



# State Consumer Activities

Society for Chemical Hazard Communication  
Spring Meeting

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# Overview

Federal vs. state regulation

California update

- Safer Consumer Products regulations
- Proposition 65
- Cleaning products ingredient disclosure

Other state actions

# Federal vs. State Regulation

# Federal preemption?

## Federal Hazardous Substances Act § 18

- No state may adopt or enforce a cautionary labeling requirement for a risk where FHSA cautionary labeling requirements apply to that risk
  - unless identical to the FHSA requirement
  - or unless the state requirement provides a higher degree of protection from such risk than the FHSA requirement
- CPSC may by regulation waive preemption

## Consumer Product Safety Improvement Act

- Section 18 does not apply to Proposition 65
- Section 18 does not apply to tort actions

# Federal preemption?

## Consumer Product Safety Act § 26

- No state may adopt or enforce restrictions addressing the same risks as a CPSC standard unless identical to the CPSC standard – or more stringent

## Consumer Product Safety Improvement Act

- Section 26 does not apply to any phthalate alternative not specifically regulated by a CPSC standard
- Section 26 does not apply to Proposition 65
- Section 26 does not apply to tort actions
- States may apply for waiver of preemption

# Federal preemption?

## Toxic Substances Control Act § 18

- No state may adopt a new restriction for a high-priority substance while EPA conducts a risk evaluation of it
- No state may adopt a new restriction or enforce an existing restriction for a chemical that EPA determines:
  - Does not present an unreasonable risk
  - Does present an unreasonable risk – but only after it adopts a risk management rule
- Preemption does not apply to:
  - Proposition 65
  - A reporting, monitoring, or information obligation
  - Tort suits
  - Requirements related to water quality, air quality, or waste, with exceptions
- Identical requirements not preempted
- EPA may waive preemption

# “Rethinking the Role of Information in Chemicals Policy”

Lars Koch & Nicholas Ashford (2006)

**Need alternative or supplement to risk management**

- Risk management seen as too linear, focusing on hazard rather than alternatives

**Aim: push firms' efforts toward the search for safer alternatives at an early stage**

- Require firms to disclose risk information to the public
- Public can change behavior or pressure firms to deselect
- Motivate firms to search for safer alternatives
- Require firms to identify and generate technological options to reduce existing risks
- Negative lists can increase pressure on firms

# State chemical restrictions

## Some legislative bans

- Few regulatory bans – must meet state APA requirements re risk determinations

## More information disclosure requirements

- List-based, with overlapping lists of lists
- Hazard-based, with very low thresholds
- Disclosure on agency website or on product labels
- Objective: influence the marketplace
  - Shame the reporting company
  - Encourage deselection
  - Encourage product reformulation
- Restrictions as a last resort



# California Update



# Overview of SCP Regulations

## Department of Toxic Substances Control

- Identifies list of Candidate Chemicals
- Identifies Priority Products containing Chemicals of Concern (CoCs)
  - Can require submission of information
- Requires responsible entities to notify DTSC
- Responsible entities do Alternatives Analyses (AAs)
- DTSC can restrict their Priority Products



Safer Consumer  
Products Regulations

# Priority Product determinations

- Only three products have been selected





- CPSC updated its guidance for labeling to warn acute hazards associated with paint strippers containing methylene chloride (Mar. 21, 2018)
- EPA has proposed to ban use of methylene chloride for consumer paint and coating removal (Jan. 19, 2017)
  - DTSC is considering adding carpets and rugs containing perfluoroalkyl and polyfluoroalkyl substances (PFASs)
    - Comment closed on April 16, 2018

# Priority Product Work Plan

*Draft Priority Product Work Plan released in February 2018 for 2018-2020*

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|---|--|
| <ul style="list-style-type: none"><li>• Carried over from the 2015-2017 Work Plan:<ul style="list-style-type: none"><li>• Beauty, personal care, and hygiene products</li><li>• Cleaning products</li><li>• Household, school, and workplace furnishings and décor</li><li>• Building products and materials used in construction and renovation</li><li>• Consumable office, school, and business supplies</li></ul></li></ul> | <ul style="list-style-type: none"><li>• New to the 2018-2020 draft Work Plan<ul style="list-style-type: none"><li>• Food packaging</li><li>• Lead-acid batteries</li></ul></li></ul>         |
| <ul style="list-style-type: none"><li>• DTSC held a public workshop on the draft plan on Feb. 26, 2018</li><li>• Comment period closed on Mar. 9, 2018</li></ul>  | <ul style="list-style-type: none"><li>• Dropped in the 2018-2020 draft Work Plan<ul style="list-style-type: none"><li>• Clothing</li><li>• Fishing and angling equipment</li></ul></li></ul> |

# Proposition 65 – consumer exposure warnings

- Safe harbor warning requirements amended effective August 30, 2018
  - From: “WARNING: This product contains a chemical known to the State of California to cause [cancer / birth defects or other reproductive harm].”
  - To: Long form: “ **WARNING:** This product can expose you chemicals including [at least one chemical name], which are known to the State of California to cause [cancer]. For more information, go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”
  - Short form: “ **WARNING:** [Cancer]–[www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”

# Proposition 65 – occupational exposure warnings

Follow OSHA or Cal/OSHA hazard communication standard

For exposures not covered by HCS, use consumer exposure warnings

Preemption for out-of-state manufacturers

- Not acknowledged by OEHHA
- May want to provide as service to in-state customers

# Proposition 65 – other actions

## New listings:

- PFOA (Nov. 10, 2017)
- PFOS (Nov. 10, 2017)
- Chlorpyrifos: reproductive harm (Dec. 15, 2017)
- N-hexane: reproductive harm (Dec. 15, 2017)
- Vinylidene chloride: cancer (Dec. 29, 2017)

## New safety levels:

- Malathion (Feb. 16, 2018)
- Glyphosate (Apr. 10, 2018)

## New safe use determinations:

- Diisononyl Phthalate (DINP) in certain carpet tiles (Dec. 15, 2017)



# Proposition 65 – enforcement

## 2017:

- 340 private enforcement judgments / \$18 million
- 348 private out-of-court settlements / \$7.76 million

## 2018 YTD:

- 78 private enforcement judgments / \$10.75 million
- 102 private out-of-court settlements / \$1.9 million

## Some recent court decisions:

- Lead and cadmium in chocolate: California court in San Francisco approved a settlement reached between a consumer advocacy group and several major chocolate manufacturers (S.F. Super. Ct., Feb. 15, 2018).
- Acrylamide in coffee: California court in Los Angeles held that ready-to-drink coffee sellers failed to meet their burden of proof on “alternative significant risk level” affirmative defense (L.A. Super. Ct., Mar. 28, 2018).
- Glyphosate in herbicide products: Federal court temporarily halted California from enforcing warnings on products with glyphosate (E.D. Cal., Feb. 26, 2018)



# California Cleaning Product Right to Know Act v. New York Household Cleansing Product Information Disclosure Program

<b>California Cleaning Product Right to Know Act</b>	Disclose chemical ingredients that are: <ul style="list-style-type: none"> <li>intentionally added</li> <li>on a designated list</li> </ul> Fragrances or allergens (100ppm)	Designated products: air care, automotive, general cleaning product, polish or floor maintenance	On label and website	<ul style="list-style-type: none"> <li>January 2020 (website)</li> <li>January 2021 (label)</li> <li>January 2023 (Prop 65 chemicals)</li> </ul>
<b>New York Household Cleansing Product Information Disclosure Program</b>	Disclose chemical ingredients and impurities + content by weight, if on one of the lists or hazard characteristic	Includes but is not limited to: soaps and detergents with surfactant, used primarily for fabrics, dishes, food utensils, household and commercial areas	On website only  Database with links to company information	Within 6 months of publication of final guidance document

# Other state actions



Green chemistry laws



Ingredient disclosures



Material restrictions

# Green chemistry: existing programs

Washington	Oregon	Maine	Vermont
Children's products	Children's products	Children's products	Children's products
AA not mandatory	Remove chemicals or submit AA + exposure assessment	AA potentially required	No AA, but state may consider further action (e.g., ban)
Notify state if certain chemicals present	Reporting requirements	Reporting requirements	Detailed notification and periodic reporting

Watch for: expanding list of chemicals (WA), scope of products covered (VT), shift to mandatory AA, other state action

# Green chemistry: new bills

## Vermont (S. 103):

- Create an Interagency Committee on Chemical Management to review state chemical inventories on an annual basis, and to recommend on the design of a state chemical reporting system by Feb. 15, 2019;
- Revise the standards for adding chemicals to the state's chemicals of high concern
- Passed in both houses (Mar. 30, 2018); Governor vetoed on Apr. 16, 2018.

## Massachusetts (S. 474):

- Require notifications of the existence of priority chemical substances in consumer products. State performs safer alternatives assessments and crafts chemical action plans for priority chemical substances.
- In committee (reported favorably in one committee on March 19, 2018).

# Ingredient disclosure: new bills

## **Mississippi:** Cosmetics (SB 2235)

- Died in committee (January 30, 2018)

## **Maryland:** Air care, automotive, general cleaning, and polish or floor maintenance products (HB 1080)

- Reported unfavorably by committee (March 14, 2018)

## **Rhode Island:** Cosmetics (H 7295)

- Recommended to be held for further study by committee (March 27, 2018)

## **Massachusetts:** Dry cleaning solvent disclosure by dry cleaners (H 2478)

- Reported date extended to May 9, 2018 (February 7, 2018)

**Alaska** (HB 28; cosmetics); **California** (AB 1575; cosmetics), **Minnesota** (SF 2268 / HF 2648; cosmetics), **New York** (A5117; cosmetics), **New York** (A 521; tampons): No recent updates

# Material restrictions: trends in 2017

*51 bills introduced in 2017, at least six enacted*

## New restrictions on:

Flame retardants in furniture, bedding and children's products (Rhode Island, Maine)

Copper in brake friction materials (Washington)

Lead and mercury in wheel weights (Maryland)

Mercury in electric switches, gas valves (Maryland)

# Material restrictions: new laws in 2018

## • PFAS •

Washington enacted two PFAS restriction laws, one on food packaging and the other on firefighting foam and PPE

Vermont proposal to restrict PFAS in dental floss, dental tape, and food contact substances dropped in the passed bill (H. 268 / S. 103)

# Washington: PFAS chemicals in food packaging

HB 2658 / SB 6396

Enacted March 21, 2018

Direct WA Department of Ecology to determine whether safer alternatives to PFAS chemicals exist by January 1, 2020

- If SA exist, food packaging with any amount of intentionally added PFAS chemicals will be banned beginning January 1, 2022;
- If SA do not exist, Ecology should repeat the determination every year beginning 2021 until SA exist. The ban then follows in two years
- Manufacturers must develop a compliance certificate by the date the ban becomes effective



# Washington: PFAS chemicals in firefighting foam and PPE

HB 2793 / SB 6413

Enacted March 27, 2018

Ban intentionally added the PFAS chemicals in class B firefighting foam

- No discharge or use by July 1, 2018
- No manufacture, sale, offer for sale, and distribution by July 1, 2020

Notice to purchasers if firefighting PPE contains PFAS chemicals

Notice to the downstream sellers of the foam restrictions by July 1, 2019

Government may request from manufacturers certificates of compliance concerning foam or PPE

# Material restrictions: active bills in 2018

States continue to consider restrictions of a variety of chemicals, including:

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**Bisphenol A:** Massachusetts, New Jersey

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**Flame retardants:** California, Connecticut, Indiana, Maryland, Massachusetts, New York, West Virginia

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**Formaldehyde:** Vermont

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**Heavy metals:** New Jersey

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**PFAS:** Rhode Island

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## Parting Thoughts

- Even with established programs, elements are in flux
- Keep CBI protections in mind
- Monitor for efforts to limit state action (e.g., on theories of preemption, commerce clause, administrative deficiencies, etc.)
- Be on the lookout for regulatory efforts to address growing concerns about ocean pollution
- Don't look to federal preemption for relief

# Thank you!

## Questions?



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