to require importers, manufacturers, distributors and retailers of consumer products (especially children's products) to provide transparency about chemicals used in products, and to impose bans or restrictions on certain chemical substances. Below, we discuss current and potential state green chemistry regimes that have developed since our last article on this topic. This high-level summary should not substitute a careful review of the detailed requirements of each state regime to which you may be subject.
Current Green Chemistry Regimes

California.

In 2008, California passed its Green Chemistry Law,[5] the first state law of its kind designed to regulate chemicals in all consumer products. Under the law, California’s Department of Toxic Substances Control (DTSC) adopted the Safer Consumer Products Regulations (SCP), which created a four-step process for evaluating chemicals of concern and determining safer consumer product alternatives.[6] After identifying candidate chemicals (step one), DTSC classifies chemicals of concern in priority products (CCPP) (step two). Manufacturers must then perform an AA comparing CCPP with potential alternatives (step three). Finally, DTSC may issue a regulatory response, such as a prohibition or use restriction (step four), which does not apply if manufacturers file conforming removal or replacement notifications. Despite the age of the law, this year marks the first time that an AA will be developed. In response to the listing of paint or varnish strippers containing methylene chloride as a priority product, five companies announced earlier this year that they will be working as a consortium to begin the AA process.[7]

Despite the regulatory focus on the AA process, a proposed bill that originated in the state Senate and is currently under consideration by the Assembly, would, if adopted, allow DTSC to bypass the AA process entirely.[8] SB 392 was introduced shortly after a February 12, 2019 legislative hearing, held jointly by California’s Senate Environmental Quality and Assembly Environmental Safety and Toxic Materials Committees, to examine the SCP’s effectiveness. During the hearing, some argued that the SCP implementation is slow and suffers from data gaps. Interestingly, DTSC released its Draft Strategic Plan for 2019-2023 on June 20, 2019, which includes plans to implement improvements to the SCP by December 2020.[9] Nevertheless, should it be enacted, SB 392 would allow DTSC to rely on existing, publicly available analyses of alternatives and then proceed to a regulatory response without a formal AA. The bill would expand DTSC’s authority, requiring product manufacturers to provide additional information such as sales data and information on a chemical’s concentration and functional use in a product. The bill would also eliminate SCP’s dispute resolution process for regulations that underwent a public notice and comment period.[10] While an earlier version of the bill would have expanded the list of candidate chemicals, the current version does not modify the list.

DTSC’s current candidate chemicals list, which is updated quarterly, is based on 23 established “authoritative lists,” including the state’s list of chemicals under its Safe Drinking Water and Toxic Enforcement Act of 1986 (better known as Proposition 65). As of the publication date of this summary, the candidate chemicals list included 2,549 chemicals.[11] The primary purpose of the list is to identify potential CCPPs. California has now finalized regulations to list three product-chemical combinations as CCPPs over the past two years:

- The regulation to list children’s foam-padded sleeping products with tris(1,3-dichloroisopropyl)phosphate (TDCPP) or tris(2-carboxyethyl)phosphine (TCEP) became effective July 1, 2012[12]
- The regulation to list spray polyurethane foam with unreacted methylene diphenyl diisocyanates (MDI) became effective on July 1, 2018;[13] and
- The regulation to list varnish strippers containing methylene chloride (DCM) became effective on January 1, 2019.[14]

Within 60 days of the effective date of a regulation establishing a product-chemical combination as a final CCPP, a “responsible entity” (defined to include a manufacturer, importer, assembler, or retailer of a CCPP) must file a notice with DTSC. The notices and preliminary AA reports for children’s foam padded sleeping products with TDCPP or TCEP and spray polyurethane foam with unreacted MDI were due in 2017 and 2018, respectively. Notifications and preliminary reports may still be submitted for products that were introduced after the effective date of those regulations. Notifications for varnish strippers containing methylene chloride were due March 4, 2019, and a preliminary AA report was due in May 2019. A Final AA Report is due one year after the notice of compliance for the Preliminary AA Report. To assist responsible entities with their AA reports, the DTSC released Version 1.0 of its AA Guide in June 2017.[15] However, as discussed above, the current AA process could be overhauled if SB 392 is adopted in its current form, creating uncertainties for businesses.

The agency also proposed four product-chemical combinations for addition to the CCPPs list:

- Perfluoralkyl and polyfluoralkyl substances (PFASs) in carpets and rugs;[16]
- Nonylphenol ethoxylates (NPEs) in laundry detergents;[17]
- Paint and varnish strippers and graffiti removers containing n-methylpyrrolidone;[18] and
- Nail products containing toluene.[19]

While DTSC is no longer soliciting comments on these proposals, it is seeking input on specific questions regarding 1,4-dioxane in personal care and cleaning products.[20] A public meeting is scheduled for August 21, 2019. Information gathered from the public comment period, which ends on August 30, 2019, will help inform the potential listing of specific consumer products containing the substance as priority products.

The agency is likely to seek input on other substances and product categories later this year as it has yet to list CCPPs from several of the seven product categories DTSC identified in its Three Year Priority Work Plan 2018–2020, which was released on May 1, 2018. The Work Plan identifies the following product categories for evaluation:

- Beauty, personal care, and hygiene products;
- Cleaning products;
Household, school, and workplace furnishings and décor;
- Building products and materials used in construction and renovation;
- Consumable office, school, and business supplies;
- Food packaging; and
- Lead-acid batteries.

**Connecticut.**

Connecticut established its green chemistry regime in 2008 to identify and list toxic substances, recommend maximum permitted levels of such substances, and to specifically set limits on levels of lead in children’s products. However, the lead restrictions were preempted by the Consumer Product Safety Improvement Act of 2008 (CPSIA) (Pub. L. 110-314), rendering the law mostly moot since it does not impose any other obligations on manufacturers, distributors, and importers.

**Maine.**

Maine’s Safer Chemicals in Children’s Products Program (SCCP) uses reporting and a three-tiered system of chemical categorization to encourage the use of safer chemical alternatives and to increase awareness of potential child chemical exposures. Tier one involves establishing a chemicals of concern list; tier two involves establishing a chemicals of high concern list; and tier three involves identifying priority chemicals. There are no changes to Maine’s green chemistry program since our last report. The priority chemicals are still BPA, nonylphenol, nonylphenol ethoxylates, cadmium, mercury, arsenic, formaldehyde, di(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), benzy1 butyl phthalate (BBP), diethyl phthalate (DEP), decabromodiphenyl ether (deca BDE) and hexabromocyclododecane (HBCD).

Like other states, Maine is looking beyond its green chemistry regime to regulate chemicals. For example, Maine recently adopted a law to regulate chemicals in packaging, modifying existing provisions modeled on the Council of Northeast Governors (CONEG) model legislation restricting certain heavy metals in packaging. The law maintains the ban on the sale or promotional distribution of packaging that contains intentionally added lead, cadmium, mercury, or hexavalent chromium, and limits contaminant levels currently to a combined 100 ppm limit. The amendments impose an additional ban on the use of phthalates in food packaging above “an incidental presence,” effective January 1, 2022, and the state’s Department of Environmental Protection (DEP) must designate lists of food contact chemicals of high concern and priority food contact chemicals. DEP is also required to ban food packaging containing PFAS in any amount greater than an incidental presence if it determines that a safer alternative is available. While the new law exists independently from the SCCP, it models some aspects of green chemistry laws. It remains to be seen whether this will become a pattern for future legislative initiatives to regulate chemicals in the state.

**Michigan.**

A green chemistry program was established by executive order in 2006 but was never implemented.

**Minnesota.**

The Toxic Free Kids Act (TFKA) of 2009 requires the Minnesota Department of Health (MDH) to create two lists of chemicals, one of chemicals of high concern and another of priority chemicals. While MDH may participate in the Interstate Chemicals Clearinghouse (IC2), there is no reporting obligation for industry. MDH has not updated its priority chemicals list since 2011, but it did recently update its chemicals of high concern list on June 28, 2019. The recent update resulted in the removal of 52 chemicals including gasoline and fuel gases, and the addition of 30 new chemicals, including tris(1-chloro-2-propyl) phosphate (TCP) and two bisphenols.

While Minnesota has not otherwise updated its green chemistry regime, it has released educational materials since our last update, including a notice sent out in August 2017 informing manufacturers, distributors, and retailers of children’s products about their obligations under the TFKA. MDH also released three consumer-targeted informational documents on formaldehyde in children’s and consumer products, lead awareness, and lead and cadmium in children’s jewelry.

**Oregon.**

In 2015, Oregon passed the Toxic-Free Kids Act (TFKA) to establish and maintain a list of chemicals of high concern in children’s products (CHCC), The law requires manufacturers to report products to the state that contain chemicals identified as CHCC at greater that de minimis levels, or those identified as high priority chemicals of concern for children’s health (HPCCCH) that are contaminants at 100 parts per million (ppm) or more, or intentionally added at or above specified practical quantification limits (PQL). The first reporting deadline was January 1, 2018; the next is January 1, 2020, and every other year after that.

Notably, the CHCC list is different for the next reporting deadline (January 1, 2020), as five new chemicals – bisphenol S (BPS); triphenyl phosphate (TPP); TCP; short-chain chlorinated paraffins (SCCPs); and 2-ethylhexyl-2,3,4,5-tetrabromobenzoxa(TEBB) – were added in 2018, and three chemicals – phthalic anhydride; octamethylcyclotetrasiloxane (D4); and molybdenum and its compounds – were removed. Notices for the January 2018 deadline covering products sold or offered for sale in Oregon in 2017 are still being accepted. The Oregon Health Authority (OHA) is not currently accepting product notices for 2018 or 2019.

Later this year, OHA plans to issue final rules on removing HPCCCHs from select children’s products, including children’s cosmetics, mouthable children’s products, and children’s products made for or marketed to children under three. Manufacturers can seek waivers through the submission of an AA and quantitative exposure assessment that demonstrates the presence of the...
chemical in the children’s product is not reasonably anticipated to result in exposure and removal of the chemical is not financially or technically feasible. Additionally, listed chemicals that are regulated by CPSIA and present at or below CPSIA-set levels need not be removed.[42] The first possible deadline for removing HPCCCHs or applying for a waiver is January 1, 2022.

Meanwhile, the state House introduced a bill earlier this year that would remove the limit on the number of chemicals that may be included on the HPCCCH list, and would also remove the requirement for OHA to grant a waiver to remove or substitute a chemical if a manufacturer submits a quantitative exposure assessment regarding the chemical.[43] However, this bill appears to be dead, as the state House adjourned on June 30, 2019, without assigning a day for a further a meeting or hearing on the bill.

Vermont.

When it was initially conceived, Vermont’s green chemistry law was modeled after Washington’s.[44] In its current form, however, Vermont’s legislation is much more onerous. While Vermont’s law does not currently ban products containing CHCCs, under the state’s Chemical Disclosure Program (CDP), manufacturers and importers of children’s products sold in the state are required to file a notice to the state’s Department of Health (VDH) if their products contain a CHCC.[45] Unlike Washington and other states, however, reports must identify chemicals in products by brand name, product model, and UPC, if applicable.

Manufacturers are exempt from reporting where a manufacturing control program (MCP) (a chemical control program that includes industry best practices to limit chemicals in children’s products) is in place.[46] Initial reports were due January 1, 2017,[48] and the second set of full reports were due August 31, 2018. Further disclosures from manufacturers are due August 31, 2020, and annually thereafter. Failure to report or comply with any other provision of the rule can subject a company to civil enforcement by the state’s attorney general.[49]

In addition, amendments signed into law on June 19, 2019, expanded the state’s authority to regulate products and add CHCCs. [50] While the original law required the Vermont Commissioner of Health to adopt a rule to regulate the sale or distribution of a children’s product “upon the recommendation” of the state’s CHCC Working Group,[51] the commissioner can now adopt a rule only after consultation with the Working Group. The amendments created an Interagency Committee on Chemical Management to evaluate chemical inventories on an annual basis, identify potential risks, and propose measures to address the risks. The amendments also changed the reporting schedule. The next submission date is August 31, 2020 (for products sold between September 1, 2018 and August 31, 2020), and annually thereafter. Finally, the requirement to submit UPCs codifies guidance from VDH on reporting and maintaining a SKU-level reporting obligation.

VDH is considering its own amendments, and the agency plans to hold a public hearing on September 5, 2019, to discuss its proposed changes to the Chemicals of High Concern in Children’s Products (CHCCs) rule. If adopted, the proposed revisions would establish processes whereby a chemical may be added or removed from the CHCC list and banned for sale or distribution. [52] The proposal also aims to add new chemicals to the CHCC list, as was done in Washington.

While reporting obligations in all green chemistry states are onerous, UPC-level reporting adds an entirely new dimension to the reporting burden. Anecdotal information indicates that some companies are electing simply not to sell certain products in Vermont to avoid Vermont’s complicated green chemistry laws.

Washington.

The state’s Children’s Safe Products Act (CSPA)[53] requires the state Department of Ecology (Ecology) to develop rules [54] to administer a green chemistry reporting program. While originally applicable only to children’s products, the state recently passed a law that significantly expands the scope of reporting obligations in Washington to apply to consumer products, defined as “any item, including any component parts and packaging, sold for residential or commercial use.”[55] The law also establishes a category of priority chemicals, which includes PFAS, phthalates, OFRs, phenolic compounds, polychlorinated biphenyls, and other chemicals identified by Ecology. Manufacturers of children’s products or consumer products containing identified priority chemicals will be required to submit annual reports.

Under the previous version of Washington’s green chemistry regime, a report was due on January 31, 2019 for children’s products sold or offered for sale in the state between September 1, 2017 and December 31, 2018.[56] The next report is scheduled for January 31, 2020, for products sold or available for sale during the prior calendar year.[57] The new law does not appear to revise this schedule. With regards to Ecology’s obligations, the law sets the following timetable:

- By June 1, 2020, Ecology must identify priority consumer products that are a significant source of or use priority chemicals;
- By June 1, 2022, Ecology must determine regulatory actions, which are to be adopted one year later, regarding priority chemicals and priority products;
- By June 1, 2024, and every five years thereafter, Ecology must select at least five chemicals for designation as priority chemicals;
- By June 1, 2025, and every five years thereafter, Ecology must identify priority consumer products that contain any new priority chemicals;
- By June 1, 2027, and every five years thereafter, Ecology must determine regulatory actions, which are to be adopted one year later, for new priority consumer products and new priority chemicals.

Based on the experience of other states, this timeline and the bill itself may be ambitious, to say the least. Its supporters claim that it is now the strongest chemicals policy in the country, as it considers effects on “sensitive” populations and species that include both humans and animals (specifically southern resident killer whales, salmon, and forage fish). “Sensitive populations” essentially includes all humans with broad categories of “men and women of childbearing age,” “infants and
While the new law requires Eclogy to take action to meet a number of regulatory milestones, Eclogy is actively enforcing limits on certain chemicals that were established by the original law and still exist. For example, earlier this year, Amazon reached a settlement with the Washington State Office of the Attorney General (AG) after an investigation found that the company sold school supplies with illegal levels of lead and cadmium.[58] Under the terms of the settlement, the company agreed to pay the AG’s office $700,000 to fund environmental protection efforts, including future investigations into children’s products that may contain toxic chemicals. Amazon also blocked further sales of school supplies and jewelry that did not have lab reports or other proof of compliance with chemical limits. The company contacted purchasers and provided more than $200,000 in refunds.

What to Expect this Year and Beyond

Fewer efforts were made to pass framework green chemistry laws on chemicals in products this year, but proposals to regulate specific chemicals in products, like PFAS and flame retardants, ticked up. Also, more bills were introduced this year than in the past. In addition to the bills, proposed amendments, and newly adopted regulations and laws identified above, Massachusetts, New Jersey, New York, and North Carolina are considering legislation to establish green chemistry regimes.

Massachusetts.

In previous years, green chemistry legislation was introduced but failed to advance. This year, three bills are up for consideration. S.149 and H.248 would create a list of toxic chemicals in consumer products that would, at a minimum, include chemicals from Washington state’s chemicals of concern list and Maine’s chemicals of high concern list, excluding mercury. [59] Reporting would be required for both children’s products and “formulated” products (chemical mixtures including laboratory chemicals, cleaning products, cosmetics, and coating materials). Separately, S.519 would create four lists of chemicals: chemicals of high concern, chemicals of concern, chemicals of unknown concern, and chemicals of low concern. [60] Annually, two to four chemicals from the chemicals of high concern list would be designated as priority chemical substances. Manufacturers of consumer products (covering “any item sold, marketed, distributed, or sold for residential or commercial use, including any component, part or packaging” in Massachusetts) containing a priority substance would be required to submit notice. None of these bills moved forward since introduction earlier this year, so passage seems unlikely.

New Jersey.

Unlike Massachusetts, New Jersey does not have history of proposed green chemistry legislation, but this year the state is considering a law that would require the New Jersey Department of Environmental Protection (DEP) to post a list of chemicals of concern and a list of dangerous chemicals on its website. The bill would also require manufacturers of children’s products to report use of those chemicals, and would eventually ban the sale and distribution of children’s products containing listed dangerous chemicals.[61] The bill provides a list of initial chemicals of concern (which closely tracks similar lists in states with existing green chemistry regimes) and a list of “dangerous chemicals,” which includes tris (1, 3 dichloro-2-propyl) phosphate, benzene, lead and its compounds, mercury and its compounds, formaldehyde, asbestos, arsenic and its compounds, cadmium, and OFRs. Since the bill was introduced relatively recently, on June 24, 2019, its fate is unclear.

New York.

New York’s state legislature has seen its fair share of proposed green chemistry legislation over the years. S 501B, titled “The Child Safe Products Act,” passed the Assembly but was returned to the Senate, where it was approved with revisions. The bill has yet to go to Governor Cuomo for signature. S 501B explicitly lists 68 chemicals of concern and nine “dangerous chemicals,” including TDCPP, benzene, lead and its compounds, mercury and its compounds, formaldehyde, asbestos, arsenic and its compounds, cadmium, and OFRs.[62] Manufacturers of children’s products containing either a chemical of concern or a dangerous chemical at the PQL would be required to report to the state. Children’s products containing a dangerous chemical would be banned three years after the chemical is added to the dangerous chemicals list. The law, if signed, would take effect March 1, 2020.

A separate but related bill would restrict chemicals in pet products. Using the same list of chemicals of concern as S 501B and a priority chemicals list that closely tracks S 501B’s dangerous chemicals list (but lists antimony and its compounds and cobalt and its compounds instead of asbestos and OFRs), A 7876 would ban the sale of pet products containing intentionally added priority chemicals beginning January 1, 2022.[63] Similar bills were introduced in 2015[64] and 2017[65] with no luck.

North Carolina.

As in New Jersey, there have been limited efforts to advance green chemistry bills in North Carolina. This year, the North Carolina House is considering the adoption of the Toxic-Free Kids Act, which would prohibit the sale of children’s products containing BPA, TDCPP, TCEP or phthalates.[66] Given the limited scope of this bill and increasing nationwide state-level bans on these chemicals, it is possible that this bill could pass even under North Carolina’s largely conservative leadership.

* * *

The above examples make clear that despite enactment of LCSA, states remain interested in a variety of regulations governing chemicals in consumer products. In prior years, the focus was on green chemistry reporting regimes, but legislative activity levels seem to have ticked up. States that adopted green chemistry regimes continue to evaluate changes, and those changes generally resulted in significant new burdens. Now, it is more common to see proposed bills that focus on specific chemicals, such as flame retardants, PFAS, phenoic compounds, and phthalates. One reason for this trend could be that these restrictions require fewer resources than comprehensive state chemical management programs. It may also be easier to gain support for a bill that is focused on restricting a handful of chemicals instead of 68 or more, although legislators in states like New York continue to consider comprehensive legislation. The focus on some specific chemical categories, like OFRs, is also potentially
at odds with the latest scientific thinking, including a recent opinion from experts at the National Academies of Sciences, Engineering, and Medicine that OFRs cannot be treated as a single class.[67]

Unfortunately, it seems that more state-level chemicals restrictions are likely to be introduced in 2020, and the business community generally opposes the proliferation of more green chemistry bills. While that is especially true for companies that make children’s products – a sector that already faces significant compliance obligations – expanding these requirements to other consumer product categories seems to be a recent trend in the states. As we have seen with other legislative/regulatory initiatives and with enforcement initiatives, as states try to have the toughest laws and biggest penalties, the landscape will only become more complicated. Consider, for example, the 100 ppm lead limits mandated for children’s products under CPSIA. Touted as the most stringent lead limit in the world, that claim was outdone when Health Canada set a 90 ppm limit. Another example is Washington’s 40 ppm limit on cadmium, which is inconsistent with the U.S. Consumer Product Safety Commission’s (CPSC) health-based approach to evaluating cadmium in toys and jewelry.[68]

More complex green chemistry reporting regimes or adoption of varying chemical limits in products results in considerable burdens to businesses, without much scientific support or evidence of consumer benefits. It nevertheless seems likely that the landscape of chemical reporting obligations and imposition of new chemical limits will continue to shift, making it more difficult for companies to enter the marketplace and increasing compliance costs. That, in turn, could well result in increased prices for consumers and reduced market choices, but with questionable safety benefits. With the existing framework of green chemistry reporting obligations now expanding to cover general use products, companies who have concluded that green chemistry is largely a children’s product phenomenon are well-advised to reconsider how new laws and requirements will affect them.

[1] In addition to these “green chemistry” laws, a variety of restrictions on the use of certain chemicals exist in many states, but these are not true “green chemistry” laws and are not discussed in this update.


[3] Cal. S.B. 258 (filed Oct. 15, 2017), available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB258 (requiring “a manufacturer of a designated product, as defined, that is sold in the state to disclose on the product label and on the product’s Internet Web site information related to chemicals contained in the designated product, as specified.”)


[10] With the exception of final regulatory response determination notices, the dispute resolution process is initiated as an informal process by DTSC at the request of a responsible party and can be appealed to DTSC’s Director by the responsible entity through submission of: (1) the original statement of dispute; (2) supporting information; and (3) copies of responses prepared by DTSC. 22 Cal. Code Regs. § 69507.1. Requests for Review of final regulatory response determination notices go through a formal dispute resolution procedure that must include “a statement of the reasons supporting the Request for Review, and, as applicable, a showing that the determination is based on: (a) erroneous facts, assumptions, approaches, or conclusions of law; and/or (b) A policy judgment that the Department should, in its discretion, reconsider.” 22 Cal. Code. Regs. § 69,507.5. If DTSC grants a Request for Review of a final regulatory response determination, a briefing schedule is set and the


[27] 06–096 Me. Code R. ch. 885, Designation of Formaldehyde as a Priority Chemical and Regulation of Formaldehyde in Children’s Products (July 26, 2015).


[33] See Minn. Dept. of Health, Toxic Free Kids Act Priority Chemicals, available at https://www.health.state.mn.us/communities/environment/childenvhealth/tfka/priority.html (listing bisphenol A, cadmium, decabromodiphenyl ether (decaBDE), formaldehyde, hexabromocyclododecane (HBCD), lead, butyl benzyl phthalate (BBP), dibutyl phthalate (DBP), and di (2-ethylhexyl) phthalate (DEHP) as priority chemicals).


[48] See Vt. Dept. of Health, Chemical Disclosure Program Guidance (July 1, 2016), available

[49] Id.


[68] ASTM’s Standard Consumer Safety Specification for Toy Safety (F963), which is a mandatory standard, and the voluntary Standard Specification for Consumer Product Safety for Children’s Jewelry (F2923) both follow CPSC’s recommendations on how to test for cadmium. Yet, although state action on toys is preempted, Washington is still targeting children’s products other than toys containing more than 40 ppm cadmium. Thus, if a children’s product meets toy safety limits for cadmium determined to be health protective by the federal government, the manufacturer may be still subject to enforcement action by the state of Washington, a result that makes no sense from a safety standpoint.

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