S.239

An act relating to the regulation of toxic substances

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. FINDINGS

The General Assembly finds that:

(1) There are more than 84,000 chemicals used commercially in the United States, and each year approximately 1,000 chemicals are added to the list of registered chemicals.

(2) More than 90 percent of the chemicals in commercial use in the United States have never been fully tested for potential impacts on human health or the environment.

(3) In 1976, the federal government passed the Toxic Substances Control Act (TSCA) in an attempt to improve the regulation of chemicals in the United States. However, TSCA grandfathered approximately 62,000 chemicals from regulation under the Act. Consequently, the U.S. Environmental Protection Agency (EPA) is not required to assess the risk of these chemicals. Since TSCA became law, EPA only has required testing for approximately 200 chemicals, and has banned or restricted the use of five of those chemicals. No chemicals have been banned in over 20 years.

(4) Biomonitoring studies reveal that toxic chemicals are in the bodies of people, including chemicals linked to cancer, brain and nervous damage,

birth defects, developmental delays, and reproductive harm. Even newborn babies have chemical body burdens, proving that they are being polluted while in the womb.

(5) A growing body of scientific evidence demonstrates that these chemical exposures are taking a toll on public health and are playing a role in the incidence and prevalence of many diseases and disorders, including leukemia, breast cancer, asthma, reproductive difficulties, birth defects, and autism.

(6) The societal and health care costs attributed to toxic exposures are extraordinary. More than $2.3 billion are spent every year just on the medical costs of cancer, asthma, and neurobehaviorial disorders associated with toxic chemicals.

(7) Vermont has regulated the use of individual chemicals of concern, including lead, mercury, bisphenol A, phthalates, decabromodiphenyl ether, tris(1,3-dichloro-2-propyl) phosphate, and tris(2-chloroethyl) phosphate, but reviewing chemicals individually, one at a time, is inefficient and inadequate for addressing the issues posed by chemicals of concern.

(8) Other states and countries, including Maine, Washington, California, and the European Union, are already taking a more comprehensive approach to chemical regulation in consumer products, and chemical regulation in Vermont should harmonize with these efforts.

(9) The State has experience monitoring and regulating chemical use through the toxic use and hazardous waste reduction programs.

(10) In order to ensure that the regulation of toxic chemicals is robust and protective, parties affected by the regulation of chemical use shall have ample opportunity to comment on proposed regulation so that the legal and financial risks of regulation are minimized.

Sec. 2. 18 V.S.A. chapter 38A is added to read:

CHAPTER 38A. TOXIC CHEMICAL IDENTIFICATION

§ 1771. POLICY

It is the policy of the State of Vermont:

(1) to protect public health and the environment by reducing exposure of its citizens and vulnerable populations, such as children, to toxic chemicals, particularly when safer alternatives exist; and

(2) that the State attempt, when possible, to regulate toxic chemicals in a manner that is consistent with regulation of toxic chemicals in other states.

§ 1772. DEFINITIONS

As used in this chapter:

(1) "Aircraft" shall be defined as in 5 V.S.A. § 202.

(2) "Chemical" means a substance with a distinct molecular composition or a group of structurally related substances and includes the breakdown products of the substance or substances that form through decomposition,

degradation, or metabolism. "Chemical" shall not mean crystalline silica in any form, as derived from ordinary sand or as present as a naturally occurring component of any other mineral raw material, including granite, gravel, limestone, marble, slate, soapstone, and talc.

(3) "Chemical of high concern" means a chemical identified by the Department pursuant to section 1773 of this title.

(4) "Consumer product" means any product that is regularly used or purchased to be used for personal, family, or household purposes. "Consumer product" shall not mean:

(A) a product primarily used or purchased for industrial or business use that does not enter the consumer product market or is not otherwise sold at retail.

(B) a food or beverage or an additive to a food or beverage;

(C) a tobacco product;

(D) a pesticide regulated by the U.S. Environmental Protection Agency;

(E) a drug or biologic regulated by the federal Food and Drug Administration, or the packaging of a drug or biologic that is regulated by the federal Food and Drug Administration; or

(F) ammunition or components thereof, firearms, air rifles, hunting or fishing equipment or components thereof.

(5) "Contaminant" means a chemical that is not an intentionally added ingredient in a product, and the source or sources of the chemical in the product are one or more of the following:

(A) a naturally occurring contaminant commonly found in raw materials that are frequently used to manufacture the product;

(B) air or water frequently used as a processing agent or an ingredient to manufacture the product;

(C) a contaminant commonly found in recycled materials that are frequently used to manufacture the product; or

(D) a processing reagent, processing reactant, by-product, or intermediate frequently used to promote certain chemical or physical changes during manufacturing, and the incidental retention of a residue is not desired or intended.

(6) "Manufacturer" means:

(A) any person who manufactures a consumer product or whose name is affixed to a consumer product or its packaging or advertising, and the consumer product is sold or offered for sale in Vermont; or

(B) any person who sells a consumer product to a retailer in Vermont when the person who manufactures the consumer product or whose name is affixed to the consumer product or its packaging or advertising does not have a

presence in the United States other than the sale or offer for sale of the manufacturer's products.

(7) "Motor vehicle" means every vehicle intended primarily for use and operation on the public highways and shall include snowmobiles, all-terrain vehicles, and farm tractors and other machinery used in the production, harvesting, and care of farm products.

(8) "Practical quantification limit (PQL)" means the lowest concentration that can be reliably measured within specified limits of precision, accuracy, representativeness, completeness, and comparability during routine laboratory operating conditions.

(9) "Priority chemical" means a chemical that:

(A) is on the list of chemicals published by the Department as required under section 1773 of this title; and

(B) is found in a consumer product.

(10) "Vessel" means every description of watercraft used or capable of being used as a means of transportation on water.

§ 1773. CHEMICALS OF HIGH CONCERN

(a) List of chemicals. On or before July 1, 2016, the Commissioner of Health, in consultation with the Secretary of Natural Resources, shall adopt and publish a list of chemicals of high concern to human health or the environment. Beginning on July 1, 2018, and biennially thereafter, the

Commissioner of Health shall review, revise, and reissue the list of chemicals of high concern to human health or the environment.

(b) Criteria. The Commissioner of Health shall designate a chemical as a chemical of high concern if it is a chemical that meets, on the basis of credible scientific evidence, both of the following criteria in subdivisions (1) and (2) of this subsection:

(1) The chemical has been demonstrated to:

(A) harm the normal development of a fetus or child or cause other developmental toxicity;

(B) cause cancer, genetic damage, or reproductive harm;

(C) disrupt the endocrine system;

(D) damage the nervous system, immune system, or organs or cause other systemic toxicity; or

(E) be persistent and bioaccumulative.

(2) The chemical has been found through:

(A) biomonitoring to be present in human blood, umbilical cord blood, breast milk, urine, or other bodily tissues or fluids;

(B) sampling and analysis to be present in household dust, indoor air, drinking water, or elsewhere in the home environment; or

(C) monitoring to be present in fish, wildlife, or the natural environment.

(c) Resources for consideration. In determining the list of chemicals of concern, the Commissioner of Health may consider designations made by other states, the federal government, other countries, or other governmental agencies.

(d) Publication of list. On or before July 1, 2016, the list of chemicals of concern shall be posted on the Department of Health website.

(e) PQL value. A PQL value established under this chapter for individual chemicals shall depend on the analytical method used for each chemical. The PQL value shall be based on scientifically defensible, standard analytical methods as advised by guidance published by the Department.

§ 1774. CHEMICALS OF HIGH CONCERN WORKING GROUP

(a) Creation. A Chemicals of High Concern Working Group (Working Group) is created for the purpose of advising the Commissioner of Health regarding implementation of the requirements of this chapter.

(b) Membership.

(1) The Working Group shall be composed of the following members who, except for ex officio members, shall be appointed by the Governor after consultation with the Commissioner of Health:

(A) the Commissioner of Health or designee, who shall be the chair of the Working Group;

(B) the Commissioner of Environmental Conservation or designee;

(C) the State toxicologist or designee;

(D) a representative of a public interest group in the State with experience in advocating for the regulation of toxic substances;

(E) a representative of an organization within the State with expertise in issues related to the health of children or pregnant women;

(F) two representatives of businesses in the State that use chemicals in a manufacturing or production process; and

(G) a scientist with expertise in the toxicity of chemicals.

(2)(A) In addition to the members of the Working Group appointed under subdivision (1) of this subsection, the Governor may appoint up to three additional, adjunct members for purposes of:

(i) reviewing whether a specific chemical should be listed as a chemical of high concern; or

(ii) recommending the regulation of the sale or distribution of a consumer product containing a priority chemical.

(B) An adjunct member appointed under this subdivision (2) shall have expertise or knowledge of the chemical or consumer product under review or shall have expertise or knowledge in the potential health effects of the chemical at issue.

(C) Adjunct members appointed under this subdivision (2) shall have the same authority and powers as a member of the Working Group appointed under subdivision (1) of this subsection (b), provided that such authority and

power is limited to review of the specific chemical or consumer product for which the adjunct member has expertise.

(3) The members of the Working Group appointed under subdivision (1) of this subsection shall serve staggered three-year terms. The Governor may remove members of the Working Group who fail to attend three consecutive meetings and may appoint replacements. The Governor may reappoint members to serve more than one term.

(c) Powers and duties. The Working Group shall:

(1) upon the request of the Chair of the Working Group, review proposed chemicals for listing as a chemical of high concern under section 1773 of this title; and

(2) recommend whether the Department of Health should adopt a rule under section 1776 of this title to regulate the sale or distribution of a consumer product containing a priority chemical.

(d) Commissioner of Health recommendation; assistance.

(1) Beginning on July 1, 2017, and biennially thereafter, the Commissioner of Health shall recommend at least two priority chemicals in consumer products for review by the Working Group. The Commissioner's recommendations shall be based on the degree of human health risks, exposure pathways, and impact on sensitive populations presented by a priority chemical.

(2) The Working Group shall have the administrative, technical, and legal assistance of the Department of Health.

(e) Meetings.

(1) The Chair of the Working Group may convene the Working Group at any time, but no less frequently than at least once every other year.

(2) A majority of the members of the Working Group, including adjunct members when appointed, shall constitute a quorum, and all action shall be taken upon a majority vote of the members present and voting.

(f) Reimbursement. Members of the Working Group, including adjunct members, whose participation is not supported through their employment or association shall receive per diem compensation pursuant to 32 V.S.A. § 1010 and reimbursement of travel expenses. A per diem authorized by this section shall be paid from the budget of the Department of Health.

§ 1775. DISCLOSURE OF INFORMATION ON CHEMICALS OF HIGH CONCERN

(a) No later than one year after a chemical is placed on the list of chemicals of high concern under section 1773 of this title, and biennially thereafter, a manufacturer of a consumer product shall submit to the Department the notice described in subsection (b) of this section if a chemical of high concern is:

(1) added to a consumer product at a level above the PQL produced by the manufacturer; or

(2) present in a consumer product produced by the manufacturer as a contaminant at a concentration of 100 parts per million or greater.

(b) The Commissioner shall specify the format for submission of the notice required by subsection (a) of this section, provided that the required format shall be generally consistent with the format for submission of notice in other states with requirements substantially similar to the requirements of this section. Any notice submitted under subsection (a) shall contain the following information:

(1) the name of the chemical used or produced and its chemical abstracts service registry number;

(2) a description of the product or product component containing the substance;

(3) the amount of the chemical used in each unit of the product or product component;

(4) the name and address of the manufacturer of the consumer product and the name, address, and telephone number of a contact person for the manufacturer;

(5) any other information the manufacturer deems relevant to the appropriate use of the product; and

(6) any other information required by the Commissioner under rules adopted pursuant to 3 V.S.A. chapter 25.

(c)(1) In order for the Department to obtain the information required in the notice described in subsection (b) of this section, the Department may enter into reciprocal data-sharing agreements with other states in which a manufacturer of consumer products is also required to disclose information related to chemicals of concern in consumer products. The Department shall not disclose trade secret information, confidential business information, or other information designated as confidential by law under a reciprocal data-sharing agreement.

(2) The Commissioner may waive reporting requirements under this section if a manufacturer submitted the information required by this section to a state with which the Department has entered a reciprocal data-sharing agreement.

(d) A manufacturer who submitted the notice required by subsection (a) of this section may at any time submit to the Department notice that a chemical of high concern has been removed from the manufacturer's consumer product or that the manufacturer no longer sells, offers for sale, or distributes in the State the consumer product containing the chemical of high concern.

(e) A manufacturer required under this section to provide information on its use of a chemical of high concern shall, within 30 days of receipt of an invoice from the Department, pay a fee not to exceed $2,000.00 per chemical included on the list of chemicals of high concern. A fee submitted under this subsection

shall be submitted only with the first submission of notice required under this section, and shall not be required for each required subsequent biennial notice. Fees collected under this subsection shall be deposited in the Chemicals of High Concern Fund for the purposes of that Fund.

§ 1776. PRIORITY CHEMICALS; PROHIBITION OF SALE; DEPARTMENT OF HEALTH RULEMAKING

(a)(1) Upon receipt of a recommendation from the Chemicals of High Concern Working Group under subdivision 1774(c)(2) of this title, the Commissioner may adopt a rule to regulate the sale or distribution of a consumer product containing a priority chemical when, based on the weight of available, scientific studies, the toxicity of the priority chemical in the consumer product and its potential exposure pathways in the product pose a public health risk as that term is defined in 18 V.S.A. § 2(12).

(2) A rule adopted under this section may:

(A) prohibit the consumer product containing the priority chemical from sale, offer for sale, or distribution in the State; or

(B) require that the consumer product containing the priority chemical be labeled prior to sale, offer for sale, or distribution in the State.

(b) In adopting a rule under this section that prohibits the sale, offer for sale, or distribution in the State of a consumer product that contains a priority chemical, the Commissioner may:

(1) consider whether a safer alternative to the priority chemical exists; or

(2) exempt from regulation a consumer product containing a priority chemical if the manufacturer of the consumer product is implementing a comprehensive chemical management strategy designed to eliminate harmful substances or chemicals from the manufacturing process.

(c)(1) In any rule adopted under this section, the Commissioner shall adopt reasonable time frames for manufacturers, distributors, and retailers to comply with the requirements of the rules. No prohibition on sale or manufacture of a consumer product in the State shall take effect sooner than two years after the adoption of a rule adopted under this subsection unless the Commissioner determines that an earlier effective date is required to protect human health and the new effective date is established by rule.

(2) On or before July 1, 2017, the Commissioner of Health shall adopt by rule the process and procedure to be required when the Commissioner of Health adopts a rule under subsection (a) of this section. The rule shall provide:

(A) criteria for evaluation of priority chemicals in a consumer product, including criteria for whether the consumer product should be prohibited from sale, subject to labeling, or subject to no regulation;

(B) requirements or time frames for phasing out the sale or distribution of a consumer product containing a priority chemical, including

whether retailers selling the consumer product shall be afforded an inventory exception;

(C) requirements or time frames afforded to a manufacturer to replace a priority chemical in a consumer product; and

(D) other criteria, requirements, time frames, processes, or procedures that the Commissioner determines are necessary for implementation of rulemaking under subsection (a) of this section.

(d) In addition to the public participation requirements of 3 V.S.A. chapter 25 and prior to submitting a rule authorized under this section to the Secretary of State under 3 V.S.A. § 838, the Commissioner shall make reasonable efforts to consult with interested parties within the State regarding any proposed prohibition of a priority chemical. The Commissioner may satisfy the consultation requirement of this section through the use of one or more workshops, focused work groups, dockets, meetings, or other forms of communication.

§ 1777. EXEMPTIONS

The requirements and prohibitions of this chapter shall not apply to a consumer product:

(1) that is an electronic device, a motor vehicle, an aircraft, or a vessel;

(2) in which the chemical of high concern is present solely within the internal components of the device, motor vehicle, aircraft, or vessel; and

(3) the internal components of which are encased in a housing, compartment, or panel or are otherwise inaccessible to a consumer using the product as intended.

§ 1778. CHEMICALS OF HIGH CONCERN FUND

(a) The Chemicals of High Concern Fund is established in the State Treasury, separate and distinct from the General Fund, to be administered by the Commissioner of Health. Interest earned by the Fund shall be credited to the Fund. Monies in the Fund shall be made available to the Department of Health and the Agency of Natural Resources to pay costs incurred in administration of the requirements of this chapter.

(b) The Chemicals of High Concern Fund shall consist of:

(1) fees and charges collected under section 1775 of this chapter;

(2) private gifts, bequests, grants, or donations made to the State from any public or private source for the purposes for which the Fund was established; and

(3) such sums as may be appropriated by the General Assembly.

§ 1779. CONFIDENTIALITY

Information submitted to or acquired by the Department or the Chemicals of High Concern Working Group under this chapter may be subject to public inspection or copying or may be published on the Department website, provided that trade secret information and confidential business information

shall be exempt from public inspection and copying under 1 V.S.A. § 317(c)(9) and information otherwise designated confidential by law shall be exempt from public inspection and copying under 1 V.S.A. § 317(c)(1). It shall be the burden of the manufacturer to assert that information submitted under this chapter is a trade secret, confidential business information, or is otherwise designated confidential by law. The Commissioner may publish information submitted or acquired under this chapter that is designated a trade secret, confidential business information, or otherwise confidential by law, provided that the information shall be published in a summary or aggregate form and the information shall not directly or indirectly identify an individual manufacturer or a business advantage of an individual manufacturer.

§ 1780. VIOLATIONS; ENFORCEMENT

A violation of this chapter shall be considered a violation of the Consumer Protection Act in 9 V.S.A. chapter 63. The Attorney General has the same authority to make rules, conduct civil investigations, enter into assurances of discontinuance, and bring civil actions under 9 V.S.A. chapter 63, subchapter 1. Private parties shall not have a private right of action under this chapter.

Sec. 3. REPORT TO GENERAL ASSEMBLY; TOXIC CHEMICAL IDENTIFICATION

(a) On or before January 15, 2015, and biennially thereafter, the Commissioner of Health shall submit to the Senate Committee on Health and Welfare, the House Committee on Human Services, the House Committee on Ways and Means, the Senate Committee on Finance, and the Senate and House Committees on Appropriations, a report concerning implementation, administration, and financing by the Department of Health of the toxic chemical identification requirements of 18 V.S.A. chapter 38A. The report shall include:

(1) any updates to the list of chemicals of high concern required under 18 V.S.A. § 1773;

(2) the number of manufacturers providing notice under 18 V.S.A. § 1775 regarding whether a consumer product includes a chemical of high concern;

(3) the number of priority chemicals in consumer products identified or regulated by the Department of Health under 18 V.S.A. § 1776;

(4) an estimate of the annual cost to the Department of Health to implement the toxic chemical identification program;

(5) the number of Department of Health employees needed to implement the toxic chemical identification program;

(6) an estimate of additional funding that the Department may require to implement the toxic chemical identification program; and

(7) a recommendation of how the State should collaborate with other states in implementing the requirements of the toxic chemical identification program.

(b) As part of the report submitted on or before January 15, 2015, the Commissioner of Health shall recommend a process or method of informing consumers in the State of the presence of a priority chemical in a consumer product. A recommendation under this subsection may include recommended legislative changes, rulemaking, public notice requirements, or reference to other publicly available resources that identify priority chemicals in consumer products.

Sec. 4. 18 V.S.A. § 1779 is amended to read

§ 1779. CONFIDENTIALITY

Information submitted to or acquired by the Department or the Chemicals of High Concern Working Group under this chapter may be subject to public inspection or copying or may be published on the Department website, provided that:

(1) Information that is protected under the Uniform Trade Secrets Act, as codified under 9 V.S.A. chapter 143, trade secret information, and confidential business information shall be exempt from public inspection and

copying under 1 V.S.A. § 317(c)(9) and information otherwise designated confidential by law shall be exempt from public inspection and copying under 1 V.S.A. § 317(c)(1). It shall be the burden of the manufacturer to assert that information submitted under this chapter is a trade secret, confidential business information, or is otherwise designated confidential by law.

(2) The Commissioner may publish information collected under this section provided that the information is not trade secret information or confidential business information, or is not otherwise designated confidential by law.

(3) The Commissioner may publish information submitted or acquired under this chapter that is designated a trade secret, confidential business information, or otherwise confidential by law, provided that the information shall be published in a summary or aggregate form and the information shall not directly or indirectly identify an individual manufacturer or a business advantage of an individual manufacturer.

(4) The Commissioner may require, as a part of a report or notice submitted under this chapter, that a manufacturer submit a notice or report that does not contain trade secret information or confidential business information and is available for public inspection and review.

Sec. 5. EFFECTIVE DATES

(a) This section and Secs. 1 (findings), 2 (toxic chemical identification program), and 3 (Department of Health report) shall take effect on passage.

(b) Sec. 4 (trade secret information) shall take effect on July 1, 2018.