



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

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BACKGROUND DOCUMENT ON PROPOSED NEW REGULATION

310 CMR 78.00: DISTRIBUTION AND SALES BAN OF COVERED PRODUCTS CONTAINING CERTAIN FLAME RETARDANTS September 15, 2022

REGULATORY AUTHORITY:
M.G.L. c. 21A, §§ 2, 8, 16 and 28 and M.G.L. c. 111, § 2C.

This information is available in alternate format. Contact Glynis Bugg at 617-348-4040.
TTY# MassRelay Service 1-800-439-2370

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I. SUMMARY

The Massachusetts Department of Environmental Protection (the Department or MassDEP) is proposing new regulations at 310 CMR 78.00 to implement chapter 261 of the acts of 2020, *An Act to Protect Children, Families and Firefighters From Harmful Flame Retardants*, signed into law on January 1, 2021 and codified at M.G.L. c. 21A, § 28. MassDEP is promulgating 310 CMR 78.00 based on this new law. This statute prohibits the sale, distribution and importation into Massachusetts “covered products” that contain certain chemical flame retardants or chemical analogues over 1000 parts per million for any component part of the covered product. Covered products are defined as bedding, carpeting, children’s products, residential upholstered furniture, and window treatments. Covered products that contain prohibited chemical flame retardants and chemical analogues manufactured prior to December 31, 2021 are exempt from the statute and the regulation. The statute and the regulation also include the exemptions listed below in Section III. The statute and the regulation also require MassDEP, at least every three years, to review, identify and recommend, if applicable, other chemical flame retardants known or reasonably anticipated to present a toxic hazard to people. The regulation includes enforcement and penalty provisions.

II. BACKGROUND

According to the United States Environmental Protection Agency (EPA), test data, monitoring studies in humans and environmental studies have demonstrated that certain chemical flame retardants can persist in the environment and bioaccumulate in humans and animals.

Historically, in response to some state and federal flammability requirements, companies have used a range of chemical flame retardants in products to decrease the ignitability of materials and inhibit the combustion process. Chemical flame retardants are found in a range of products such as plastic, textile, and foam products.

The EPA has taken a range of regulatory actions on chemical flame retardants in both their new and existing chemicals programs under Toxic Substances Control Act (TSCA). Since 2004, EPA has also helped to facilitate voluntary commitments to cease production of some of these chemicals.

As part of EPA’s ongoing strategy to more fully understand the potential health and environmental concerns posed by these chemicals, EPA is currently assessing the potential risk posed by more than 20 chemical flame retardants. EPA believes that industry’s voluntary phase-out of several chemical flame retardants and additional actions the Agency has already taken are useful steps to minimize and ultimately help prevent further exposure to these chemicals.

Firefighters may be exposed to chemical flame retardants during the management of fires. These individuals can be exposed when products, including furniture and window treatments, ignite and release the chemicals to the surrounding environment. Dust and particulates from furniture, window treatments, and various children’s products containing chemical flame retardants can also pose exposure to the individuals using them.

MassDEP is proposing these regulations to implement the new law that restricts the sale, distribution and importation into Massachusetts covered products that contain certain chemical flame retardants and chemical analogues and help protect its citizens from possible exposure to these chemicals. The only chemical flame retardants or chemical analogues prohibited in covered products are those listed in 310 CMR 78.00. MassDEP will consider additional chemical analogues of the chemical flame retardants listed in M.G.L. c. 21A, §28 during the three-year review described below.

III. DESCRIPTION OF PROPOSED REGULATION

The purpose of 310 CMR 78.00 is to protect the environment, and public health, safety, and welfare by prohibiting the sale, distribution or importation into the Commonwealth of covered products that contain certain chemical flame retardants. The regulation applies to any manufacturer or retailer that sells, offers or manufactures for sale, distributes in commerce or imports into the Commonwealth a covered product.

The regulation includes a definition section. Many of the definitions are from the statute, but some terms are not defined in the statute, such as Chemical Abstract Service, Chemical Analogue and Nanometer. The Department defined these terms because they are key terms used in the regulation.

The regulation lists 11 chemical flame retardants and chemical analogues that if present in covered products above the stated threshold are prohibited from being sold and distributed in or imported into Massachusetts. Covered products manufactured before December 31, 2021, can continue to be sold and distributed in or imported into the Massachusetts. The regulation does not prohibit the manufacture of covered products with prohibited chemical flame retardants or chemical analogues above the stated threshold for sale outside of Massachusetts.

The regulation describes a process for the Department to identify other chemical flame retardants and potentially ban them in covered products. The Department is directed to undertake this process at least every three years, in consultation with the Toxics Use Reduction Institute at the University of Massachusetts at Lowell, the Science Advisory Board established in section 6 of chapter 21I, and any other relevant state agencies identified by the Department. The regulation directs MassDEP to determine through scientific documentation whether the chemical flame retardant is known or reasonably anticipated to present a toxic hazard to people through one or more potential routes of exposure. If the Department determines that it does, it is required to propose regulations within nine months to prohibit these chemicals from covered products when the total weight exceeds 1,000 parts per million for any component part of the covered product. However, if the chemical flame retardant is an engineered nanoobject, the covered product is not allowed to contain the chemical flame retardant in any amount per the statute. Any new prohibited chemical flame retardants will be listed in the regulation. After the promulgation of the regulation, only covered products manufactured before the effective date of the amended regulation will be allowed to be sold and distributed in or imported into Massachusetts.

The following products are exempt from the statute and the regulation:

- covered products that contain the prohibited chemical flame retardants and chemical analogues on the initial list, manufactured prior to December 31, 2021;

- covered products contained in motor vehicles, watercraft, aircraft, all-terrain vehicles, off-highway scramblers or any component parts;
- the sale or purchase of any previously owned product containing a chemical flame retardant or chemical analogue prohibited under 310 CMR 78.00;
- covered products contained in electronic devices;
- electronic components of covered products; and
- covered products that contains chemical flame retardants or chemical analogues prohibited under 310 CMR 78.00 due to the presence of recycled materials used during the manufacture of the covered product.

The regulation requires manufacturers and retailers of covered products to keep records to demonstrate compliance and to provide these records to the Department upon request. Records may include, among other things, documents listing the chemical content of the covered product or documents showing a chemical analysis of the covered product. MassDEP is particularly interested in obtaining public comment on the requirement to maintain records demonstrating compliance including the extent and availability of such records. The regulation also requires manufacturers and retailers to provide reasonable access to properties containing or suspected of containing covered products to Department inspectors for the purpose of determining compliance with this regulation. In addition to laying out the Department's administrative enforcement authority, the regulation sets out civil penalties for manufacturers and retailers who violate the law. They range from \$5000 for the first violation to \$50,000 for the third and subsequent violations.

IV. IMPACTS OF PROPOSED REGULATIONS

Economic Impacts

The proposed regulation is not anticipated to significantly impact the regulated entities. The manufacturers of covered products and retailers that sell them under this regulation will be required to review the chemical flame retardant content of covered products sold or distributed in or imported into Massachusetts to comply with the regulations. The costs associated with this inventory management is not anticipated to be excessive or to adversely impact the finances of the regulated businesses. If the covered products contain excess amounts of the prohibited chemical flame retardants or chemical analogues and it was manufactured after December 31, 2021, the covered product is prohibited from being imported or sold in Massachusetts. Regulated parties will need to seek alternative chemicals to use in manufacturing and alternative products to sell in Massachusetts. MassDEP had a stakeholder meeting on the proposed regulation and has not heard from any manufacturers of covered products expressing difficulty anticipated in complying with the proposed prohibitions.

Impacts on Massachusetts Municipalities

Pursuant to Executive Order 145, state agencies must assess the fiscal impact of new regulations on the Commonwealth's municipalities. The proposed regulation at 310 CMR 78.00 will not have fiscal impacts on any municipality. The regulation applies to manufacturers and retailers of covered products and not municipalities.

Massachusetts Environmental Policy Act (MEPA)

Pursuant to 301 CMR 11.03(12) (Massachusetts Environmental Policy Act Regulations), MassDEP is not required to file an Environmental Notification Form (ENF) regarding the proposed amendments. The proposed amendments do not reduce standards for environmental protection, nor do they reduce opportunities for public participation in review processes or public access to information generated or provided in accordance with the regulations.

V. PUBLIC HEARING AND COMMENT

MassDEP will hold public hearings on the proposed regulation in accordance with M.G.L c. 30A. MassDEP will accept written comments for 10 days after the public hearing. The public hearing notice and proposed regulation are available on MassDEP's website at: <https://www.mass.gov/service-details/massdep-public-hearings-comment-opportunities>. For further information, please contact MassDEP via email at flame.retardant@mass.gov.