

# The heat is on: Flame retardant use under review with focus toward regulation and bans

By Judah Prero, Esq., and Michelle F. Gillice, Esq., Arnold & Porter\*

NOVEMBER 17, 2021

Flame retardants are used in countless products to prevent or delay ignition of a fire and slow or end the combustion process. Many of these products, which include building materials, furniture and electronics, are “consumer products” regulated by the Consumer Product Safety Commission (CPSC).

Numerous government entities in the United States have been studying the use and safety of flame retardants and the potential for bans or regulations of flame retardants is a significant possibility. Accordingly, it is important for manufacturers to be aware of developments at both the federal and state level that could affect the use of flame retardants in their products.

## One size fits all?

The confirmation of Alexander Hoehn-Saric as chairman of the Consumer Product Safety CPSC on October 7, 2021, is significant as it marks the first time in more than four years that the CPSC has had a permanent chairman. Prior to Chairman Hoehn-Saric’s confirmation, the Commission was briefly comprised of two Republican commissioners and only one Democrat.

That unusual ratio allowed Republican Commissioners Dana Baiocco and Peter Feldman to amend the Commission’s FY22 Operating Plan<sup>1</sup> by a 2-1 vote over the opposition of then-Acting (Democratic) Chairman Robert Adler.

---

*The potential for bans or regulations of flame retardants is a significant possibility.*

---

Of the several dozen amendments to the Operating Plan, one pertained to the CPSC study of organohalogen flame retardants (OFRs) and replaced the word “classes” with “subclasses” throughout the relevant paragraph. A closer look at the emphasis on “subclasses” gives us a perspective on the state of affairs — and the prospect of regulation — for this particular group of chemical substances.

In 2017, the CPSC granted a petition submitted by several organizations and individuals to ban the use of *all* additive, non-polymeric OFRs in durable infant or toddler products, children’s

toys, child care articles, or other children’s products; residential upholstered furniture; mattresses and mattress pads; and the plastic casings of electronic devices.

The CPSC directed staff, in cooperation with the National Academy of Sciences, Engineering, and Medicine (NASEM) to develop a scientifically based scoping plan to identify the potential health hazards associated with additive, nonpolymeric OFRs as a class. In May 2019, NASEM issued its report,<sup>2</sup> with the main finding being that OFRs *cannot be treated as a single class*. NASEM identified 14 subclasses of OFRs based on chemical structure, physicochemical properties of the chemicals, and predicted biologic activity.

---

*There continues to be a push, from advocacy groups and at the state level, to regulate all OFRs as a single class.*

---

Based on the NASEM findings, the CPSC staff developed proposals for methods to collect and analyze data and other information to perform risk assessment. Last year, staff began to implement the NASEM plan to assess the potential risks of the OFR classes.

According to the CPSC’s FY 2022 Operating Plan,<sup>3</sup> CPSC staff contemplates that it will complete a literature screening on the 14 OFR subclasses, begin drafting scope documents, and begin work on an exposure assessment in 2022. Any potential regulation that would affect how OFRs could be used in consumer products could follow the completion of this risk assessment.

## A multi-agency approach

CPSC activity on OFRs had a cross-agency impact; it was the stated impetus for an EPA rule that took effect earlier this year. Under the TSCA Health and Safety Data Reporting rule<sup>4</sup> manufacturers (including importers) of 30 specific OFRs are required to submit unpublished health and safety studies. The deadline for compliance was originally September 27, 2021 but has been extended to January 25, 2022. Failure to comply is a violation of the Toxic Substances Control Act (TSCA).

EPA stated that it intends to use the gathered information not only to aid the CPSC in its efforts to evaluate the 14 subclasses of OFRs, but also to inform TSCA-related activities such as future prioritization efforts and new chemical reviews.

*Flame retardants are clearly the center of government attention, and specifically their use in electronics and electronic casings.*

However, despite the pronouncement from NASEM that all OFRs cannot be treated as a single class and the CPSC adoption of a subclass approach, there continues to be a push, from advocacy groups and at the state level, to regulate *all* OFRs as a single class.

### State activity

While the CPSC and the EPA, for the time being, are focused on studying specific chemistries or subclasses of flame retardants, some states have opted to take a one-size-fits all approach, regardless of NASEM's findings.

Earlier this year, the New York State Legislature passed S4630B/A5418B,<sup>5</sup> The Family and Fire Fighter Protection Act. The legislation prohibits the sale of any new upholstered furniture or mattress containing any flame-retardant chemical. Additionally, the bill prohibits the sale of any electronic display containing *any* OFR chemical in its enclosure or stand and requires annual reporting of any replacement flame retardants used in electronic displays. To date, the bill has not yet been signed by Governor Kathy Hochul.

### About the authors



**Judah Prero** (L), a counsel at **Arnold & Porter**, advises clients on use, security and safety of commercial and consumer chemicals, pesticides and antimicrobials. He can be reached at [judah.prero@arnoldporter.com](mailto:judah.prero@arnoldporter.com). **Michelle F. Gillice** (R), a counsel with the firm, helps companies enhance their product safety compliance programs, avoid unnecessary recalls and defend against penalty investigations. She can be reached at [michelle.gillice@arnoldporter.com](mailto:michelle.gillice@arnoldporter.com). Both authors are based in Washington, D.C. This article was originally published Oct. 25, 2021, on the Arnold & Porter website. Republished with permission.

The State of Washington is currently contemplating regulating flame retardants in specific products. The Pollution Prevention for Healthy People and Puget Sound Act<sup>6</sup> was enacted with a stated goal to reduce the use of toxic chemicals in products by restricting or eliminating those toxics when safer alternatives are available. The Washington State program that implements the law is called "Safer Products for Washington."

Under the program, the Washington Department of Ecology is required to identify priority consumer products that are significant sources of the priority chemical classes. Flame retardants are considered priority chemicals, and recreational polyurethane foam and electronic enclosures containing flame retardants were identified as priority products for further research and potential regulation. Washington currently plans to report its determinations concerning where regulatory action is needed to the legislature by June 2022, with the adoption of rules to be implemented by June 2023.

Flame retardants are clearly the center of government attention, and specifically their use in electronics and electronic casings. Companies that manufacture, import or sell consumer products in the U.S. that utilize flame retardants, and particularly electronics, will need to closely follow federal and state OFR activity so that they have an opportunity to engage with the appropriate agencies as well as prepare for any new regulatory requirements.

### Notes

<sup>1</sup> <https://bit.ly/3qD9iG8>

<sup>2</sup> <https://bit.ly/3Hh5joy>

<sup>3</sup> <https://bit.ly/3cfBvdS>

<sup>4</sup> <https://bit.ly/3ChQ1wb>

<sup>5</sup> <https://bit.ly/3ChKC8u>

<sup>6</sup> <https://bit.ly/3qzLYOm>

This article was published on Westlaw Today on November 17, 2021.

\* © 2021 Judah Prero, Esq., and Michelle F. Gillice, Esq., Arnold & Porter

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit [legalsolutions.thomsonreuters.com](https://legalsolutions.thomsonreuters.com).