

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: CS/SB 886

INTRODUCER: Commerce Committee and Senators Justice and Lynn

SUBJECT: Toxic substances in children's products

DATE: April 3, 2008 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Earlywine	Cooper	CM	Fav/CS
2.	Erickson	Cannon	CJ	Favorable
3.			JU	
4.			GA	
5.				
6.				

Please see Section VIII. for Additional Information:

- A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes
 B. AMENDMENTS..... Technical amendments were recommended
 Amendments were recommended
 Significant amendments were recommended

I. Summary:

The bill creates a new section of the Florida Statutes that provides that a person may not use or apply a toxic substance (a substance containing lead or a lead coating as specified in the bill) in or on any toy or child care article in Florida and further provides that a person may not manufacture, sell, offer for sale, or distribute a toy or child care article in Florida which contains a toxic substance. There is an exception for the sale of a collectible toy that is not marketed to or intended to be used by a minor.

A civil fine must be waived if this person acted in good faith to comply with the new section, pursued compliance with due diligence, and promptly corrected any noncompliance after discovering the violation.

The bill also provides for graduated civil fines for a violation or violations of the new section by a person who is not an individual consumer (fines escalating based on the number of violations) and further provides that such person commits a third degree felony (unranked) and is liable for a civil fine for an intentional violation of this new section.

The bill creates an undesignated section of the Florida Statutes.

II. Present Situation:

In 2007, millions of children's toys were recalled for safety issues.¹ These recalls included concerns over lead levels and tiny magnets being swallowed by children. The Consumer Product Safety Commission (CPSC) regulates the safety of children's toys placed in the marketplace.

State Law

Currently, the Florida Department of Agriculture and Consumer Services ("department") contracts with the CPSC for the department to perform requested recall effectiveness checks and investigations. Specifically, the department verifies whether the business received the recall notice, whether the business properly posted the notice, and that the recalled items have been removed from the business' shelf.² For this service, the department receives approximately \$3,000 a year from the CPSC.³

Federal Law

Toys sold in the market place are subject to federal regulations that are intended to protect a child from injury. These regulations can be found in Title 16, Code of Federal Regulations (Parts 1500, 1501, 1505, 1508, 1509, 1510, 1511 and 1303). In addition, there are toy-industry voluntary standards.

Federal Legislation

Bills were introduced in Congress that would ban or restrict lead in all children's products and add more enforcement power to the CPSC. The U.S. House passed a bill (H.R. 4040, the Consumer Product Safety Modernization Act) in December 2007 that increases funding and staff for the CPSC and intended to provide greater protection for children's products. On March 6, 2008, the U.S. Senate passed the House bill but the differences in the bills still need to be worked out. The Senate also has another bill (S. 2045, CPSC Reform Act of 2007) intended to provide greater protection for children's products.

Other States

Numerous media articles report that Illinois, Missouri, Michigan, Louisiana, Arkansas, Rhode Island, New Jersey, and Vermont have laws that prohibit the sale of recalled products. Other states including Maryland, Massachusetts, and California are considering legislation to address safety issues with children's toys and jewelry.

III. Effect of Proposed Changes:

Provided is a section-by-section analysis of the bill:

Section 1 of the bill creates an undesignated section of the Florida Statutes to provide that a person may not use or apply a toxic substance (a substance containing lead or a lead coating as specified in the bill) in or on any toy or child care article in Florida and to provide that a person may not manufacture, sell, offer for sale, or distribute a toy or child care article in Florida which

¹ Mattel CEO: 'Rigorous standards' after massive toy recall. (November 15, 2007). *CNN.com/US* (<http://www.cnn.com/2007/US/08/14/recall/index.html>).

² Information provided by the department to staff of the Senate Committee on Commerce.

³ *Id.*

contains a toxic substance. There is an exception for the sale of a collectible toy that is not marketed to or intended to be used by a minor. Additionally, while these prohibitions are specified to apply to a “person,” civil fines and criminal penalties do not apply to individual consumers.

The bill provides the following definitions of key terms:

- “Child” means an individual who is 7 years of age or younger.
- “Child care article” means a product designed or intended by the manufacturer to facilitate the sleep, relaxation, or feeding of a child or to help a child with sucking or teething.
- “Consumer” means an individual; a child, by and through its parent or legal guardian; or a business, firm, association, joint venture, partnership, estate, trust, business trust, syndicate, fiduciary, corporation, any commercial entity, however denominated, or any other group or combination.
- “Person” has the same meaning as the definition of this term in s. 1.01, F.S. (which includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations).
- “Toxic substance” means a substance that contains lead, or a coating on an item that contains lead, so that the lead content is more than 0.06 percent of the total weight. The term does not include glass or crystal decorative components.
- “Toy” means an article designed and made for the amusement of a child or for the child’s use in play.

If a person who is not an individual consumer violates this new section, that person is liable for a civil fine of not more than:

- One hundred dollars per item, not to exceed \$5,000, for the first violation.
- Five hundred dollars per item, not to exceed \$25,000, for a second violation.
- One thousand dollars per item, not to exceed \$50,000, for a third or subsequent violation.

A civil fine must be waived if this person acted in good faith to comply with this new section, pursued compliance with due diligence, and promptly corrected any noncompliance after discovering the violation.

A person who is not an individual consumer who knowingly and intentionally violates this new section commits a third degree felony⁴ and is liable for a civil fine of not more than \$3,000 per item, not to exceed \$150,000.

Section 2 of the bill provides the bill takes effect on July 1, 2008.

⁴ The maximum penalty for a third degree felony is 5 years in state prison and a fine of up to \$5,000 may also be imposed. Sections 775.082 and 775.083, F.S. The third degree felony created by the bill is unranked in the Criminal Punishment Code offense severity ranking chart (s. 921.0022, F.S.), and therefore, is ranked pursuant to s. 921.0023, F.S., as a level 1 offense. A first-time offender with only this offense would not score a lowest permissible sentence of state prison, though the sentencing court is authorized to impose a state prison sentence that does not exceed 5 years.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill may raise potential federal preemption issues by expanding the lead standard to all toys and child care articles. Currently, federal law provides standards for lead contained in paint.

Courts have found generally three categories of preemption. First, Congress expressly states its intent to preempt in the federal statute.⁵ Second, Congress has implied preemption by creating a “pervasive regulatory scheme” or attempting to “take over a field.”⁶ The third category is when federal law conflicts with state law and where “compliance with both federal and state regulations is a physical impossibility”⁷ or because the state law stands “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁸

States may impose greater restrictions than those in federal law.⁹ Courts have held that state laws imposing stricter requirements are not necessarily preempted.¹⁰

Federal law provides that states do not have the “authority” to establish or continue to have in effect a safety standard or regulation relating to the “performance, composition, contents, design, finish, construction, packaging, or labeling” of products that is designed to address the “same risk of injury” unless identical to the federal standard.¹¹ Upon application, the Consumer Protection Safety Commission may allow a state to provide a higher degree of protection if the standard does not unduly burden interstate commerce.¹²

⁵ *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992).

⁶ *Id.*

⁷ *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272 (1987) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)). The court upheld a California law that imposed minimum ripeness standards on avocados imported into the state and barred retail sale of avocados that didn’t meet the ripeness standard. The court held that simultaneous compliance was possible and that the law was not overly burdensome to interstate commerce.

⁸ *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272 (1987) (citing *Hines v. Davidowitz*, 312 U.S. 52, (1941)).

⁹ *Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602 (1999).

¹⁰ *Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602 (1999).

¹¹ 15 U.S.C. s. 2075.

¹² 15 U.S.C. s. 2075

The bill prohibits a person who is not an individual consumer from using or applying a toxic substance (a substance containing lead or a lead coating as specified in the bill) in or on any toy or child care article in Florida and also prohibits that person from manufacturing, selling, offering for sale, or distributing a toy or child care article in Florida which contains a toxic substance. Currently, federal law currently prohibits lead levels in paint that exceed 600 parts per million.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There may be an indeterminate impact on manufactures and sellers of toys and child care articles due to the bill's requirements.

C. Government Sector Impact:

The Florida Department of Agriculture and Consumer Services indicates that the bill (in its committee substitute form) does not have a fiscal impact on the department.

Staff requested that the bill be placed on the next available agenda for consideration by the Criminal Justice Impact Conference (CJIC). The CJIC had not met to consider the prison bed impact, if any, of the bill at the time this analysis was completed. However, the third degree felony created by the bill is unranked in the Criminal Punishment Code offense severity ranking chart (s. 921.0022, F.S.), and therefore, is ranked pursuant to s. 921.0023, F.S., as a level 1 offense. A first-time offender with only this offense would not score a lowest permissible sentence of state prison, though a sentencing court is authorized to impose a state prison sentence that does not exceed 5 years (the maximum penalty for a third degree felony).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce on March 18, 2008:

- Replaces the bill as filed by imposing new prohibitions on the manufacture and sale of toys in Florida.
- Provides that a person may not use or apply a toxic substance containing lead in or on a toy or child care article in Florida and provides that a person may not manufacture, sell, or offer for sale, or distribute a toy or child care article in Florida that contains a toxic substance. There is an exception for collectible toys not intended to be used by a minor.
- Provides for graduated civil fines for a violation or violations of the new section by a person who is not an individual consumer (fines escalating based on the number of violations) and further provides that such person commits a third degree felony (unranked) and is subject to a specified fine for an intentional violation of this section.

- B. **Amendments:**

None.