

LFC Requester:	
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AGENCY BILL ANALYSIS
2017 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original Amendment
Correction Substitute

Date Feb. 18, 2017
Bill No: HB 450

Sponsor: Elizabeth "Liz" Thompson
Short Fire Retardant Safety Act
Title: _____

Agency Code: 264
Person Writing Gary Cade
Phone: 505-507-7752 Email cadeabq@gmail.com

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: HB 450 would limit the amounts of 13 specific fire retardant chemical compounds that could be contained in children’s products (primarily designed or intended for use by a child under age 12) or in upholstered residential furniture manufactured, sold, distributed or offered in New Mexico. It further provides that none of the specific compounds could be replaced with a chemical that there is credible scientific evidence from a state, federal or international agency that is, “known or suspected with a high degree of probability to: (1) harm the normal development of a fetus or child or cause other developmental toxicity; (2) cause cancer, genetic damage or reproductive harm; (3) disrupt the endocrine or hormone system; or (4) damage the nervous system, immune system or organs or cause other systemic toxicity.” Manufacturers, wholesalers and retailers that produce, distribute or sell a prohibited product would be subject to civil penalties of \$5,000.00, “for each violation in the case of a first offense,” and \$10,000.00 “for each repeat offense.” A violation of Fire Retardant Safety Act (“FRSA”) would be deemed an unfair or deceptive practice pursuant to the Unfair Practices Act. The bill further provides that the attorney general and the district attorney of any county may file an action, “to restrain and prevent a violation of the FRSA.”

FISCAL IMPLICATIONS

Unknown.

SIGNIFICANT ISSUES

HB 450 requires that the specifically listed chemicals used in children’s products or upholstered residential furniture not exceed “one thousand parts per million in any product component.” Determining whether the product(s) meet that standard will be challenging and is virtually certain to require expensive laboratory testing if the suspected violator does not admit their product(s) is not in compliance. Food, beverages, dietary supplements, pharmaceutical products or biological forms of medicine, some approved toys and medical devices, and certain other products approved by federal law would expressly not be subject to the standards. Investigation of the nationally approved products will require expertise in identifying those items, and information regarding their approval status.

The bill would prohibit substitution of any of the specific chemicals with any other chemical for which there is “credible scientific evidence by a state, federal or international agency as being known or suspected with a high degree of probability” to cause any of the health problems listed above. There is no guidance on who would determine whether the evidence is “credible” or what

standards they should use in making that determination. It might be possible that with 50 states and a myriad of nations one government agency could determine there is a health risk from a replacement chemical but the agency of another state or nation might determine there is not and resolving the potential disputes could be difficult and expensive. If the chemical was banned by the agency in one state but another state or federal agency approved its usage, and yet another took no position resolving the conflict will be daunting but with potential fines of \$5,000.00 or \$10,000.00 for each violation that might be necessary if a manufacturer, distributor or vendor of a product covered by the FRSA is charged.

As drafted, HB 450 provides a civil penalty of up to \$5,000.00 “for each violation in the case of a first offense.” A second or subsequent violation carries a potential fine of \$10,000. Although the phrase, “each violation in the case of a first offense” may be intended to refer to each single product manufactured, distributed, offered for sale or sold by a person or business who has not violated the FRSA before, that is unclear. A person might claim their sale (or manufacture or distribution, etc.) of items that were together should be deemed to be a single offense instead of multiple violations. For example, a store selling pajamas treated with an excessive amount of a forbidden fire retardant chemical might claim that although they had 100 pairs for sale that should be considered as only one violation and not 100 violations. It’s also possible that a person might be found in violation of the FRSA for unlawfully making a product, distributing it to others, offering it for sale, and selling it even though only one item (or only one group of items?) would be involved. The principle of lenity is usually applied in criminal cases but it’s less certain it would apply for civil sanctions.

Under HB 450 a violation of the FRSA is declared to be “an unfair or deceptive trade practice pursuant to the Unfair Practices Act (“UPA”).” The Act essentially defines an unfair or deceptive trade practice as an act specifically declared unlawful by the UPA, or a knowingly false or misleading statement or other representation made by someone relating to transfer of goods in the regular course of their trade or commerce that may tend to or does deceive or mislead another person. See, Sect. 57-12-2(D), NMSA 1978.

Under the UPA the Attorney General is already responsible for enforcing it to promote uniformity in the Act’s enforcement, although he can delegate enforcement authority to a district attorney when appropriate. See, Sect. 57-12-15, NMSA 1978. District Attorneys throughout New Mexico are struggling now to keep up with burgeoning caseloads and face more sophisticated criminal defendants and increasingly complex cases and trials with limited resources. That has made it necessary for most of the DA’s and their assistants to specialize in criminal law. They have little or no experience in civil cases or pursuing injunctive relief so would not be the best group to try to restrain and prevent a potential violation of the FRSA that the bill would make available. Since the AG’s office already has experience investigating and enforcing the UPA, and the FRSA is intended to fit within that regulatory structure, it seems logical and practical to make the AG responsible for its enforcement and filing for injunctive relief when appropriate.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS