



February 2020

New York’s ‘Toxic Toys’ Law: Governor Signs Legislation Regulating Chemicals in Children’s Products, But Changes to the Law Are Already Coming

On Feb. 7, New York Governor Andrew M. Cuomo signed legislation regulating the presence of toxic chemicals in children’s products and apparel. The governor agreed to the legislation – the last of the bills from the 2019 legislative session to be signed – on the condition that the bills be amended in the current 2020 legislative session. Not uncommon in bills that have budgetary, substantive, or other technical flaws, the handshake agreement between the legislature and the governor to amend a bill later in the legislative session allows the executive branch to negotiate fixes to a bill without vetoing it, signaling an agreement on the general intent of legislation while recognizing the need for revisions. On Feb. 10, the legislature introduced the agreed-upon bill. Although the bill removes some flaws in the legislation, manufacturers, importers, and retailers of children’s products and apparel should closely monitor both the legislative developments as well as the regulatory and administrative proceedings that will play out over the next several years in light of this new law.

As drafted, the original legislation requires the New York State Department of Environmental Conservation (DEC) to post lists of “dangerous chemicals” and “chemicals of concern” on the DEC’s website within 180 days of the effective date of the legislation. DEC, in consultation with the Department of Health (DOH), may periodically review the list of dangerous chemicals and chemicals of concern to

identify or remove chemicals from those lists based on credible scientific evidence. The legislation applies to a broad range of children's products and apparel, but exempts batteries, consumer electronics, apparel used to prevent injuries such as helmets, drugs, food additives, and medical devices regulated by the Food and Drug Administration. The legislation also provides a safety valve for trace amounts of chemicals. Effective Jan. 1, 2023, the legislation also bans the sale of children's products containing certain chemicals, including organohalogen flame retardants, tris, and asbestos.

The amended bill sets forth a new regulatory framework for the DEC to designate "chemicals of concern" and "high-priority chemicals," establishes a children's product safety council charged with providing DEC with recommendations on additional chemicals that should be considered for future prohibitions on use in children's products, establishes timelines for future regulatory actions, and incorporates a standard to review chemicals for future prohibitions.

Under the amended legislation, DEC will promulgate a list of chemicals of concern within the next two years, and the bill contains a list of chemicals that should be considered by the department for listing. A chemical may be listed as a chemical of concern if there is credible scientific evidence that it is a carcinogen, reproductive or developmental toxicant, neurotoxicant, asthmagen, or endocrine disruptor, is persistent, bioaccumulative and toxic, or is "very persistent and very bioaccumulative." Within one year of a chemical being identified as a chemical of concern, manufacturers will be required to disclose the use of that chemical if it is contained in their product. The legislation permits DEC to share this information with an online database used by other states that have similar laws and programs. The revised legislation, in addition to the exemptions in the original law, further exempts sporting equipment, science and chemistry kits, vehicles, and watercraft. The new legislation, effective Jan. 23, 2023, bans the sale or distribution of children's products containing tris, benzene, or asbestos.

The revised legislation also creates a category of "high-priority chemicals," including tris, benzene, mercury, asbestos, arsenenic, cadmium, and organohalogen flame retardants used in bedding and furniture. The legislation sets forth criteria for the DEC to add to the list of high-priority chemicals that will also be subject to disclosure, including evidence through biomonitoring or other testing of the presence of a chemical in humans or the environment, or the banning of the chemical by another state. DEC will review high-priority chemicals periodically to determine if they should be prohibited, and manufacturers using high-priority chemicals in their products must notify retailers that a product contains the chemical.

The agreed-upon legislation raises numerous questions about how the DEC or other state agencies will promulgate regulatory standards, and administer and enforce the new law. This new law would create a substantial ongoing compliance obligation, as manufacturers will need to closely monitor and report on products containing listed chemicals, and retailers will need to be vigilant about notifications of products containing listed chemicals. It also remains unclear whether there will be potential administrative enforcement of the law, including penalties for violations of reporting and other legal or regulatory requirements, and, if so, how the DEC or other state agencies will implement such enforcement.

The new regulatory regime, in one of the nation's largest markets, will surely reverberate outside New York, as market participants seek to comply with a patchwork of state regulations on this topic. In addition, the new regulatory requirements could fuel product liability and other mass tort lawsuits seeking to hold manufacturers liable for children's alleged exposure to chemicals identified on the DEC list. Manufacturers, importers, distributors, and retailers of children's products and apparel should closely monitor the legislative developments during the 2020 legislative session, and should consider monitoring and participating in the regulatory and administrative proceedings that will take place over the next several years.

Authors

This GT Alert was prepared by **Zackary D. Knaub**, **Steven C. Russo**, and **Francis A. Citera**. Questions about this information can be directed to:

- **Zackary D. Knaub** | +1 518.689.1428 | knaubz@gtlaw.com
- **Steven C. Russo** | +1 212.801.2155 | russos@gtlaw.com
- **Francis A. Citera** | +1 312.456.8413 | citeraf@gtlaw.com
- Or your **Greenberg Traurig attorney**

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.~ Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. Milan.* Minneapolis. Nashville. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.* Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¤Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2020 Greenberg Traurig, LLP. All rights reserved.*