

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 Commerce Committee

BILL: CS/SB 886

INTRODUCER: Commerce Committee and Senator Justice

SUBJECT: Toxic substances in children's products

DATE: March 18, 2008 REVISED: _____

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

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This committee substitute 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

This committee substitute provides for civil violations with a waiver for those persons who acted in good faith, pursued compliance with due diligence, and promptly corrected any noncompliance after discovering the violation.

This committee substitute also provides that a knowing and intentional violation is a 3rd degree felony with a civil fine.

This committee substitute creates undesignated sections 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 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:

Section 1 creates an undesignated section of the Florida Statutes to provide 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 to provide that a person may not manufacture, sell, or offer for sale, or distribute a toy or child care

¹ <http://www.cnn.com/2007/US/08/14/recall/index.html>.

² Information provided by department staff.

³ Information provided by department staff.

article in Florida that contains a toxic substance. There is an exception for collectible toys not intended to be used by a minor

This section provides the following definitions:

- “Child” which means an individual who is 7 years of age or younger.
- “Child care article” which 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” which means an individual, child, by and through its parent or legal guardian; 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” which includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.
- “Toxic substance” which 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” which means an article designed and made for the amusement of a child or for the child’s use in play.

A person who violates this section and is not an individual consumer 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 the person acted in good faith, pursued compliance with due diligence, and promptly corrected any noncompliance after discovering the violation.

A knowing and intentional violation is a 3rd degree felony, and is liable for a civil fine of not more than \$3,000 per item, not to exceed \$150,000.

Section 2 provides an effective state of July 1, 2008.

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:

This committee substitute may raise potential 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.⁴ Second, Congress has implied preemption by creating a “pervasive regulatory scheme” or attempting to “take over a field.”⁵ The third category is when federal law conflicts with state law and where “compliance with both federal and state regulations is a physical impossibility”⁶ or because the state law stands “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁷

States may impose greater restrictions than those in federal law.⁸ Courts have held that state laws imposing stricter requirements are not necessarily preempted.⁹

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.¹⁰ Upon application, the Consumer Protection Safety Commission (CPSC) may allow a state to provide a higher degree of protection if the standard does not unduly burden interstate commerce.¹¹

This committee substitute prohibits the use or application of a toxic substance in or on a toy or child care article in Florida and prohibits a person from manufacturing, selling, or offer to sell, or distribute a toy or child care article in Florida that contains a toxic substance. Currently, federal law currently prohibits lead levels in paint that exceed 600 parts per million.

⁴ *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992).

⁵ *Id.*

⁶ *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)(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.)

⁷ *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272 (1987)(citing *Hines v. Davidowitz*, 312 U.S. 52, (1941).

⁸ *Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602 (1999).

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

¹⁰ 15 U.S.C. s. 2075.

¹¹ 15 U.S.C. s. 2075

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 requirements in this committee substitute.

C. Government Sector Impact:

A knowing and intentional violation of this committee substitute is a 3rd degree felony which may result in an insignificant prison bed impact on the Department of Corrections.

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:**

This committee substitute replaces the bill as filed by imposing for new prohibitions on the manufacture and sale of toys in Florida.

Specifically, this committee substitute 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

This committee substitute imposes civil violations with a waiver for those persons who acted in good faith, pursued compliance with due diligence, and promptly corrected any noncompliance after discovering the violation.

This committee substitute also creates a 3rd degree felony for a knowing and intentional violation and a civil fine.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
