

HOUSE BILL NO. 560
INTRODUCED BY D. MCALPIN

A BILL FOR AN ACT ENTITLED: "AN ACT PROHIBITING THE MANUFACTURE, SALE, OR DISTRIBUTION OF CERTAIN PRODUCTS CONTAINING POLYBROMINATED DIPHENYL ETHERS; DEFINING TERMS; PROVIDING CERTAIN EXEMPTIONS AND EXCEPTIONS; REQUIRING THAT CERTAIN REPORTS BE MADE TO THE LEGISLATURE; REQUIRING A MANUFACTURER TO PROVIDE NOTIFICATION OF RESTRICTIONS TO PERSONS SELLING PRODUCTS THAT CONTAIN POLYBROMINATED DIPHENYL ETHERS; PROVIDING COMPLIANCE MECHANISMS; AUTHORIZING CIVIL PENALTIES; REQUIRING THE DEPARTMENT OF ENVIRONMENTAL QUALITY TO ASSIST OTHER STATE AGENCIES IN IDENTIFYING CERTAIN PRODUCTS FOR PURCHASE; AUTHORIZING THE DEPARTMENT OF ENVIRONMENTAL QUALITY TO ADOPT RULES; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, polybrominated diphenyl ethers have been used extensively as flame retardants in a large number of common household products for the past 30 years; and

WHEREAS, studies on animals show that polybrominated diphenyl ethers can impact the developing brain, affecting behavior and learning after birth and into adulthood and therefore making exposure to fetuses and children a particular concern; and

WHEREAS, levels of polybrominated diphenyl ethers are increasing in people and in the environment, particularly in North America; and

WHEREAS, because people can be exposed to these chemicals through house dust and indoor air, as well as through food, it is important to restrict the use of these chemicals in common household products, provided that effective flame retardants that are safer and technically feasible are available at a reasonable cost.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Definitions. As used in [sections 1 through 11], unless the context requires otherwise, the following definitions apply:

(1) "Commercial decabromodiphenyl ether" means the chemical mixture of decabromodiphenyl ether, including associated polybrominated diphenyl ether impurities not intentionally added.

(2) "Department" means the department of environmental quality as provided for in 2-15-3501.

(3) "Electronic enclosure" means the plastic housing that encloses the components of electronic products, including but not limited to televisions and computers.

(4) (a) "Manufacturer" means any person, firm, association, partnership, corporation, governmental entity, organization, or joint venture that produces a product containing polybrominated diphenyl ethers or an importer or domestic distributor of a noncombustible product containing polybrominated diphenyl ethers.

(b) The term does not include a retailer who:

(i) adds a private label brand or co-brands a product for sale; or

(ii) assembles components to create a single noncombustible product based on an individual consumer's preference.

(5) "Mattress" has the same meaning as defined by the United States consumer product safety commission in 16 CFR, part 1633, and includes mattress pads, mattress sets, box springs, futons, crib mattresses, and youth mattresses.

(6) "Medical device" means an instrument, machine, implant, or diagnostic test used to help diagnose a disease or other condition or to cure, treat, or prevent disease.

(7) "Noncombustible product" means a product that is not edible.

(8) "Polybrominated diphenyl ethers" means chemical forms that consist of diphenyl ethers bound with bromine atoms. Polybrominated diphenyl ethers include but are not limited to the three primary forms of the commercial mixtures known as pentabromodiphenyl ether, octabromodiphenyl ether, and decabromodiphenyl ether.

(9) "Residential upholstered furniture" means residential seating products intended for indoor use in a home or other dwelling intended for residential occupancy that consist in whole or in part of resilient cushioning materials enclosed within a covering consisting of fabric or related materials if the resilient cushioning materials are sold with the item of upholstered furniture and the upholstered furniture is constructed with a contiguous upholstered seat and back that may include arms.

(10) (a) "Retailer" means a person who offers a product for sale at retail through any means, including but not limited to remote offerings such as sales outlets, catalogs, or the internet.

(b) The term does not include a person, firm, association, partnership, corporation, governmental entity, organization, or joint venture that both manufactures and sells a product at retail or that makes a sale that is a wholesale transaction with a distributor or another retailer.

(11) "Technically feasible" means an alternative that is available at a cost and in sufficient quantity to permit the manufacturer to produce an economically viable product.

(12) "Transportation vehicle" means a mechanized vehicle that is used to transport goods or people, including but not limited to airplanes, automobiles, motorcycles, trucks, buses, trains, boats, ships, streetcars, or monorail cars.

(13) "Used product" means a product that has been previously owned, purchased, or sold in commerce if it was manufactured before January 1, 2008, or the effective date of a restriction under [section 3 or 4].

NEW SECTION. Section 2. Exemptions. The provisions of [sections 1 through 11] do not apply to:

- (1) products containing decabromodiphenyl ether except as provided in [sections 3(2) and 4];
- (2) the sale or distribution of any used transportation vehicle manufactured before January 1, 2008, with component parts containing polybrominated diphenyl ethers;
- (3) the sale of any used transportation vehicle parts or new transportation vehicle parts manufactured before January 1, 2008, that contain polybrominated diphenyl ethers;
- (4) except for consumer-based goods with broad applicability, the manufacture, sale, repair, distribution, maintenance, refurbishment, or modification of equipment containing polybrominated diphenyl ethers and used primarily for military or federally funded space program applications;
- (5) safety systems required by the federal aviation administration;
- (6) the manufacture, sale, repair, distribution, maintenance, refurbishment, or modification of any new raw material or component part used in a transportation vehicle with component parts, including original spare parts, containing decabromodiphenyl ether;
- (7) the use of commercial decabromodiphenyl ether in the maintenance, refurbishment, or modification of transportation equipment;
- (8) the sale or distribution of any used product containing polybrominated diphenyl ethers;
- (9) the manufacture, sale, or distribution of any new product or product component consisting of recycled or used materials containing decabromodiphenyl ether;
- (10) the manufacture, sale, or distribution of new carpet cushion made from recycled foam containing less than 1/10 of 1% pentabromodiphenyl ether; or
- (11) medical devices.

NEW SECTION. Section 3. General prohibitions. (1) Except as provided in [sections 2, 4, and 7], after January 1, 2008, a person may not manufacture, knowingly sell, offer for sale, distribute for sale, or distribute for use in this state noncombustible products containing polybrominated diphenyl ethers.

(2) Except as provided in [sections 2 and 7], after January 1, 2008, a person may not manufacture, knowingly sell, offer for sale, distribute for sale, or distribute for use in this state a mattress containing decabromodiphenyl ether.

NEW SECTION. Section 4. Qualified prohibition for certain products based on agency evaluations. (1) (a) Except as provided in subsection (1)(b), a person may manufacture, knowingly sell, offer for sale, distribute for sale, or distribute for use in this state residential upholstered furniture that contains commercial decabromodiphenyl ether or any television or computer that has an electronic enclosure that contains commercial decabromodiphenyl ether.

(b) Pursuant to subsection (2), if it is determined that a safer and technically feasible alternative is available and that the alternative meets applicable fire safety standards, the department shall by rule, except as provided in [section 7], prohibit a person from manufacturing, knowingly selling, offering for sale, distributing for sale, or distributing for use in this state residential upholstered furniture that contains commercial decabromodiphenyl ether or any television or computer that has an electronic enclosure that contains commercial decabromodiphenyl ether.

(2) (a) The department and the department of public health and human services shall annually review risk assessments, peer-reviewed scientific studies, and other relevant findings regarding alternatives to the use of commercial decabromodiphenyl ether in residential upholstered furniture, televisions, and computers.

(b) If the department and the department of public health and human services jointly find that safer and technically feasible alternatives are available, the department shall consult the fire prevention and investigation advisory council provided for in 2-15-2005 to determine if the identified alternatives meet applicable fire safety standards.

(c) If the fire prevention and investigation advisory council determines that an alternative identified under subsection (2)(b) meets applicable fire safety standards, the department shall institute rulemaking pursuant to subsection (1)(b).

(d) If the fire prevention and investigation advisory council determines that none of the alternatives identified under subsection (2)(b) meet applicable fire safety standards, the department may not institute rulemaking pursuant to subsection (1)(b).

(3) The department and the department of public health and human services shall document their findings and the findings of the fire prevention and investigation advisory council in a report to the legislature by January 1, 2009. The report must also include any additional evidence of the potential harm posed by

decabromodiphenyl ether.

NEW SECTION. Section 5. Transporting products. [Sections 1 through 11] do not restrict the ability of a manufacturer, importer, or distributor from transporting products containing polybrominated diphenyl ethers through the state or storing the products in the state for later distribution outside the state.

NEW SECTION. Section 6. Notification. A manufacturer of products containing polybrominated diphenyl ethers that are restricted under [sections 1 through 11] shall notify persons that sell the manufacturer's products in this state of the provisions of [sections 1 through 11] not less than 90 days prior to the effective date of the restrictions.

NEW SECTION. Section 7. Selling banned products -- exceptions. (1) A retailer who unknowingly sells products banned under [sections 3 and 4] is not liable under the provisions of [sections 1 through 11].

(2) In-state retailers in possession of products on the date that restrictions become effective under [sections 3 and 4] may exhaust their existing stock through sales to the public.

(3) The department shall assist in-state retailers in identifying potential products containing polybrominated diphenyl ethers.

(4) If a retailer unknowingly possesses products that are banned for sale under [sections 3 and 4] and the manufacturer does not recall the products as required under [section 8(2)], the retailer may exhaust its existing stock through sales to the public. However, additional banned stock may not be sold or offered for sale.

NEW SECTION. Section 8. Compliance. (1) The department:

(a) shall, before the date that a product is banned under [section 3 or 4], prepare and distribute information to in-state manufacturers and out-of-state manufacturers, to the maximum extent practicable, to assist them in identifying products prohibited for manufacture, sale, or distribution under [sections 1 through 11];

(b) may request a certificate of compliance from a manufacturer. A certificate of compliance attests that a manufacturer's product or products meets the requirements of [sections 1 through 11].

(c) may issue a warning letter to a manufacturer that produces, sells, or distributes banned products in violation of [sections 1 through 11]; and

(d) shall offer information or other appropriate assistance to the manufacturer in complying with [sections 1 through 11].

(2) A manufacturer that produces, sells, or distributes a product prohibited from manufacture, sale, or distribution in this state under [sections 1 through 11] shall, subject to [section 7], recall the products and reimburse the retailer or any other purchaser for the product and any applicable shipping and handling for returning the products.

NEW SECTION. Section 9. Civil penalty. (1) In an action initiated by the department to collect civil penalties against a manufacturer who is found to have violated [sections 1 through 11] or a rule, order, or condition of approval issued under [sections 1 through 11], the manufacturer is subject to a civil penalty not to exceed \$5,000. The action must be filed in the district court of the county in which the violation occurred or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County.

(2) Each day of violation constitutes a separate violation.

(3) Action under this section does not bar enforcement of [sections 1 through 11] or a rule, order, or condition of approval issued under [sections 1 through 11] by injunction or other appropriate remedy.

(4) When seeking penalties under this section, the department shall take into account the penalty factors in 75-1-1001 in determining an appropriate settlement or judgment, as appropriate.

(5) Civil penalties collected pursuant to this section must be deposited in the state general fund.

NEW SECTION. Section 10. Assistance to state agency. The department shall assist state agencies in identifying for purchase equipment, supplies, and other products that do not contain polybrominated diphenyl ethers.

NEW SECTION. Section 11. Rulemaking. The department may adopt rules to implement and enforce the provisions of [sections 1 through 11].

NEW SECTION. Section 12. Codification instruction. [Sections 1 through 11] are intended to be codified as an integral part of Title 75, and the provisions of Title 75 apply to [sections 1 through 11].

NEW SECTION. Section 13. Effective date. [This act] is effective on passage and approval.

- END -