

By: Burnam

H.B. No. 963

A BILL TO BE ENTITLED

AN ACT

relating to the regulation of the sale and use of products containing mercury; providing penalties.

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

SECTION 1. Subtitle D, Title 6, Health and Safety Code, is amended by adding Chapter 508 to read as follows:

CHAPTER 508. MERCURY REDUCTION

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 508.001. DEFINITIONS. In this chapter:

(1) "Board" means the Texas Board of Health.

(2) "Department" means the Texas Department of Health.

(3) "Interstate clearinghouse" means a regional, multistate clearinghouse as provided in Subchapter C.

(4) "Manufacturer" means a person that produces a product containing mercury or an importer or domestic distributor of a product containing mercury produced in a foreign country.

(5) "Mercury-added product" means a product or a component of a product containing mercury or a mercury compound intentionally added to the product or component.

(6) "Pharmacist" has the meaning assigned by Section 481.002.

(7) "Practitioner" has the meaning assigned by Section 481.002.

(8) "Product containing mercury" means a product or a

1 component of a product that contains:

2 (A) mercury; or

3 (B) a mercury compound from any source, including  
4 a mercury-added product and a product manufactured using mercury.

5 Sec. 508.002. RULES. (a) The board shall adopt rules to  
6 administer this chapter.

7 (b) In administering this chapter, the board shall seek  
8 voluntary industry cooperation.

9 Sec. 508.003. EXEMPTION. Except as provided by Section  
10 508.056, this chapter does not apply to a prescription drug or any  
11 substance sold over the counter without a prescription under the  
12 Federal Food, Drug, and Cosmetic Act (21 U.S.C. Section 301 et  
13 seq.).

14 Sec. 508.004. DEPARTMENTAL REVIEW OF CHAPTER. (a) The  
15 department shall:

16 (1) review the effectiveness of this chapter not later  
17 than May 1, 2008; and

18 (2) provide a report on the effectiveness of this  
19 chapter to the governor, the lieutenant governor, and the speaker  
20 of the house of representatives not later than November 1, 2008.

21 (b) The report required by Subsection (a)(2) shall examine  
22 the effectiveness of the programs administered under this chapter.  
23 The report may contain recommendations for improving the programs  
24 and recommendations for legislative action and may identify, with  
25 the assistance of the Texas Department of Human Services, consumer  
26 products and products used in health care facilities that contain  
27 mercury in amounts greater than one part per billion.

1 (c) This section expires February 1, 2009.

2 [Sections 508.005-508.050 reserved for expansion]

3 SUBCHAPTER B. MERCURY REGULATION

4 Sec. 508.051. REGISTRATION. (a) A manufacturer who uses,  
5 distributes, or offers for sale a mercury-added product in this  
6 state shall register by filing with the department a registration  
7 statement as provided by this section.

8 (b) The board by rule shall detail the registration  
9 requirements and prescribe the contents of the registration  
10 statement. The registration statement must include:

11 (1) a brief description of the product to be used,  
12 distributed, or offered for sale;

13 (2) the amount of mercury in each product unit  
14 reported as an exact number or an average within an upper and lower  
15 limit and the purpose for the mercury in the product;

16 (3) the name and address of the manufacturer; and

17 (4) the name, address, and telephone number of a  
18 contact person for the manufacturer.

19 (c) A manufacturer must file the registration statement  
20 with the department:

21 (1) before a mercury-added product manufactured by the  
22 manufacturer is used, distributed, or offered for sale in this  
23 state; and

24 (2) in each succeeding year the manufacturer continues  
25 the business in this state, not later than the anniversary of the  
26 initial filing.

27 (d) On approval from the department, the manufacturer may

1 supply the information required by Subsection (b) for a product  
2 category rather than an individual product.

3 (e) The department may waive the information required by  
4 Subsection (b)(2) as the department considers necessary to protect  
5 the confidentiality of the trade secrets of the manufacturer or for  
6 other practical reasons.

7 (f) The department, after notice and hearing, may refuse to  
8 register or may cancel, revoke, suspend, or probate the  
9 registration of a manufacturer who fails to comply with this  
10 chapter.

11 Sec. 508.052. DETERMINATION OF MANUFACTURER OF  
12 MULTICOMPONENT PRODUCT. For the purposes of this chapter, for a  
13 multicomponent product containing mercury, the manufacturer is the  
14 last manufacturer to produce or assemble the product. If the  
15 multicomponent product is produced in a foreign country, the  
16 manufacturer is the importer or domestic distributor.

17 Sec. 508.053. FEE. The board by rule shall charge a fee for  
18 each initial registration statement and each annual registration  
19 statement required under Section 508.051 in an amount necessary to  
20 cover the department's costs for administering this chapter.

21 Sec. 508.054. CONFIDENTIALITY. (a) Except as provided by  
22 this section, information collected by the department under this  
23 chapter is available to the public. The department shall maintain  
24 information as confidential and may not release the information to  
25 the public if the department determines that:

26 (1) the information relates to:

27 (A) production or sales figures; or

1                   (B) processes or production unique to the  
2 manufacturer; or

3                   (2) release of the information may adversely affect  
4 the competitive position of the manufacturer.

5                   (b) A manufacturer may expressly agree to the publication of  
6 information collected under this chapter.

7                   (c) The department may release confidential information to  
8 the interstate clearinghouse. The clearinghouse may use  
9 information obtained under this subsection only for the purposes  
10 described by Subchapter C and shall maintain the information as  
11 confidential.

12                   Sec. 508.055. RESTRICTIONS ON SALE OF CERTAIN MERCURY-ADDED  
13 PRODUCTS. (a) A person may not distribute or offer for sale in  
14 this state a mercury-added product intended for personal or  
15 household enjoyment or adornment, if the person knows or has reason  
16 to know the product contains mercury, including an item intended  
17 for use as a practical joke, figurine, adornment, toy, game, card,  
18 ornament, yard statue, candle, piece of jewelry, or holiday  
19 decoration or an item of apparel or footwear.

20                   (b) This section does not prohibit the sale or distribution  
21 of a product solely because the product uses a removable button cell  
22 battery containing mercury.

23                   Sec. 508.056. RESTRICTION ON SALE OF MERCURY FEVER  
24 THERMOMETERS. (a) A person may not sell or distribute mercury  
25 fever thermometers used for measuring body temperature in this  
26 state except as provided by this section.

27                   (b) A pharmacist may dispense a mercury fever thermometer

1 to a person only under a valid prescription.

2 (c) A manufacturer may not sell a mercury fever thermometer  
3 to a person except to a pharmacy, school, practitioner, or other  
4 person as provided by this chapter and board rule. A manufacturer  
5 of mercury fever thermometers shall include with each thermometer  
6 instructions describing:

7 (1) the proper care and handling of the thermometer to  
8 prevent breakage; and

9 (2) the proper procedures for cleaning up and  
10 disposing of mercury.

11 (d) A mercury fever thermometer does not include a digital  
12 thermometer that uses a removable button cell battery containing  
13 mercury.

14 Sec. 508.057. RESTRICTIONS ON MERCURY IN  
15 SCHOOLS. (a) Except as provided by Subsection (b), a primary or  
16 secondary school may not use or purchase for use in the school  
17 elemental mercury, mercury compounds, or mercury-added  
18 instructional equipment and materials.

19 (b) A primary or secondary school may use or purchase for  
20 use in the school measuring devices and fever and other  
21 thermometers that contain mercury as provided by board rule only  
22 if:

23 (1) the equipment is used in a school laboratory; and

24 (2) no adequate substitute for the mercury-added  
25 equipment exists.

26 Sec. 508.058. LIMITATIONS ON USE OF ELEMENTAL  
27 MERCURY. (a) A person may not sell or distribute elemental

1 mercury to a purchaser or recipient in this state unless the person  
2 provides to the purchaser or recipient a material safety data  
3 sheet, as defined in 42 U.S.C. Section 11049, and the purchaser or  
4 recipient signs a statement indicating the purchaser or recipient:

5 (1) understands mercury is toxic and should be stored  
6 and used appropriately to prevent the exposure of any person to the  
7 mercury; and

8 (2) should not place or allow anyone under the  
9 purchaser's or recipient's control to place the mercury or cause the  
10 mercury to be placed in solid waste for disposal or in a wastewater  
11 disposal system.

12 (b) A purchaser or recipient may use elemental mercury only  
13 for medical, dental, research, or manufacturing purposes.

14 Sec. 508.059. PUBLIC EDUCATION AND OUTREACH. (a) The  
15 department shall implement a public education, outreach, and  
16 assistance program for households, hazardous waste generators,  
17 local and regional solid waste management agencies, dismantlers,  
18 institutions, and schools on:

19 (1) the hazards of mercury;

20 (2) the requirements and obligations of individuals,  
21 manufacturers, and agencies under this chapter; and

22 (3) the voluntary actions that individuals,  
23 institutions, and businesses may take to reduce mercury in the  
24 environment.

25 (b) The department shall cooperate with manufacturers of  
26 mercury-added products and other affected businesses in the  
27 development and implementation of public education and technical

1 assistance programs.

2 (c) The department shall cooperate with neighboring states  
3 and regional organizations in the development of outreach,  
4 assistance, and education programs.

5 [Sections 508.060-508.100 reserved for expansion]

6 SUBCHAPTER C. INTERSTATE CLEARINGHOUSE

7 Sec. 508.101. INTERSTATE CLEARINGHOUSE. (a) The  
8 department may participate in the establishment and implementation  
9 of an interstate clearinghouse to assist the department in:

10 (1) administering this chapter;

11 (2) coordinating reviews of:

12 (A) the manufacturers' notifications regarding  
13 mercury-added products;

14 (B) collection plans; and

15 (C) the disclosures of mercury content; and

16 (3) providing education and outreach programs.

17 (b) The clearinghouse may also maintain:

18 (1) a list of all products containing mercury,  
19 including mercury-added products; and

20 (2) a file on all exemptions granted by the states.

21 Sec. 508.102. PUBLICATION. The department and the  
22 interstate clearinghouse may compile or publish analyses or  
23 summaries relating to the amount and effect of mercury in products  
24 and in the environment. The analyses or summaries may not identify  
25 any manufacturer or reveal any information that is confidential  
26 under this chapter.

27 [Sections 508.103-508.150 reserved for expansion]



SUBCHAPTER D. ENFORCEMENT

1                   Sec. 508.151. EXAMINATIONS AND INVESTIGATIONS. (a) To  
2 enforce this chapter, an officer, employee, or agent of the  
3 department, on the presentation of appropriate credentials to the  
4 owner, operator, or agent, at reasonable times may enter a factory,  
5 warehouse, or establishment in which a product containing mercury  
6 is manufactured, processed, packaged, or held for introduction into  
7 commerce in this state or in which a product containing mercury is  
8 held after introduction into commerce, or a vehicle used to  
9 transport or hold a product containing mercury in commerce, for the  
10 purpose of inspecting within reasonable limits and in a reasonable  
11 manner the factory, warehouse, establishment, or vehicle and all  
12 pertinent equipment, finished and unfinished materials, and  
13 labeling in the factory, warehouse, establishment, or vehicle.

14                   (b) The officer, employee, or agent of the department may  
15 obtain samples of any materials, packaging, labeling, or finished  
16 product.

17                   Sec. 508.152. RECORDS OF PRODUCT CONTAINING MERCURY IN  
18 COMMERCE. (a) For the enforcement of this chapter, a carrier  
19 engaged in commerce, a person receiving a product containing  
20 mercury in commerce, or a person holding a product containing  
21 mercury received in commerce, on request of the department shall  
22 permit a representative of the department at reasonable times to  
23 have access to and to copy all records showing the movement in  
24 commerce or the holding after movement in commerce of any product  
25 containing mercury and the quantity, consignees, and shipper of the  
26 product containing mercury.

1        (b) Evidence obtained under this section may not be used in  
2 the criminal prosecution of the person from whom the evidence is  
3 obtained.

4        (c) A carrier is not subject to the other provisions of this  
5 chapter because of the carrier's receipt, carriage, holding, or  
6 delivery of a product containing mercury in the usual course of the  
7 carrier's business.

8        Sec. 508.153. SEIZURE AND DISPOSITION OF BANNED  
9 PRODUCT. (a) An authorized agent of the department who has good  
10 reason to believe a product is a product containing mercury that may  
11 not be distributed or sold under Section 508.055 or that is not  
12 packaged as required by Section 508.056(c) shall affix to the  
13 article a tag or other appropriate marking to:

14            (1) give notice that the article is or is suspected to  
15 be a product containing mercury that may not be distributed or sold  
16 under Section 508.055 or that is not packaged as required by Section  
17 508.056(c) and that the article has been detained; and

18            (2) warn all persons not to remove the article from the  
19 premises or dispose of the article by sale or in any other manner  
20 until permission to do so is given by the agent or a court.

21        (b) The department shall petition a district court of Travis  
22 County or the county in which the article is located to authorize  
23 the disposition of the article. If the court determines the article  
24 is a product containing mercury that may not be distributed or sold  
25 under Section 508.055 or that is not packaged as required by Section  
26 508.056(c), the department shall dispose of the article, and the  
27 court shall impose all court costs and fees and storage and other

1 proper expenses against the claimant of the article.

2 (c) If the court finds the article is not a product  
3 containing mercury that may not be distributed or sold under  
4 Section 508.055 or that is not packaged as required by Section  
5 508.056(c), the court shall order the department to remove the tags  
6 or other markings.

7 Sec. 508.154. CRIMINAL PENALTY. (a) A person commits an  
8 offense if the person violates this chapter or a rule adopted by the  
9 board under this chapter.

10 (b) An offense under this section is a Class C misdemeanor.

11 [Sections 508.155-508.200 reserved for expansion]

12 SUBCHAPTER E. ADMINISTRATIVE PENALTY

13 Sec. 508.201. IMPOSITION OF PENALTY. (a) The department  
14 may impose an administrative penalty on a person:

15 (1) who produces a product containing mercury that is  
16 distributed in this state or who imports or distributes in this  
17 state a product containing mercury produced in a foreign country;  
18 and

19 (2) who violates this chapter or a rule or order  
20 adopted under this chapter.

21 (b) A penalty collected under this subchapter shall be  
22 deposited in the state treasury in the general revenue fund.

23 Sec. 508.202. AMOUNT OF PENALTY. (a) The amount of the  
24 penalty may not exceed \$5,000 for each violation, and each day a  
25 violation continues or occurs is a separate violation for purposes  
26 of imposing a penalty. The total amount of the penalty assessed for  
27 a violation continuing or occurring on separate days under this

1 subsection may not exceed \$25,000.

2 (b) The amount shall be based on:

3 (1) the seriousness of the violation, including the  
4 nature, circumstances, extent, and gravity of the violation;

5 (2) the threat to health or safety caused by the  
6 violation;

7 (3) the history of previous violations;

8 (4) the amount necessary to deter a future violation;

9 (5) whether the violator demonstrated good faith,  
10 including when applicable whether the violator made good faith  
11 efforts to correct the violation; and

12 (6) any other matter that justice may require.

13 Sec. 508.203. REPORT AND NOTICE OF VIOLATION AND  
14 PENALTY. (a) If the department initially determines that a  
15 violation occurred, the department shall give written notice of the  
16 report by certified mail to the person.

17 (b) The notice must:

18 (1) include a brief summary of the alleged violation;

19 (2) state the amount of the recommended penalty; and

20 (3) inform the person of the person's right to a  
21 hearing on the occurrence of the violation, the amount of the  
22 penalty, or both.

23 Sec. 508.204. PENALTY TO BE PAID OR HEARING  
24 REQUESTED. (a) Within 20 days after the date the person receives  
25 the notice sent under Section 508.203, the person in writing may:

26 (1) accept the determination and recommended penalty  
27 of the department; or

1           (2) make a request for a hearing on the occurrence of  
2 the violation, the amount of the penalty, or both.

3           (b) If the person accepts the determination and recommended  
4 penalty or if the person fails to respond to the notice, the  
5 commissioner of public health by order shall approve the  
6 determination and impose the recommended penalty.

7           Sec. 508.205. HEARING. (a) If the person requests a  
8 hearing, the commissioner of public health shall refer the matter  
9 to the State Office of Administrative Hearings, which shall  
10 promptly set a hearing date and give written notice of the time and  
11 place of the hearing to the person. An administrative law judge of  
12 the State Office of Administrative Hearings shall conduct the  
13 hearing.

14           (b) The administrative law judge shall make findings of fact  
15 and conclusions of law and promptly issue to the commissioner of  
16 public health a proposal for a decision about the occurrence of the  
17 violation and the amount of a proposed penalty.

18           Sec. 508.206. DECISION BY COMMISSIONER. (a) Based on the  
19 findings of fact, conclusions of law, and proposal for a decision,  
20 the commissioner of public health by order may:

21           (1) find that a violation occurred and impose a  
22 penalty; or

23           (2) find that a violation did not occur.

24           (b) The notice of the commissioner's order under Subsection  
25 (a) that is sent to the person in accordance with Chapter 2001,  
26 Government Code, must include a statement of the right of the person  
27 to judicial review of the order.

1       Sec. 508.207. OPTIONS FOLLOWING DECISION: PAY OR  
2 APPEAL. Within 30 days after the date an order of the commissioner  
3 of public health under Section 508.206 that imposes an  
4 administrative penalty becomes final, the person shall:

5           (1) pay the penalty; or

6           (2) file a petition for judicial review of the  
7 commissioner's order contesting the occurrence of the violation,  
8 the amount of the penalty, or both.

9       Sec. 508.208. STAY OF ENFORCEMENT OF PENALTY. (a) Within  
10 the 30-day period prescribed by Section 508.207, a person who files  
11 a petition for judicial review may:

12           (1) stay enforcement of the penalty by:

13                   (A) paying the penalty to the court for placement  
14 in an escrow account; or

15                   (B) giving the court a supersedeas bond approved  
16 by the court that:

17                                   (i) is for the amount of the penalty; and

18                                   (ii) is effective until all judicial review  
19 of the commissioner's order is final; or

20           (2) request the court to stay enforcement of the  
21 penalty by:

22                   (A) filing with the court a sworn affidavit of  
23 the person stating that the person is financially unable to pay the  
24 penalty and is financially unable to give the supersedeas bond; and

25                   (B) giving a copy of the affidavit to the  
26 commissioner of public health by certified mail.

27       (b) If the commissioner of public health receives a copy of

1 an affidavit under Subsection (a)(2), the commissioner may file  
2 with the court, within five days after the date the copy is  
3 received, a contest to the affidavit. The court shall hold a hearing  
4 on the facts alleged in the affidavit as soon as practicable and  
5 shall stay the enforcement of the penalty on finding that the  
6 alleged facts are true. The person who files an affidavit has the  
7 burden of proving that the person is financially unable to pay the  
8 penalty or to give a supersedeas bond.

9 Sec. 508.209. COLLECTION OF PENALTY. (a) If the person  
10 does not pay the penalty and the enforcement of the penalty is not  
11 stayed, the penalty may be collected.

12 (b) The attorney general may sue to collect the penalty.

13 Sec. 508.210. DECISION BY COURT. (a) If the court  
14 sustains the finding that a violation occurred, the court may  
15 uphold or reduce the amount of the penalty and order the person to  
16 pay the full or reduced amount of the penalty.

17 (b) If the court does not sustain the finding that a  
18 violation occurred, the court shall order that a penalty is not  
19 owed.

20 Sec. 508.211. REMITTANCE OF PENALTY OR INTEREST. (a) If  
21 the person paid the penalty and if the amount of the penalty is  
22 reduced or the penalty is not upheld by the court, the court shall  
23 order, when the court's judgment becomes final, that the  
24 appropriate amount plus accrued interest be remitted to the person  
25 within 30 days after the date that the judgment of the court becomes  
26 final.

27 (b) The interest accrues at the rate charged on loans to

1 depository institutions by the New York Federal Reserve Bank.

2 (c) The interest shall be paid for the period beginning on  
3 the date the penalty is paid and ending on the date the penalty is  
4 remitted.

5 Sec. 508.212. RELEASE OF BOND. (a) If the person gave a  
6 supersedeas bond and the penalty is not upheld by the court, the  
7 court shall order, when the court's judgment becomes final, the  
8 release of the bond.

9 (b) If the person gave a supersedeas bond and the amount of  
10 the penalty is reduced, the court shall order the release of the  
11 bond after the person pays the reduced amount.

12 Sec. 508.213. ADMINISTRATIVE PROCEDURE. A proceeding to  
13 impose the penalty is considered to be a contested case under  
14 Chapter 2001, Government Code.

15 SECTION 2. (a) A person may not offer for sale or  
16 distribute in this state any mercury-added product unless the  
17 person has complied with Chapter 508, Health and Safety Code, as  
18 added by this Act, except that a retailer in this state may sell  
19 until September 1, 2004, products containing mercury from the  
20 retailer's stock as it existed on the effective date of this Act.

21 (b) The Texas Board of Health shall adopt rules to  
22 administer Chapter 508, Health and Safety Code, as added by this  
23 Act, not later than July 1, 2004.

24 SECTION 3. A manufacturer that sells a mercury-added  
25 product prohibited under Section 508.055, Health and Safety Code,  
26 as added by this Act, shall notify retailers of the requirements of  
27 Chapter 508, Health and Safety Code, as added by this Act, and the



1 proper method to dispose of remaining inventory.

2 SECTION 4. This Act takes effect May 1, 2004.