310 CMR 78.00: BAN OF COVERED PRODUCTS CONTAINING CERTAIN FLAME RETARDANTS

78.01 : Purpose and applicability

The purpose of 310 CMR 78.00 is to protect the environment, public health, safety, welfare by prohibiting the sale, distribution, or import into the Commonwealth of covered products that contain certain chemical flame retardants.

310 CMR 78.00 applies to any manufacturer or retailer that sells, offers or manufactures for sale, distributes in commerce or imports into the Commonwealth a covered product.

78.02 : Definitions

As used throughout 310 CMR 78.00, the following terms shall have the following meanings:

Bedding. Any bedding material, including, but not limited to, a mattress, mattress pad, mattress cover, sheeting, pillow, blanket, comforter, duvet cover, sleeping bag or any other stuffed item intended to be used for reclining or sleeping.

Carpeting. Any fabric floor covering, including carpet padding.

Children's Product. A consumer product intended, made or marketed for use by children 12 years of age or under.

Chemical Abstract Service. Registry Number (CAS #). That number assigned to a chemical substance by the Chemical Abstract Service.

Chemical Analogue. A compound having a structure similar to that of another compound, but differing from it in respect to a certain aspect. It can differ in one or more atoms, functional groups, or substructures, which are replaced with other atoms, groups, substructures, or in their arrangement.

Covered Product. Bedding, carpeting, children's product, residential upholstered furniture or window treatment.

Department. The Massachusetts Department of Environmental Protection.

Engineered Nanoobject. A material with 1, 2 or 3 external dimensions in the nanoscale.

Manufacturer. A person or entity that produces, imports or distributes covered products.

Nanometer. One billionth of a meter.

Nanoscale. A size which ranges from approximately 1 to 100 nanometers.

Residential Upholstered Furniture. Seating or other upholstered products intended for indoor or outdoor use in or at 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 other textile.

Retailer. A person or entity that offers a product for retail sale through any means, including, but not limited to, remote offerings such as sales outlets, catalogs or the internet; provided, however, that retail sale shall not include a sale that is a wholesale transaction with a distributor or a retailer.

Window Treatment. Curtain materials, blinds or shades intended for indoor residential or indoor commercial use.

78.03 : Exemptions.

The following products are exempt from the requirements of 310 CMR 78.00:

(1) Inventory manufactured prior to December 31, 2021;

(2) motor vehicles, watercraft, aircraft, all-terrain vehicles, off-highway motorcycles or any component parts;

(3) the sale or purchase of any previously-owned product containing a chemical flame retardant or chemical analogues prohibited under 310 CMR 78.00;

(4) electronic devices;

(5) electronic components of covered products;

(6) any covered product that contains chemical flame retardants or chemical analogues in amounts prohibited under 310 CMR 78.00 due to the presence of recycled materials used during the manufacture of the covered product.

78.04 : Prohibited chemical flame retardants and chemical analogues

(1) A manufacturer or retailer shall not sell, offer or manufacture for sale, distribute in commerce or import into the Commonwealth a covered product that contains any chemical flame retardants or chemical analogues listed in 310 CMR 78.04(3), the combined total of which exceeds 1,000 parts per million for any component part of the covered product.

(2) A manufacturer or retailer shall not sell, offer or manufacture for sale, distribute in commerce or import into the Commonwealth a covered product that contains any amount of an engineered nanoobject form of any chemical flame retardants or chemical analogues listed in 310 CMR 78.04(3).

(3) List of chemical flame retardants and chemical analogues.

(a) Tris(1,3-dichloro-2-propyl)phosphate (TDCPP) (CAS # 13674–87–8);

(b) Tris(2-chloroethyl)phosphate (TCEP) (CAS # 115–96–8);

(c) Antimony trioxide (CAS # 1309–64–4);

(d) Hexabromocyclododecane (HBCD) (CAS # 25637–99–4);

(e) Bis(2-Ethylhexyl)-3,4,5,6- tetrabromophthalate (TBPH) (CAS # 26040–51–7)

(f) 2-EthylhexYl-2,3,4,5-tetrabromobenzoate (TBB) (CAS # 183658– 27–7);

(g) Chlorinated paraffins (CAS # 85535–84–8);

(h) Tris (1-chloro-2-propyl) phosphate (TCPP) (CAS # 13674–84–5);

(i) PentaBDE (CAS # 32534-81-9);

(j) OctaBDE (CAS # 32536-52-0); or

(k) Tetrabromobisphenol A (TBBPA) (CAS # 79-94-7).

(4) Not less than every three years, the Department shall, in consultation with the Toxics Use Reduction Institute at the University of Massachusetts at Lowell, the TURA Science Advisory Board established in M.G.L. c. 21I, § 6 and other relevant state agencies identified by the Department, review, identify and recommend, if applicable, other chemical flame retardants that should be prohibited in covered products.

(a) In recommending other chemical flame retardants to be prohibited, the Department shall determine through scientific documentation that the chemical flame retardant is known or reasonably anticipated to present a toxic hazard to people through one or more potential routes of exposure.

(b) A toxic hazard may include, but shall not be limited to:

1. harming the normal development of a fetus or child or causing other developmental toxicity;
2. causing cancer, genetic damage or reproductive harm;
3. disrupting the endocrine system;
4. damaging the nervous system, immune system or an organ or causing other systemic toxicity;
5. being persistent, bioaccumulative and toxic; or
6. having health and environmental impacts.

(c) If the Department determines that a chemical flame retardant meets the conditions of 310 CMR 78.04(4)(a), within nine months of making the determination it shall promulgate regulations to prohibit the sale, distribution in commerce or importation into the Commonwealth of covered products that contain the prohibited chemical flame retardant in an amount that alone or in combination with any other listed chemical flame retardant or chemical analogue exceeds 1,000 parts per million for any component part of the covered product. If the chemical flame retardant is an engineered nanoobject, the covered product shall not contain the chemical flame retardant in any amount.

(d) If the Department determines that a chemical flame retardant meets the conditions of 310 CMR 78.04(4)(a)), it shall send notice of the determination to the Joint Committee on Public Health.

78.05 : Recordkeeping Requirements.

Manufacturers and retailers subject to 310 CMR 78.00 shall maintain records in hard copy or electronically that demonstrate compliance with 310 CMR 78.00 and shall provide said records to the Department upon request.

78.06 : Department Access to Facilities and Records.

(1) Access.

(a) For purposes of determining compliance with M.G.L. c. 21A, § 28 and 310 CMR 78.00, personnel or representatives of the Department may, upon presentation of credentials, enter property containing or suspected of containing covered products to inspect or obtain samples from any covered product and to inspect, and copy all records relating to covered products.

(b) Said inspections shall be conducted during normal business hours or at other reasonable times, with or without prior notice.

(2) Duty to Comply.

(a) Manufacturers and retailers shall cooperate with and assist Department personnel or authorized representatives and shall not restrict, impede, or delay any inspection or request for information by personnel or authorized representatives of the Department where such inspection or request is made pursuant to a request in accordance with 310 CMR 78.06, or pursuant to the terms of any order or other enforcement document, or as otherwise authorized by law.

(b) For announced inspections, the manufacturer or retailer shall provide the personnel necessary to provide Department personnel or authorized representatives with access to records and facilities.

78.07 : Enforcement and Penalties

(1) General. Any failure to comply with any provision of 310 CMR 78.00 or M.G.L. c. 21A, § 28, or the terms of any order issued thereunder, shall constitute a violation of 310 CMR 78.00 for which the Department may take an enforcement action in accordance with applicable laws and regulations, including, but not limited to M.G.L. c. 21A, §§ 16 and 28, M.G.L. c. 111, §2C, 310 CMR 78.00 and 310 CMR 5.00: *Administrative Penalty*.

(2) For purposes of calculation of penalties for noncompliance with 310 CMR 78.00, one covered product shall be either:

(a) an individual covered product packaged for retail sale; or

(b) a collection of covered products that is combined within one package for retail sale.

(3) Civil Penalties.

(a) For the first violation, a fine of not more than $100 per covered product, not to exceed a total of $5,000;

(b) For the second violation, a fine of not more than $250 per covered product, not to exceed a total of $25,000; and

(c) For the third or subsequent violation, a fine of not more than $1,000 per covered product, not to exceed a total of $50,000.

(d) A manufacturer or retailer who knowingly violates this section shall be subject to a civil penalty equal to three times the amount of the fine imposed for such violation under this subsection.

(e) A civil penalty for a violation of this section shall be waived if the Department determines that a manufacturer or retailer acted in good faith to be in compliance with this section, pursued compliance with due diligence and promptly corrected any noncompliance after discovery of the violation.

78.08 : Other Applicable Laws

Compliance with 310 CMR 78.00 does not release a manufacturer or retailer from the need to comply with other applicable state, federal or local requirements.

78.09 : Severability

The provisions of 310 CMR 78.00 are severable, and if any provision or if the application of any provision to any person or any circumstance is held invalid, such invalidity shall not affect other provisions or applications of provisions which can be given effect without the invalid provision or application.

REGULATORY AUTHORITY

310 CMR 78.00: M.G.L. c. 21A, §§ 2, 8, 16 and 28; M.G.L. c. 111, § 2C.