

Department of Legislative Services
Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 151

(Senator Frosh, *et al.*)

Finance

Health and Government Operations

**Public Health - Containers of Infant Formula Manufactured with Bisphenol-A -
Prohibition**

This bill expands the existing prohibition on the use of bisphenol-A (BPA) in child care articles. Specifically, on or after July 1, 2014, the State may not purchase – and an individual may not manufacture, knowingly sell, or distribute in commerce – infant formula in a container that contains BPA at a level of more than 0.5 parts per billion. An individual must use a safe and legal alternative when replacing BPA. A violator is guilty of a misdemeanor and subject to fines of up to \$10,000 per violation.

In addition, the bill retroactively extends the date by which the Department of Health and Mental Hygiene (DHMH) must adopt regulations to carry out the existing prohibition on the use of BPA from January 1, 2011, to January 1, 2012.

The bill takes effect June 1, 2011.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues beginning in FY 2015 due to the bill's penalty provision. Enforcement can likely be handled with existing resources.

Local Effect: Potential minimal increase in revenues beginning in FY 2015 due to the bill's penalty provision. Enforcement can likely be handled with existing resources.

Small Business Effect: Potential minimal.

Analysis

Bill Summary: The bill specifies that implementation of its provisions related to infant formula may be suspended if (1) the Secretary of Health and Mental Hygiene certifies that the safety concerns for BPA are resolved by additional research; or (2) implementation would adversely affect the health or well-being of children or adults. In addition, the bill requires DHMH to report to specified committees by September 1, 2012, on (1) the findings of federal research and regulatory activities related to BPA; and (2) the availability and safety of substitutes for BPA used in infant formula containers.

Current Law: On or after January 1, 2012, a person is prohibited from manufacturing, distributing, or knowingly selling child care articles that contain BPA. A “child care article” means an empty bottle or cup to be filled with food or liquid that is designated or intended by the manufacturer to be used by a child younger than age four. (However, if a federal law regulating the use of BPA in child care articles is enacted, “child care article” will be defined as specified in federal law.) A manufacturer must instead use the least toxic alternative, and may not replace BPA with specified carcinogens or reproductive toxicants. A violator is guilty of a misdemeanor and subject to fines of up to \$10,000 per violation.

DHMH was required to adopt regulations on or before January 1, 2011, to carry out the State’s prohibitions on child care articles containing BPA, but the department advises that those regulations are still in progress.

Background: BPA is a compound found in many plastics. According to the federal Centers for Disease Control and Prevention (CDC), BPA can leach from the linings of canned foods and polycarbonate water and baby bottles. Since the 1960s, the U.S. Food and Drug Administration (FDA) generally had considered exposure to BPA through food packaging to be safe. However, in January 2010, FDA released new findings stating it has some concern about the effects of BPA on the brain, behavior, and prostate gland in fetuses, infants, and young children. The Environmental Working Group notes recent studies show babies are exposed to BPA at levels above those that cause adverse effects in laboratory studies, including birth defects of the male and female reproductive systems. BPA has been found in breast milk, amniotic fluid, and cord blood, indicating exposure to the developing fetus and newborn.

FDA is taking a number of steps to reduce human exposure to BPA by supporting actions to stop producing baby bottles and infant feeding cups containing BPA for the U.S. market, facilitating the development of BPA alternatives for the linings of infant formula cans, supporting efforts to replace BPA in other food can linings, supporting a shift to a more robust oversight of BPA, and seeking further external scientific input regarding BPA. However, FDA is not recommending families change the use of infant formula or foods as it believes that the benefits of good nutrition outweigh the potential risk from BPA exposure.

Under the Toxic Substances Control Act of 1976, the U.S. Environmental Protection Agency (EPA) ensures that chemicals manufactured, imported, processed, or distributed in commerce, or used or disposed of in the United States, do not pose any unreasonable risks to human health or the environment. There are roughly 82,000 chemicals in EPA's chemical inventory, including BPA. Over the past 35 years, EPA has regulated five chemicals within its chemical inventory.

Every two years the U.S. Government Accountability Office (GAO) provides the U.S. Congress with an update on its High-Risk Program, which highlights major problems at the federal level. GAO has designated EPA's process for assessing and controlling toxic chemicals as a high-risk area since 2009 because EPA has failed to assess the toxicity of many chemicals used commercially in the United States. According to GAO's most recent update, EPA's backlog as of June 2009 consisted of over 70 ongoing toxic assessments – most of which had been ongoing for more than five years.

EPA's most recent review of BPA occurred in 1988, although the agency launched a major investigation into the risks of BPA in March 2010. Studies over the past 20 years have indicated BPA is toxic at doses far below EPA's safety standards. Although EPA had anticipated publishing an advance notice of rulemaking in late 2010, no such notice has yet been published, and the agency has not initiated any regulatory action under the Toxic Substances Control Act at this time.

Due to consumer demand, a number of manufacturers have voluntarily stopped producing child care articles containing BPA, including the six main baby bottle manufacturers. Wal-Mart, Toys "R" Us, and Babies "R" Us have all begun phasing out certain child care articles containing BPA. Other producers – including Nestlé, the world's largest food manufacturer – have begun phasing out the use of BPA in all products sold in the United States.

According to the National Conference of State Legislatures, 18 states considered 59 measures in 2010 to curtail the use of BPA. Seven states, Maryland and Connecticut, Minnesota, New York, Vermont, Washington, and Wisconsin, have enacted restrictions since 2009.

State Revenues: Potential minimal increase in general fund revenues beginning in fiscal 2015 under the bill's monetary penalty provision for those cases heard in District Court.

State Expenditures: The bill's requirements can likely be handled with existing resources. Many producers are phasing out the use of BPA in their products; therefore, it is assumed that complaints will be minimal. However, if complaint volume is high, DHMH may

require additional staff to enforce the bill's provisions, resulting in an increase in expenditures beginning in fiscal 2015.

The bill's prohibition on State purchases of certain infant formula is not expected to materially affect the finances of the Maryland Women, Infants, and Children (WIC) Program, as the WIC Program is federally (rather than State) funded. Moreover, the prohibition is not likely to have a material effect on any other State program that might purchase infant formula.

Local Fiscal Effect: Potential minimal increase in revenues beginning in fiscal 2015 due to the bill's penalty provision for those cases heard in circuit court. Enforcement can likely be handled with existing resources. However, if complaint volume is high, local health department workloads may increase.

Small Business Effect: Potential increase in expenditures beginning in fiscal 2015 for small business manufacturers that use BPA to make containers for infant formula. While some manufacturers in Maryland may be affected by the bill, it cannot be reliably determined at this time how many, if any, have 50 or fewer employees and are considered small businesses.

Additional Information

Prior Introductions: None.

Cross File: None designated; however, HB 4 (Delegate Hubbard, *et al.* – Health and Government Operations) is identical.

Information Source(s): U.S. Environmental Protection Agency, Environmental Working Group, U.S. Food and Drug Administration, U.S. Government Accountability Office, U.S. Department of Health and Human Services, Office of the Attorney General (Consumer Protection Division), Maryland Department of the Environment, Department of Health and Mental Hygiene, Department of Legislative Services

Fiscal Note History: First Reader - February 7, 2011
mc/mwc Revised - Senate Third Reader - March 30, 2011

Analysis by: Jennifer A. Ellick

Direct Inquiries to:
(410) 946-5510
(301) 970-5510