

STATES STEP IN TO REGULATE CHEMICALS OF HIGH CONCERN TO CHILDREN

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Last year, we reported on Congressional efforts to reform and modernize the decades old federal Toxic Substances Control Act ("TSCA") *[insert link here]* via the Chemical Safety Improvement Act (the "CSIA"). Although versions of the CSIA included state preemption provisions, efforts to finalize TSCA reform have stalled, and states are continuing to propose laws to regulate and manage chemicals. This situation has led to a panoply of different, and changing, requirements as dozens of states have some form of chemical management law. Although many of these state laws ban or restrict individual chemicals (e.g., flame retardants, lead, cadmium, bisphenol A and phthalates), some states are adopting more comprehensive laws, often focusing on identifying and prioritizing chemicals of high concern to children.

For example, **Washington's** benchmark Children's Safe Products Act (Wash. Rev. Code §§ 70.240.010 - 70.240.060) provides for creating a list of priority chemicals of concern and collecting information from manufacturers to further understand the presence of chemicals in children's products.¹ In addition to prohibiting manufacturing and sale of children's products containing certain specified substances, high priority chemicals that are of high concern for children must be identified after considering a child's or developing fetus's potential for exposure to each chemical based on the following criteria: the chemical is present in: human umbilical cord blood, human breast milk, human urine, or other bodily tissues or fluids; household dust, indoor air, drinking water, or elsewhere in the home environment; or, in a consumer product used or present in the home.² Manufacturers whose products contain listed chemicals of high concern to children are required to report to the state.³ Washington's list of chemicals of concern (*available at* <http://www.ecy.wa.gov/programs/swfa/cspa/chcc.html>) currently contains 66 chemicals. 4,4'-Methylene bis (2-chloroaniline) ("MOCA," CAS no. 101-14-4), toluene diisocyanate ("TDI," CAS no. 584-84-9) and methylene diphenyl diisocyanate ("MDI," CAS no. 101-68-8) are not currently listed.⁴

¹ Ross Strategic, *State Chemicals Policy: Trends and Profiles* (Apr. 2013), available at <http://www.p2.org/wp-content/uploads/2013-state-toxics-policy-profiles-report-2.pdf>.

² Kristen L. Miller, *OLR Research Report 2013-R-0351* (Nov. 8, 2013), <http://www.cga.ct.gov/2013/rpt/2013-R-0351.htm>.

³ Paul Shukovsky, *Washington State Proposes to Amend Chemicals on Children's Safe Products List*, 149 Daily Env. Rep. (BNA) A-3 (Aug. 2, 2013).

⁴ Washington's list currently contains : 50-00-0 Formaldehyde; 62-53-3 Aniline; 62-75-9 N-Nitrosodimethylamine; 71-43-2 Benzene; 75-01-4 Vinyl chloride; 75-07-0 Acetaldehyde; 75-09-2 Methylene chloride; 75-15-0 Carbon disulfide; 78-93-3 Methyl ethyl ketone; 79-34-5 1,1,2,2-Tetrachloroethane; 79-94-7 Tetrabromobisphenol A; 80-05-7 Bisphenol A; 84-66-2 Diethyl phthalate; 84-74-2 Dibutyl phthalate; 84-75-3 Di-n-Hexyl Phthalate; 85-44-9 Phthalic Anhydride; 85-68-7 Butyl Benzyl phthalate (BBP); 86-30-6 N-Nitrosodiphenylamine; 87-68-3 Hexachlorobutadiene; 94-13-3 Propyl paraben; 94-26-8 Butyl paraben; 95-53-4 2-Aminotoluene; 95-80-7 2,4-Diaminotoluene; 99-76-3 Methyl paraben; 99-96-7 p-Hydroxybenzoic acid; 100-41-4 Ethylbenzene; 100-42-5 Styrene; 104-40-5 4-Nonylphenol; 4-NP and its isomer mixtures including CAS 84852-15-3 and CAS 25154-52-3; 106-47-8 para-Chloroaniline; 107-13-1 Acrylonitrile; 107-21-1 Ethylene glycol; 108-88-3 Toluene; 108-95-2 Phenol; 109-86-4 2-Methoxyethanol; 110-80-5 Ethylene glycol monoethyl ester; 115-96-8 Tris(2-chloroethyl) phosphate; 117-81-7 Di-2-ethylhexyl phthalate; 117-84-0 Di-n-octyl phthalate (DnOP); 118-74-1 Hexachlorobenzene; 119-93-7 3,3'-Dimethylbenzidine and Dyes Metabolized to 3,3'-Dimethylbenzidine; 120-47-8 Ethyl paraben; 123-91-1 1,4-Dioxane; 127-18-4 Perchloroethylene; 131-55-5 Benzophenone-2 (Bp-2); 2,2',4,4'-Tetrahydroxybenzophenone; 140-66-9 4-tert-Octylphenol; 1,1,3,3-Tetramethyl-4-butylphenol; 140-67-0 Estragole; 149-57-

Additional states that list and regulate chemicals of high concern to children include:

- **Maine** -- The Toxic Chemicals in Children's Products Law (Me. Rev. Stat. tit. 38 §§ 1691 - 1699B) provides for chemical prioritization, alternative assessment, and data reporting.⁵ "Maine lists approximately 1400 compounds as chemicals of concern. From this list, chemicals of high concern are designated and upon further review, may be elevated to priority chemical status which results in regulatory action. Each tier of prioritization builds upon the criteria of the list before it."⁶ **Maine's chemicals of high concern list** (*available at <http://www.maine.gov/dep/safechem/highconcern/index.html>*) contains 49 substances and **does include 4,4'-Methylenebis(2-Chloroaniline) (101-14-4)** but not TDI or MDI.⁷ Criteria to determine whether a substance will be included on the List of Chemicals of High Concern include, but are not necessarily limited to: status as a reproductive or developmental toxicant, endocrine disruptor, or carcinogen; and, presence in human tissues or fluids, the household environment, or consumer products used in the home. The list must be revised at least every three years and includes a tiered prioritization system.⁸ Companies making products to which children could be exposed and that contain listed substances must report certain information to the state.⁹ Distributors also have reporting obligations. Moreover, the law addresses sales prohibitions and safer alternatives to priority chemicals.

5/2-Ethylhexanoic Acid; 556-67-2 Octamethylcyclotetrasiloxane; 608-93-5 Benzene, pentachloro; 842-07-9 C.I. Solvent Yellow 14; 872-50-4 N-Methylpyrrolidone; 1163-19-5/2,2',3,3',4,4',5,5',6,6'-Decabromodiphenyl ether; BDE-209; 1763-23-1 Perfluorooctanyl sulphonic acid and its salts; PFOS; 1806-26-4 Phenol, 4-octyl; 5466-77-3 2-Ethyl-hexyl-4-methoxycinnamate; 7439-97-6 Mercury & mercury compounds including methyl mercury (22967-92-6); 7439-98-7 Molybdenum & molybdenum compounds; 7440-36-0 Antimony & Antimony compounds; 7440-38-2/Arsenic & Arsenic compounds including arsenic trioxide (1327-53-3) & dimethyl arsenic (75-60-5); 7440-43-9 Cadmium & cadmium compounds; 7440-48-4 Cobalt & cobalt compounds; *13674-87-8/Tris(1,3-dichloro-2-propyl)phosphate; 25013-16-5 Butylated hydroxyanisole; BHA; 25637-99-4 Hexabromocyclododecane; 26761-40-0 Diisodecyl phthalate (DIDP); and, 28553-12-0 Diisononyl phthalate (DINP).

⁵ Ross Strategic, *supra* Note 1.

⁶ *Safer Chemicals in Children's Products*, <http://www.maine.gov/dep/safechem/>.

⁷ Maine's list currently contains: 27193-28-8 (1,1,3,3-tetramethylbutyl)-phenol; 140-66-9 1,1,3,3-Tetramethyl-4-butylphenol ; 106-93-4 1,2-Dibromoethane; 106-99-0 1,3-Butadiene; 1163-19-5 2,2',3,3',4,4',5,5',6,6'-Decabromodiphenyl ether; BDE-209; 131-55-5 2,2',4,4'-tetrahydroxybenzophenone, BP-2; 131-56-6 2,4-Dihydroxybenzophenon; 95-53-4 2-Aminotoluene; 5466-77-3 2-ethyl-hexyl-4-methoxycinnamate; 2425-85-6 2-Naphthalenol, 1-[(4-methyl-2-nitrophenyl)azo]-; 91-59-8 2-Naphthylamine; **101-14-4 4,4'-Methylenebis(2-Chloroaniline)**; 92-69-3 4-Hydroxybiphenyl; 7440-38-2 Arsenic & Arsenic compounds; 71-43-2 Benzene; 608-93-5 Benzene, pentachloro-; 92-87-5 Benzidine and its salts; 85-68-7 Benzyl Butyl phthalate; BBP ; 7440-41-7 Beryllium & Beryllium compounds ; 94-26-8 Butyl paraben; 25013-16-5 Butylated hydroxyanisole; 7440-43-9 Cadmium; 117-81-7 Di-(2-ethylhexyl) phthalate, DEHP; 84-74-2 Dibutyl phthalate, DBP; 84-61-7 Dicyclohexyl phthalate; DCHP; 84-66-2 Diethyl phthalate ; 84-75-3 Di-n-Hexyl Phthalate; 106-89-8 Epichlorohydrin; 120-47-8 Ethyl paraben; 50-00-0 Formaldehyde; 25637-99-4 Hexabromocyclododecane; 118-74-1 Hexachlorobenzene; 87-68-3 Hexachlorobutadiene; 7439-97-6 Mercury & mercury compounds; 99-76-3 Methyl paraben; 634-04-4 Methyl tert-butyl ether; MTBE; 131-70-4 Mono-n-butylphthalate; 7440-02-0 Nickel & nickel compounds; 556-67-2 Octamethylcyclotetrasiloxane; 1763-23-1 perfluorooctanyl sulphonic acid and its salts; PFOS; 1806-26-4 Phenol, 4-octyl- ; 99-96-7 p-Hydroxybenzoic acid; 94-13-3 Propyl paraben; 14808-60-7 Quartz; 100-42-5 Styrene; 79-94-7 Tetrabromobisphenol A; 108-88-3 Toluene; 115-96-8 Tris(2-chloroethyl) phosphate; and, 75-01-4 Vinyl chloride.

⁸ Kristen L. Miller, *supra* Note 2; Ross Strategic, *supra* Note 2.

⁹ Pat Rizzuto, *With Federal Action Stalled, Many States Take Active Role in Chemical Management*, 111 Daily Env. Rep. (BNA) A-6 (June 11, 2012).

- Minnesota** -- The Toxic Free Kids Act (Minn. Stat. §§ 116.9401 - 116.9407) requires the state to prioritize chemicals and report opportunities to regulate prioritized chemicals.¹⁰ Criteria affecting inclusion on the List of Chemicals of High Concern include, but are not necessarily limited to, status as a high-production volume chemical and presence in human tissues or fluids, the home environment, or fish, wildlife, or the natural environment. **Minnesota's Chemicals of High Concern List** (*available at* <http://www.health.state.mn.us/divs/eh/hazardous/topics/toxfreekids/chlist/mdhchc2013.pdf>) **does contain 4,4'-Methylene bis(2-chloroaniline) (101-14-4); Toluene 2,4-diisocyanate (584-84-9); and, Methylenebis (4-Phenylisocyanate) (101-68-8). These substances are not, however, priority chemicals.**¹¹ Approximately nine chemicals are currently listed [on the priority list], and the list must be revised whenever a new priority chemical is designated.¹²
- Vermont** -- The Act Relating to the Regulation of Toxic Substances/Chemical Disclosure Program for Children's Products (Vt. Stat. tit. 18, §§ 1771 - 1779) requires manufacturers of children's products to report, and pay a fee, on chemicals of high concern in their products. The list (*available at* http://healthvermont.gov/enviro/chemical/documents/chemicals_of_high_concern_to_children.pdf) currently does not contain MOCA, TDI, or MDI.¹³ Sixty-six chemicals are listed, and the state can regulate the sale or distribution of children's products where exposures to these chemicals lead to certain listed adverse health effects, including developmental toxicity, cancer, genetic damage, endocrine disruption, and systemic toxicity. Product bans and labeling requirements are included in the state's authority. However, to regulate a chemical, the state

¹⁰ Ross Strategic, *supra* Note 1.

¹¹ Minnesota's priority list, <http://www.health.state.mn.us/divs/eh/hazardous/topics/toxfreekids/priority.html>, contains: Bisphenol A (BPA) 80-05-7; Cadmium 7440-43-9; Decabromodiphenyl ether (decaBDE) 1163-19-5; Formaldehyde 50-00-0; Hexabromocyclododecane (HBCD) 3194-55-6; Lead 7439-92-1; Butyl benzyl phthalate (BBP) 85-68-7; Dibutyl phthalate (DBP) 84-74-2; and, Di (2-ethylhexyl) phthalate (DEHP) 117-81-7.

¹² *Id.*; Kristen L. Miller, *supra* Note 2.

¹³ Vermont's list currently contains: 50-00-0 Formaldehyde; 62-53-3 Aniline; 62-75-9 N-Nitrosodimethylamine; 71-43-2 Benzene; 75-01-4 Vinyl chloride; 75-07-0 Acetaldehyde; 75-09-2 Methylene chloride; 75-15-0 Carbon disulfide; 78-93-3 Methyl ethyl ketone; 79-34-5 1,1,2,2-Tetrachloroethane; 79-94-7 Tetrabromobisphenol A; 80-05-7 Bisphenol A; 84-66-2 Diethyl phthalate; 84-74-2 Dibutyl phthalate; 84-75-3 Di-n-hexyl Phthalate; 85-44-9 Phthalic anhydride; 85-68-7 Butyl benzyl phthalate (BBP); 86-30-6 N-Nitrosodiphenylamine; 87-68-3 Hexachlorobutadiene; 94-13-3 Propyl paraben; 94-26-8 Butyl paraben; 95-53-4 2-Aminotoluene; 95-80-7 2,4-Diaminotoluene; 99-76-3 Methyl paraben; 99-96-7 p-Hydroxybenzoic acid; 100-41-4 Ethylbenzene; 100-42-5 Styrene; 104-40-5 4-Nonylphenol; 4-NP and its isomer mixtures including CAS 84852-15-3 and CAS 25154-52-3; 106-47-8 para-Chloroaniline; 107-13-1 Acrylonitrile; 107-21-1 Ethylene glycol; 108-88-3 Toluene; 108-95-2 Phenol; 109-86-4 2-Methoxyethanol; 110-80-5 Ethylene glycol monoethyl ester; 115-96-8 Tris(2-chloroethyl) phosphate; 117-81-7 Di-2-ethylhexyl phthalate; 117-84-0 Di-n-octyl phthalate (DnOP); 118-74-1 Hexachlorobenzene; 119-93-7 3,3'-Dimethylbenzidine and Dyes Metabolized to 3,3'-Dimethylbenzidine; 120-47-8 Ethyl paraben; 123-91-1 1,4-Dioxane; 127-18-4 Perchloroethylene; 131-55-5 Benzophenone-2 (Bp-2); 2,2',4,4'-Tetrahydroxybenzophenone; 140-66-9 4-tert-Octylphenol; 1,1,3,3-Tetramethyl-4-butylphenol; 140-67-0 Estragole; 149-57-5 2-Ethylhexanoic Acid; 556-67-2 Octamethylcyclotetrasiloxane; 608-93-5 Benzene, pentachloro; 842-07-9 C.I. Solvent Yellow 14; 872-50-4 N-Methylpyrrolidone; 1163-19-5 2,2',3,3',4,4',5,5',6,6'-Decabromodiphenyl ether; BDE-209; 1763-23-1 Perfluorooctanyl sulphonic acid and its salts; PFOS; 1806-26-4 Phenol, 4-octyl-; 5466-77-3 2-Ethyl-hexyl-4-methoxycinnamate; 7439-97-6 Mercury & mercury compounds including methyl mercury (22967-92-6); 7439-98-7 Molybdenum & molybdenum compounds; 7440-36-0 Antimony & Antimony compounds; 7440-38-2 Arsenic & Arsenic compounds including arsenic trioxide (1327-53-3) & dimethyl arsenic (75-60-5); 7440-43-9 Cadmium & cadmium compounds; 7440-48-4 Cobalt & cobalt compounds; 13674-87-8 Tris(1,3-dichloro-2-propyl)phosphate; 25013-16-5 Butylated hydroxyanisole; BHA; 25637-99-4 Hexabromocyclododecane; 26761-40-0 Diisodecyl phthalate (DIDP); and, 28553-12-0 Diisononyl phthalate (DINP).

must demonstrate that children will be exposed to the chemical in a product and a probability that exposure could cause or contribute to one or more listed adverse health impacts.¹⁴

Moreover, **Connecticut's** State Child Protection Act (Conn. Gen. Stat. §§ 21a-335 - 21a-376) allows the state to declare any substance or mixture to be a hazardous substance and to establish safety requirements and standards, banned hazardous substances, labeling requirements, and testing procedures for articles intended for use by children. And, **California's** Safer Consumer Products Regulation (Cal. Health & Safety Code §§ 25251- 25257.1), while not limited to chemicals of concern to children, does specifically address children's products and is significant due to the relative scale of the state's economy. Among other things, the law requires manufacturers to complete an alternatives analysis on identified chemicals of concern and to replace harmful chemicals with safer alternatives. Manufacturers of certain specified products must reevaluate use of targeted chemicals. For example, spray polyurethane foam systems containing diisocyanates must be evaluated, because unreacted isocyanates used in spray polyurethane foams can irritate the respiratory tract and cause cancer and occupational asthma.

Additional state laws that are not specifically aimed at protecting children still may be used to protect children from toxic substances, because they provide for one or more of the following: declaration of hazardous substances; labeling of hazardous substances; and, bans on sale or distribution of certain hazardous substances/articles. Examples include:

- **California** Hazardous Substances Act (Cal. Health & Safety Code §§ 108100-108515);
- **Colorado** Hazardous Substances Act of 1973 (Colo. Rev. Stat. §§ 25-5-501 - 25-5-512);
- **Illinois** Uniform Hazardous Substances Act (430 Ill. Comp. Stat. 35/1-35/16a);
- **Maryland** Hazardous Materials Law (Md. Code Ann. Health-Gen. §§ 22-501 - 22-508);
- **Massachusetts** Hazardous Substances Labeling Law (Mass. Gen. Laws. ch. 94B, §§ 1-10);
- **Michigan** Hazardous Substances Act (Mich. Comp. Laws §§ 286.451-286.463);
- **Montana** Consumer Product Safety Act of 1975 (Mont. Code Ann. §§ 50-30-101 - 50-30-307).
- **New Hampshire** Labeling of Hazardous Substances (N.H. Rev. Stat. §§ 339A:1 - 339A:11);
- **North Dakota** Hazardous Substances Labeling Act (N.D. Cent. Code §§ 19-21-01 - 19-21-10);
- **Oregon** Hazardous Substances (Or. Rev. Stat. §§ 453.001 - 453.185);
- **South Carolina** Hazardous Substances Act (S.C. Code §§ 23-39 - 10-23-39-120);
- **Tennessee** Hazardous Substances Act (Tenn. Code Ann. §§ 68--131-101-68-131-113);
- **Texas** Hazardous Substances (Tex. Health & Safety Code §§ 501.001 - 501.113); and,
- **Wisconsin** Hazardous Substances Act (Wis. Stat. § 100.37).¹⁵

For more information on specific state laws regarding toxic or hazardous substances, see the Interstate Chemicals Clearinghouse U.S. State Chemicals Policy Database, <http://theic2.org/chemical-policy>, which can be searched by state, region, status, policy category, chemical, and product type. Because state chemicals regulation is in a constant state of flux, the database, as well as individual state lists (for example, of chemicals of high concern to children) and state websites, should be monitored and

¹⁴ Timothy Malloy, *Mick Jagger on Chemical Reform Vermont's new chemical program looks to be a mixed bag*, Legal Planet (June 16, 2014), <http://legal-planet.org/2014/06/16/mick-jagger-on-chemical-reform/>.

¹⁵ U.S. State Chemicals Policy Database, <http://www.newmoa.org/prevention/ic2/iframe/chempolicy/index.php> (date last visited Dec. 5, 2014). See also our previous article on California's Proposition 65. *[INSERT LINK HERE]* And, note that Oregon also maintains a list of priority chemicals.

companies should keep abreast of recent developments. This will ensure that companies are poised to comment on proposed legislation and/or revisions to the chemicals lists, as well as to comply with enacted legislation.

In many cases, the impact of these state laws is far-reaching. "After Washington's law went into effect, Rite Aid, Wal-Mart, Vi-Jon Inc., Western Family foods, among others, indicated that their suppliers would reformulate children's products to eliminate parabens. Gap reported it was phasing out the phthalate DINP, which had been in clothing."¹⁶ Moreover, Wal-Mart tells suppliers how to move away from certain ten specific chemicals, and, last fall, Target announced a Sustainable Product Standard that uses a 100-point rating system for each of 7,500 chemical products, with half of product's score based on whether it is free of ingredients listed on Washington's list of chemicals of high concern to children, California's Proposition 65 list of chemicals known to cause cancer or developmental or reproductive toxicity, EPA's list of persistent, bioaccumulative and toxic chemicals, the European Chemicals Agency's candidate list of high-concern substances, and the European Commission's priority list for endocrine disruptors.¹⁷ Finally, in addition to keeping apprised of developments on the state level, it is also important to stay informed about progress in the attempt to modernize TSCA at the federal level.

¹⁶ Jane Kay and Environmental Health News, *Chemicals of High Concern Found in Thousands of Children's Products*, *Scientific American* (May 6, 2013), available at <http://www.scientificamerican.com/article/chemicals-of-high-concern-found-in-thousands-of-childrens-products/>.

¹⁷ Robert Iafolla, *Target Announces Product Rating Program Based on Chemical Safety, Other Attributes*, 200 Daily Env. Rep. (BNA) A-11 (Oct. 15, 2013).