

# Client Alert

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## EPA Designates 20 Common Chemicals as High Priorities for Possible Regulation

On August 23, 2019, the United States Environmental Protection Agency (EPA) designated 20 chemicals commonly found in consumer products as “high priorities” for risk evaluation and possible regulation. EPA’s identification of these chemicals comes under the authority conferred by the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Lautenberg Act), which amended the Toxic Substances Control Act (TSCA) in 2016 to give EPA new powers to review and regulate chemicals.

The 20 chemicals proposed for high-priority review include:

- Formaldehyde, a chemical commonly used in building products and as a preservative;
- Five phthalates used as plasticizers in products like plastic pipes, toys, food packaging, cosmetics and medical/dental products (BBP, DBP, DEHP, DIBP and DCHP) and one chemical used to make phthalates (phthalic anhydride);
- Three flame retardants (TBBPA, TCEP and TPP) and a chemical sometimes used in the manufacture of flame retardants and fire extinguishers (ethylene dibromide);
- A fragrance additive found in perfumes, cosmetics and other consumer products (HHCB, also known as galaxolide);
- Seven chlorinated solvents found in products like cleaning solutions, paint thinners and glues (1,1-dichloroethane, 1,2-dichloroethane, 1,2-dichloropropane, o-dichlorobenzene, p-dichlorobenzene, trans-1,2-dichloroethylene and 1,1,2-trichloroethane); and
- A chemical used to manufacture synthetic rubber (1,3-butadiene).

The Lautenberg Act requires EPA to finalize its high-priority designations by December 19, 2019, and complete “risk evaluations” within three years. For each of the high-priority chemicals, EPA will be required to undertake a comprehensive review to identify the current uses of the chemical, potential toxicity or other health effects, and affected individuals or populations. If EPA finds during the course of a risk evaluation that a chemical poses an unreasonable risk to human health or to the environment, it must issue regulations prohibiting or restricting the manufacture, processing, distribution, use and/or disposal of the chemical.

EPA’s identification of formaldehyde as a high-priority substance is particularly noteworthy given that the chemical has been a focal point of recent criticism directed at EPA. Since 2017, EPA has faced intense pressure from consumer groups and legislators over its decision to delay review of an updated formaldehyde risk assessment conducted by its Integrated Risk Information System (IRIS) program, purportedly to allow time for reevaluation of the scientific methods used in the assessment. That risk assessment reportedly links formaldehyde exposure to leukemia and other hematopoietic cancers, despite the National Research Council’s criticism of “serious data gaps” in that conclusion following IRIS’s release

of an earlier draft in 2010. And just last summer, EPA lost a bid to impose a yearlong delay of its Final Rule implementing the Formaldehyde Standards for Composite Wood Products Act of 2010 (Formaldehyde Final Rule), which amended TSCA and set emissions limits for formaldehyde in composite wood used in furniture, flooring and other products. Consumer groups claiming that EPA's decision to delay enforcement posed immediate threats to human health filed suit against EPA, eventually negotiating an agreement compelling EPA to implement the Formaldehyde Final Rule six months earlier than EPA—and affected companies—had planned.

EPA's designation of each these 20 substances for high-priority review could have far-reaching consequences for companies in the retail industry. All of the chemicals are commonly used in popular consumer products and any future regulation could dramatically affect the supply chains for the chemicals—if not eliminate them altogether. More immediately, designation of these chemicals as “high-priority” by EPA will invite scrutiny from consumer groups and the general public, meaning that companies may soon find themselves defending the safety of their products. And along with increased publicity comes increased litigation risk, as plaintiffs' lawyers and consumer groups look to capitalize on new toxic tort and product liability theories.

Companies whose products or manufacturing processes use any of the 20 chemicals designated by EPA as potential “high-priority” substances can take steps now to prepare for EPA's risk evaluations and potential regulation and/or litigation. First, companies should identify all of their products and processes in which any of the 20 identified chemicals are used. Second, companies should review their supply and distribution agreements for those products to evaluate risk-shifting provisions in order to assess potential litigation exposure and, if necessary, negotiate more favorable terms. Finally, companies should ensure that they have effective communication and action plans that will position them for success in addressing consumer inquiries and potential litigation.

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