

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 Judiciary Committee

BILL: CS/SB 886

INTRODUCER: Commerce Committee and Senators Justice and Lynn

SUBJECT: Toxic Substances in Children's Products

DATE: April 20, 2008 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Earlywine	Cooper	CM	Fav/CS
2.	Erickson	Cannon	CJ	Favorable
3.	Daniell	Maclure	JU	Favorable
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 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.

The bill provides for graduated civil fines for a violation or violations of the new section by a person who is not an individual consumer. 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 further provides that a person who knowingly or intentionally violates the new section commits a third-degree felony and is also liable for a civil fine.

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. Lead poisoning can affect both adults and children, but children six years old or younger are more vulnerable because their brains and nervous systems are still forming.² Some effects of lead poisoning on young children include: reduced IQ, learning disabilities, attention deficit disorders, behavior problems, stunted growth, impaired hearing, kidney damage, mental retardation, coma, and death.³ The Consumer Product Safety Commission (CPSC) was created in 1972 to protect the public against unreasonable risks of injury associated with consumer products.⁴ The CPSC is in charge of regulating the safety of children's toys placed in the marketplace.

Federal Law and Legislation

Toys sold in the marketplace 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.

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 of Representatives passed a bill (H.R. 4040, the Consumer Product Safety Modernization Act) in December 2007 that increases funding and staff for the CPSC and is 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.

Florida 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 a business received the recall notice, whether the business properly posted the notice, and that the recalled items have been removed from the business' shelf.⁵ For this service, the department receives approximately \$3,000 a year from the CPSC.⁶

¹ See *Mattel CEO: 'Rigorous standards' after massive toy recall* (Nov. 15, 2007), available at <http://www.cnn.com/2007/US/08/14/recall/index.html> (last visited April 19, 2008). One source shows that approximately 25.6 million toys were recalled in the United States in the fiscal year ending September 30, 2007. Vital Statistics, *Entertainment: Toys*, <http://www.vitalstatistics.info/sub-category2.asp?cid=20&scid=1360> (last visited April 19, 2008).

² National Safety Council, *Lead Poisoning*, <http://www.nsc.org/library/facts/lead.htm> (last visited April 19, 2008).

³ *Id.*

⁴ U.S. Consumer Product Safety Comm'n, *Frequently Asked Questions*, <http://www.cpsc.gov/about/faq.html> (last visited April 19, 2008).

⁵ Information provided by the Department of Agriculture and Consumer Services to staff of the Senate Committee on Commerce.

⁶ *Id.*

Other States⁷

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:

This 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 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 seven 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.⁸
- "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.

⁷ This information is repeated from the Senate Committee on Commerce's professional staff analysis on CS/SB 886. See <http://www.flsenate.gov/data/session/2008/Senate/bills/analysis/pdf/2008s0886.cm.pdf> (last visited April 19, 2008).

⁸ The term "person" includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations. See s. 1.01, F.S.

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 felony⁹ and is liable for a civil fine of not more than \$3,000 per item, not to exceed \$150,000.

The bill provides that it takes effect on 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:

The bill prohibits the use or application of a toxic substance in or on any toy or child care article in Florida. The bill defines a toxic substance as a substance that contains lead, or a coating on an item that contains lead. Currently, federal law provides standards for lead contained in paint. The bill may raise potential federal preemption issues to the extent it can be argued that the federal government has preempted the field of lead regulation.

Courts have found generally three categories of preemption. First, Congress can expressly state its intent to preempt in the federal statute.¹⁰ Second, Congress can imply preemption by creating a “pervasive regulatory scheme” that leaves no room for the states to supplement it.¹¹ The third category is when federal law conflicts with state law and where ““compliance with both federal and state regulations is a physical impossibility””¹² or because the state law stands ““as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.””¹³

⁹ The maximum penalty for a third-degree felony is five 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 five years.

¹⁰ *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

¹¹ *Id.*

¹² *California Fed. Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (upholding a California law that imposed minimum ripeness standards on avocados

States may impose greater restrictions than those in federal law.¹⁴ Courts have held that state laws imposing stricter requirements are not necessarily preempted.¹⁵

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.¹⁶ 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.¹⁷

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 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 manufacturers 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 does not have a fiscal impact on the department.

The Criminal Justice Impact Conference 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

imported into the state and barred retail sale of avocados that did not meet the ripeness standard. The Court held that simultaneous compliance was possible and that the law was not overly burdensome to interstate commerce).

¹³ *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁴ *Franklin Tower One, L.L.C. v. N.M.* 157 N.J. 602, 617 (1999).

¹⁵ *Id.* at 618.

¹⁶ 15 U.S.C. s. 2075.

¹⁷ *Id.*

state prison sentence that does not exceed five 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:

The committee substitute:

- 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.