

# WEST VIRGINIA LEGISLATURE

## 2021 REGULAR SESSION

Introduced

### House Bill 2126

FISCAL  
NOTE

BY DELEGATE FLEISCHAUER

[Introduced February 10, 2021; Referred to the  
Committee on Health and Human Resources then the  
Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,  
2 designated §16-63-1, §16-63-2, §16-63-3, §16-63-4, §16-63-5, §16-63-6, §16-63-7, §16-  
3 63-8, and §16-63-9, all relating to creating the West Virginia Residential Furniture and  
4 Children's Products Flame Retardants Act administered and enforced under the authority  
5 of the Commissioner of the Bureau for Public Health; prohibiting the use of certain flame-  
6 retardant chemicals in certain products; legislative findings; definitions; rule-making  
7 authority; when replacement chemicals may be used; exemptions to requirements;  
8 requiring report to Joint Committee on Government and Finance; requiring certificate of  
9 compliance; injunctive relief for violations; and providing civil penalties for violations.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 63. WEST VIRGINIA RESIDENTIAL FURNITURE AND CHILDREN'S  
PRODUCTS FLAME RETARDANTS ACT.**

**§16-63-1. Legislative findings.**

1 The Legislature makes the following findings:

2 (a) The safety and efficacy of organohalogen and organophosphorus flame retardants  
3 when used in children's products or upholstered residential furniture is doubtful when their  
4 exposure impact on human health is compared with any purported fire safety benefits.

5 (b) Organohalogen and organophosphorus flame retardants migrate from consumer  
6 products and can be inhaled, ingested, or absorbed through the skin. The United States Centers  
7 for Disease Control and Prevention estimates that 97 percent of the population has measurable  
8 quantities of organohalogen or organophosphorus flame retardants in their bodies. Scientific  
9 research indicates concentrations of these flame retardants are increasing in human tissues,  
10 including breast milk, and children carry the highest concentrations per unit of body weight.

11 (c) Organohalogen and organophosphorus flame retardants have been found in  
12 sediments, air, surface water, and wildlife including fish, birds, and mammals. Scientific research

13 indicates the concentrations of these flame retardants are increasing in the environment.

14 (d) Organohalogen and organophosphorus flame retardants as a class are toxic due to  
15 their physical, chemical, and biological properties. Exposure to organohalogen and  
16 organophosphorus flame retardants is linked to many adverse human health impacts, including  
17 reproductive impairment, endocrine disruption, immune disorders, and neurological impacts such  
18 as decreased IQ in children, impaired memory, and learning deficits. Exposure to some  
19 organohalogen and organophosphorus flame retardants has produced cancer in laboratory  
20 animals and several forms of organohalogen and organophosphorus are recognized by state and  
21 federal agencies as probable human carcinogens.

22 (e) This article shall be known as the West Virginia Residential Furniture and Children's  
23 Products Flame Retardants Act.

**§16-63-2. Definitions.**

1 For the purposes of this article, the following terms have the meanings given.

2 "Bedding" means any mattress, upholstered spring, sleeping bag, pad, comforter, cushion,  
3 pillow, decorative pillow, and any other padded or stuffed item designed to be or commonly used  
4 for reclining or sleeping. This definition includes dual-purpose furniture such as studio couches  
5 and sofa beds. The term "mattress" does not include water bed liners, bladders, or cylinders  
6 unless they contain padding or stuffing. The term "mattress" also does not include quilts and  
7 comforters made principally by hand sewing or stitching in a home or community workshop.

8 "Child" means a person under 12 years of age.

9 "Children's product" means a product primarily designed or intended by a manufacturer to  
10 be used by or for a child, including any article used as a component of such a product, but  
11 excluding food, beverage, dietary supplement, pharmaceutical product or biologic, children's toys  
12 that are subject to the most recent version of the American Society for Testing and Materials  
13 F963, Standard Consumer Safety Specification for Toy Safety, a medical device as defined in the  
14 Federal Food, Drug and Cosmetic Act, 21 U. S. C. §321(h), products listed under section

15 116.9405, clauses (10) and (11), and products listed under sections 325F.03 and 325F.04.

16 “Commissioner” means the Commissioner of the Bureau for Public Health.

17 “Congener” means any of two or more chemical substances related to each other by origin,  
18 structure or function.

19 “Flame retardant” means any chemical that is added to a plastic, foam, textile or other  
20 material to inhibit flame formation.

21 “Manufacturer” means any person or enterprise that manufactures children’s products or  
22 upholstered residential furniture containing a regulated flame retardant or any person or  
23 enterprise whose brand name is affixed to children’s products or upholstered residential furniture  
24 containing a regulated flame retardant. Manufacturer includes, in the case of children’s products  
25 or upholstered residential furniture that was imported into the United States, the importer or  
26 domestic distributor of the children’s products or upholstered residential furniture when the person  
27 who manufactured or assembled the children’s products or upholstered residential furniture, or  
28 whose brand name is affixed to the children’s products or upholstered residential furniture, does  
29 not have a presence in the United States.

30 “Regulated flame retardant” means any of the following flame retardants:

31 (1) TDCPP (tris (1, 3-dichloro-2propyl) phosphate);

32 (2) Decabromodiphenyl ether;

33 (3) Pentabromodiphenyl ether;

34 (4) Hexabromocyclododecane;

35 (5) TCEP (tris (2-chloroethyl) phosphate).

36 “Renovate” or “renovated” means the reworking or remaking of used children’s products  
37 or upholstered residential furniture or the making of children’s products or upholstered residential  
38 furniture from materials from which previous use has been made.

39 “Retailer” means and includes every person engaging in the business of selling, leasing  
40 or renting tangible personal property or custom software or furnishing a taxable service for use

41 within the meaning of this article, or in the business of selling, at auction, tangible personal  
42 property or custom software owned by the person or others for use in this state: *Provided*, That  
43 when in the opinion of the Tax Commissioner it is necessary for the efficient administration of this  
44 article to regard any salespersons, representatives, truckers, peddlers, or canvassers as the  
45 agents of the dealers, distributors, supervisors, employees or persons under whom they operate  
46 or from whom they obtain the tangible personal property sold by them, irrespective of whether  
47 they are making sales on their own behalf or on behalf of the dealers, distributors, supervisors,  
48 employers or persons, the Tax Commissioner may so regard them and may regard the dealers,  
49 distributors, supervisors, employers or persons as retailers for purposes of this article.

50 “Upholstered residential furniture” means furniture with padding, coverings or cushions  
51 intended and sold for use in the home or places of lodging and includes, but is not limited to,  
52 bedding.

**§16-63-3. Prohibition of flame retardants.**

1 (a) On and after July 1, 2021, no manufacturer or wholesaler may manufacture, sell, offer  
2 for sale, distribute for sale or distribute for use in this state a children’s product or upholstered  
3 residential furniture containing, in amounts greater than 1000 parts per 1,000,000 in any product  
4 component of any regulated flame retardant.

5 (b) On and after July 1, 2022, no retailer may sell or offer for sale or use in this state a  
6 children’s product or upholstered residential furniture containing in amounts greater than 1000  
7 parts per 1,000,000 in any product component of any regulated flame retardant.

8 (c) The sale or offer for sale of any previously owned product containing a chemical  
9 restricted under this section is exempt from the provisions of this section.

**§16-63-4. Replacement chemicals.**

1 A manufacturer may not replace a chemical whose use is prohibited under this article with  
2 a chemical identified on the basis of credible scientific evidence known or suspected with a high  
3 degree of probability by any state, federal, or international agency to:

4 (1) Harm the normal development of a fetus or child or cause other developmental toxicity;

5 (2) Cause cancer, genetic damage, or reproductive harm;

6 (3) Disrupt the endocrine or hormone system; or

7 (4) Damage the nervous system, immune system or organs, or cause other systemic  
8 toxicity.

**§16-63-5. Rules; exemptions.**

1 The Commissioner of the Bureau for Public Health shall administer and enforce the  
2 provisions of this article. The commissioner shall propose rules for legislative approval in  
3 accordance with §29A-3-1 et seq. of this code for the implementation of this article.

4 The commissioner may grant an exemption to any provisions of this article for a term not  
5 to exceed two years. The exemption shall be renewable upon written application if the specific  
6 use of the regulated flame retardant continues to meet the criteria of this section and the  
7 manufacturer or other persons comply with the conditions of its original approval. The  
8 commissioner may grant an exemption for a specific use of the regulated flame retardant with or  
9 without conditions, upon finding that the applicant has demonstrated one or more of the following:

10 (1) A technically feasible alternative is not available at comparable cost.

11 (2) The potential harm to public health and the environment directly posed by a technically  
12 feasible alternative is greater than the potential harm caused by the regulated flame retardant.

**§16-63-6. Labeling requirements.**

1 The commissioner may establish a “Meets Fire Safety Standards Without the Use of  
2 Chemical Flame Retardants” labeling program for children’s products or upholstered furniture that  
3 meet fire safety standards and do not contain regulated flame retardants. The commissioner may  
4 establish partnerships with manufacturers to enhance the market for children’s products or  
5 upholstered furniture designed to retard fire without the use of regulated flame retardants and  
6 reduce the use of other potentially hazardous flame retardants in children’s products or  
7 upholstered furniture. The commissioner may develop an awards program to recognize the

8 accomplishments of West Virginia manufacturers who exceed the requirements of this article and  
9 who excel at reducing or eliminating regulated flame retardants in children's products or  
10 upholstered furniture.

**§16-63-7. Education and outreach.**

1 (a) The commissioner shall develop a program to inform and educate retailers of children's  
2 products or upholstered furniture regarding the requirements of this article and methods for  
3 identifying children's products or upholstered furniture that contains regulated flame retardants.

4 (b) The commissioner may participate in a regional, multistate clearinghouse to do all of  
5 the following:

6 (1) Assist in the implementation of the requirements of this section.

7 (2) Help coordinate public education and outreach activities.

8 (3) Review risk assessments.

9 (4) Review alternatives to regulated flame retardants in children's products or upholstered  
10 furniture.

11 (5) Implement other activities related to the administration of this article.

**§16-63-8. Flame retardant reports.**

1 (a) By January 15, 2022, the Commissioner of the Bureau for Public Health in consultation  
2 with the State Fire Marshal, shall report to the Joint Committee on Government and Finance  
3 regarding:

4 (1) The status of federal, international, and other states' laws and regulations in identifying,  
5 prioritizing, evaluating and regulating the use of flame retardants in upholstered furniture,  
6 mattresses, and carpet pads;

7 (2) The status of relevant fire safety standards and practices for residential settings for  
8 products including mattresses, upholstered furniture, and carpet pads;

9 (3) The status of and any authoritative findings from studies and reports on a direct link to  
10 meaningful negative health and safety effects and impacts on firefighters of flame retardants

11 covered by this article, particularly as it relates to the combustion of flame retardants in articles in  
12 actual fire fighting settings relative to overall smoke hazards and combustion byproducts;

13 (b) In developing the report, the commissioner and fire marshal may consult with  
14 stakeholders, including representatives of state agencies, product manufacturers, chemical  
15 manufacturers, firefighters, public health experts, and independent scientists. The report must  
16 include information on any stakeholder process consulted with or used in developing the report.

**§16-63-9. Certificate of compliance, injunctive relief, and civil penalties.**

1 (a) If the commissioner reasonably suspects that children's products or upholstered  
2 furniture containing a regulated flame retardant are being manufactured, sold, offered for sale or  
3 distributed for sale in violation of this article, the commissioner may request the manufacturer of  
4 the children's products or upholstered furniture to provide the commissioner with a certificate of  
5 compliance. Within 10 days of receipt of the request for a certificate of compliance, the  
6 manufacturer shall do at least one of the following:

7 (1) Provide the commissioner with a certificate declaring that the children's products or  
8 upholstered furniture comply with the requirements of this article.

9 (2) Notify persons that sell the manufacturer's children's products or upholstered furniture  
10 in the state that the sale of the children's products or upholstered furniture is prohibited and submit  
11 to the commissioner a list of the names and addresses of those notified.

12 (b) If a manufacturer fails to comply with the requirements under this article, the  
13 commissioner may take enforcement action against the children's products or upholstered  
14 furniture manufacturer by requesting the Attorney General to initiate immediate injunction  
15 proceedings, or assessing civil penalties under subsection (c) of this section to prevent the sale  
16 of the children's products or upholstered furniture, or both.

17 (c) Subject to subsections (d) and (e) of this section, a person who violates this article is  
18 subject to the following civil penalties:

19 (1) If the violation is the person's first offense under this article, a civil fine of not more than

20 \$100 per article of children's products or upholstered furniture, not to exceed \$5,000 total.

21 (2) If the violation is the person's second offense under this article, a civil penalty of not  
22 more than \$250 per article of children's products or upholstered furniture, not to exceed a total of  
23 \$25,000.

24 (3) If the violation is the person's third or subsequent offense under this article, a civil  
25 penalty of not more than \$1,000 per article of children's products or upholstered furniture, not to  
26 exceed a total of \$50,000.

27 (4) For purposes of calculating a penalty under this section, a collection of children's  
28 products or upholstered furniture items that are sold as a set shall collectively constitute one  
29 article of children's products or upholstered furniture.

30 (d) If a person knowingly violates this article, the person is subject to a civil penalty equal  
31 to three times the amount of the penalty under subdivision (3) of subsection (c) of this section.

32 (e) A civil fine imposed under this section shall be waived if it is determined that a person  
33 acted in good faith to comply with this article, pursued compliance with due diligence, and  
34 promptly corrected any noncompliance after the discovery of the violation.

NOTE: The purpose of this bill is to create the West Virginia Residential Furniture and Children's Products Flame Retardants Act administered and enforced under the authority of the Commissioner of the Bureau for Public Health. The bill prohibits the use of certain flame-retardant chemicals in certain products, including those designed for use by children. The bill states when replacement chemicals may be used in these products and provide exemptions to requirements. The bill requires a report to the Joint Committee on Government and Finance by the Commissioner of the Bureau for Public Health in conjunction with the Fire Marshal. The bill requires certificates of compliance from persons or businesses selling products subject to this article, provides for injunctive relief for violations, and provides for civil penalties.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.