

Department of Legislative Services
 Maryland General Assembly
 2011 Session

FISCAL AND POLICY NOTE

Senate Bill 637 (Senator Benson, *et al.*)

Finance and Education, Health, and
 Environmental Affairs

Healthy Kids, Healthy Maryland - Toxic Chemical Identification and Reduction

This bill requires the Maryland Department of the Environment (MDE), in consultation with the Department of Health and Mental Hygiene (DHMH), to publish a list of designated chemicals of concern by January 1, 2012, and a list of designated priority chemicals by January 1, 2013. The bill authorizes MDE to prohibit the manufacture, sale, or distribution of children’s products that contain certain priority chemicals and to require the use of specific acceptable alternatives. The bill establishes notification requirements for manufacturers and distributors to provide specified information to MDE and provisions relating to compliance plans. MDE may adopt regulations to implement the bill, including regulations to impose a fee on manufacturers and distributors to cover reasonable costs incurred in implementing the bill’s notice provisions.

Fiscal Summary

State Effect: General fund expenditures increase by \$100,000 for MDE in FY 2012 for contractual assistance with toxicological, chemical, and policy research to identify chemicals of concern and priority chemicals. General fund expenditures increase by more than \$498,400 beginning in FY 2013 for MDE to hire additional staff to implement the bill. General fund expenditures may increase further to the extent additional legal counsel is needed. General fund revenues increase beginning in FY 2013 due to the authorization for MDE to establish a new fee to recover the cost of the bill’s notice provisions.

(in dollars)	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
GF Revenue	\$0	-	-	-	-
GF Expenditure	\$100,000	\$498,400	\$502,700	\$523,300	\$544,900
Net Effect	(\$100,000)	(\$498,400)	(\$502,700)	(\$523,300)	(\$544,900)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: Potential minimal increase in workloads for local health departments to the extent that the bill results in additional complaints or questions.

Small Business Effect: Meaningful impact on small businesses engaged in the manufacture, distribution, or sale of certain chemicals or children's consumer products.

Analysis

Bill Summary: The bill requires MDE, in consultation with DHMH, to designate and publish on its website a list of chemicals of concern by January 1, 2012, and a list of priority chemicals, including elemental mercury and mercury compounds, by January 1, 2013. MDE must update the list of priority chemicals by January 1, 2014, and every two years thereafter. MDE is authorized to update the list of chemicals of concern as often as necessary.

MDE may designate a chemical as a chemical of concern if the chemical has been identified by a governmental entity on the basis of credible scientific evidence regarding specified harmful effects of the chemical, including whether it bioaccumulates, is toxic, carcinogenic, mutagenic, or an endocrine disruptor. MDE may designate a chemical of concern as a priority chemical if the chemical has been found in certain human tissue or fluids through biomonitoring, in children's products or certain indoor environments through sampling and analysis, or in wildlife or the natural environment, or if the chemical is identified as a high production volume chemical by the U.S. Environmental Protection Agency (EPA).

Within 180 days of MDE's designation of a new priority chemical, the manufacturer or distributor of children's products that contain the chemical must provide written notice to MDE identifying the products, the number of units sold, the amount and intended purpose of the priority chemical, any other chemicals contained in the products, and whether any of the information is proprietary. The bill defines a "child" as an individual younger than age 18, and defines a "children's product" as a consumer product intended for use by a child and a consumer product that, when used or disposed of, is likely to expose a child to a priority chemical contained in the product. A "consumer product" includes component parts and packaging. A "manufacturer" is the person who manufactures the final product, or whose brand name is affixed to the product, and includes an importer or first domestic distributor of a foreign product.

MDE may require additional information relating to the likelihood that the priority chemical will be released into the environment; the likely routes of exposure to children; the extent that children will likely be exposed to the chemical during the life of the product; and an assessment of any alternatives to the priority chemical. The bill also

authorizes MDE to extend the 180-day deadline and authorizes a trade organization to provide the notice on behalf of a member manufacturer or distributor.

MDE must make the information contained in a manufacturer or distributor's notice available to the public unless MDE determines that the information is proprietary. To avoid the disclosure of proprietary information, yet maximize the amount of information available to the public, the bill authorizes MDE to publish information in a redacted or aggregate form. MDE may share proprietary information with State and federal agencies, but the agencies must keep the information confidential. "Proprietary information" is defined as a trade secret, confidential commercial information, or confidential financial information. MDE may, by regulation, impose a fee on a manufacturer or distributor to cover reasonable costs incurred in implementing the notice provisions.

The bill authorizes the Secretary of the Environment to waive all or part of the notice requirements for specific uses of a priority chemical if substantially equivalent information is already publicly available, the information is not needed, or the uses of the priority chemical are minor in volume.

MDE may adopt regulations prohibiting the manufacture, sale, offer for sale, or distribution of children's products that contain a priority chemical if MDE determines that (1) the product will cause an unacceptable level of exposure to the priority chemical in children; and (2) alternatives to the priority chemical are available at a comparable cost. A prohibition adopted by regulation may not take effect until at least 12 months after the date of notice of the proposed regulation is published in the Maryland Register. By January 1, 2014, and every two years thereafter, MDE must identify at least two priority chemicals whose presence in children's products will trigger the prohibition.

MDE may require the use of the least toxic acceptable alternatives to the priority chemical in order for a product to avoid prohibition. The bill defines an "alternative" as a substitute process, product, material, chemical, or strategy, or combination of these, which serves a functionally equivalent purpose to a chemical in a children's product. MDE may presume, in the absence of contrary persuasive evidence, that an acceptable alternative is available if the sale of the priority chemical in a children's product has been banned in another state, the alternative is already sold in the United States, or if the children's product containing the priority chemical in question is an item of apparel or novelty.

Within 180 days of the effective date of a prohibition adopted by regulation, the manufacturer or distributor of a children's product subject to the prohibition must file a compliance plan with MDE or seek a waiver. A compliance plan must identify the affected children's product and specify whether compliance will be achieved by substituting an alternative for the priority chemical or discontinuing the manufacture,

sale, or distribution of the product. If an alternative will be used, the compliance plan must identify the alternative and specify a timetable for the substitution. In addition, the manufacturer or distributor of the children's product must notify retailers and distributors of the prohibition.

An application for a waiver for specific uses of the priority chemical must identify the specific uses and any available alternatives to the priority chemical; explain why the use of an alternative is not feasible; and describe any steps taken to minimize the use of the priority chemical. MDE may grant a five-year waiver or partial waiver if MDE determines that (1) there is a need for the children's product containing the priority chemical and no feasible alternative is available; or (2) the lack of the children's product could pose an unreasonable risk to the public's health, safety, or welfare. MDE may renew a waiver for additional five-year terms if the manufacturer or distributor submits a written application and demonstrates that technically or economically feasible alternatives remain unavailable.

If MDE has reasonable grounds to suspect that a children's product containing a priority chemical is being manufactured, sold, offered for sale, or distributed in violation of a prohibition adopted by regulation, MDE may require a manufacturer or distributor to file a certificate of compliance. Within 10 days of receiving a request from MDE, the manufacturer or distributor must (1) file a written affirmation that the product does not contain the priority chemical that was the basis of the prohibition; or (2) notify sellers of the children's product that the sale or offer for sale of the product is prohibited and provide a list of the notified sellers to MDE.

The bill does not apply to chemicals in used children's products, pharmaceutical products, medical devices, motor vehicles and their component parts, containers or packaging for food or beverages (except as noted below), combustible fuel, or to chemicals generated as by-products of combustion. The bill does apply to chemicals in child car seats and containers or packaging for food or beverages that are specifically marketed or intended for use by children age three or younger. The bill applies only to retailers who knowingly sell a children's product that contains a prohibited priority chemical. Finally, the bill does not apply to a telecommunications service provider whose name appears on a telecommunications device but does not manufacture the device.

The bill authorizes MDE to participate in an interstate chemical clearinghouse that (1) collects and disseminates information relating to chemical hazards in children's products; (2) assesses alternatives to these chemicals; and (3) educates the public. If MDE participates in an interstate chemical clearinghouse, the clearinghouse may maintain information relating to priority chemicals on behalf of the State.

Current Law: Maryland currently regulates the use of specific chemicals in consumer products but does not have a comprehensive chemical safety law. Since 1976, the federal Toxic Substance Control Act (TSCA) has functioned as the primary mechanism for regulating chemicals in consumer products in the United States. Under TSCA, EPA is charged with ensuring 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. Although there are approximately 84,000 chemicals in EPA's chemical substance inventory, it is very rare for a chemical to be subject to a total prohibition.

Background: On December 2, 2009, a group of 13 states, including Maryland, released the *States' Principles on Reform of the Toxic Substances Control Act*. The document included eight recommendations for reforming chemical policy, including requiring manufacturers to demonstrate that their products and the chemicals they use are safe for the public and the environment, prioritizing the regulation of the most problematic chemicals, promoting safer alternatives, and increasing the availability of information on chemicals and safety. EPA, the National Conference of State Legislatures, and the national Safer Chemicals/Healthy Families campaign, have each also developed principles to guide TSCA reform.

Although TSCA reform bills were introduced in 2010, the U.S. Congress has not yet passed any of the TSCA reform measures. In 2008, however, Congress enacted the Consumer Product Safety Improvement Act to regulate lead, cadmium, and certain chemicals known as phthalates, in children's products.

In addition, in 2000, EPA launched the Voluntary Children's Chemical Evaluation Program (VCCEP) as a pilot program to gather information on 23 chemicals to which children have a high likelihood of exposure. EPA requested companies that manufacture or import any of the 23 chemicals to voluntarily provide information, including the health effects, exposure, risk, and additional data needed to fully characterize the risk that the chemicals present to children. In response to EPA's request, 35 companies and 10 consortia volunteered to sponsor assessments of 20 of the 23 chemicals. EPA's website provides links to the chemical assessments, peer evaluations, and EPA's decisions as to whether additional data are needed. EPA has conducted an interim evaluation of the pilot program and plans modifications, including revising the chemical selection process so that future VCCEP candidate chemicals will be selected from those identified as high priority and of special concern for potential risks to children in EPA's Chemical Assessment and Management Program.

At the state level, California, Maine, Minnesota, and Washington have enacted comprehensive chemical policy legislation in some form. Several other states, including Maryland, have regulated specific chemicals or specified uses of toxic chemicals,

particularly in products for children, including mercury, cadmium, bisphenol-A (BPA), phthalates, lead, and flame retardants.

State Expenditures: General fund expenditures increase by \$100,000 in fiscal 2012 for MDE to contract with an outside consultant with expertise on toxicology and the chemical industry. The consultant will identify chemicals of concern, begin to assist MDE in identifying priority chemicals, and otherwise assist in implementing the bill.

General fund expenditures increase by more than \$498,400 beginning in fiscal 2013 for MDE to hire additional staff to implement the bill and continue to contract with the expert consultant. This assumes that MDE will begin to receive information from affected manufacturers and distributors in fiscal 2013. MDE will require one physician and one epidemiologist to analyze information sent by manufacturers, identify and assess alternative chemicals, and collaborate with the consultant in the assessment of chemicals of concern and priority chemicals. MDE will also require an additional assistant Attorney General to assess manufacturers' claims regarding proprietary information, oversee the maintenance of confidentiality in any information submitted to MDE, assist in the development of regulations, and provide counsel regarding potentially litigious actions taken under the bill. Finally, MDE will require a program administrator and clerical staff position to communicate with affected industries, consider waivers and extensions, and otherwise administer the bill.

	<u>FY 2012</u>	<u>FY 2013</u>
Positions	0	5
Salaries and Fringe Benefits	\$0	\$380,727
Start-up Costs and Operating Expenses	0	17,676
Contractual Assistance	<u>100,000</u>	<u>100,000</u>
Total State Expenditures	\$100,000	\$498,403

Future year expenditures reflect 4.4% annual increases in salaries and 3% employee turnover as well as 1% annual increases in ongoing operating expenses.

Due to the new and expansive nature of the bill's requirements and potentially comprehensive regulations, MDE advises that numerous legal issues may arise. Therefore, general fund expenditures may increase further to the extent the workload of the Office of the Attorney General increases beyond what can be handled with one additional position. Any additional workload for DHMH in its consultative role required by the bill can be handled with existing resources.

State Revenues: General fund revenues increase beginning in fiscal 2013 due to the authorization for MDE to establish, by regulation, a new fee to recover the cost of the bill's notice provisions. A reliable estimate cannot be made as to the extent of any increase in revenues from the collection of such fees. While MDE must set the fee at a level necessary to recover the cost of specified activities (including receiving notices by manufacturers and distributors regarding products containing priority chemicals, making specified notices publicly available, evaluating claims of proprietary information, and determining whether to grant waivers of specified notice requirements), the bill does not specifically authorize MDE to set the fee at a level necessary to recover *all* costs associated with implementing the bill. Therefore, although the increase in fee revenue under the bill may be significant, it will not be sufficient to cover all of MDE's anticipated expenditures.

Small Business Effect: The bill has a meaningful impact on small businesses engaged in the manufacture, distribution, or sale of certain chemicals or children's consumer products.

Any small business manufacturer or distributor of a children's product will be required to monitor MDE's website for the addition of new designated priority chemicals and prepare a notice for submission to MDE. The notice must contain specified technical information, including probabilities that the chemical will be released into the environment at any point in the life cycle of the product, and an assessment of alternatives to the priority chemical. Additionally, a manufacturer or distributor may incur substantial losses related to any new regulations submitted by MDE that prohibit the manufacture, sale, or distribution of a children's consumer product that contains a priority chemical. Affected firms may incur substantial legal expense involved in protecting proprietary information and determining means of compliance with various MDE actions and regulations authorized by the bill.

Although retailers are generally exempt from the bill's requirements, small business retailers may incur a loss in revenue as the result of any discontinuance in the availability of products that would otherwise be lawfully sold. Finally, small business chemical manufacturers may incur a substantial loss of revenue as a result of actions taken by MDE affecting some or all of their existing products.

Manufacturers, distributors, and retailers involved in the production of children's products, and the chemicals and parts thereof, may also realize a meaningful benefit to the extent they currently sell chemicals that will qualify as acceptable alternatives or children's products that are devoid of chemicals of concern and priority chemicals designated by MDE.

Additional Information

Prior Introductions: None.

Cross File: HB 759 (Delegate Waldstreicher, *et al.*) - Health and Government Operations.

Information Source(s): Maryland Department of the Environment, Department of Health and Mental Hygiene, U.S. Environmental Protection Agency, Department of Legislative Services

Fiscal Note History: First Reader - February 23, 2011
mc/lgc

Analysis by: Evan M. Isaacson

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