

S.239: An Act Relating to the Regulation of Toxic Substances that Cause Harm to Children: Overview and Summary

Overview

- S.239 requires manufacturers of children’s products to notify the Department of Health (DOH) if their children’s product contains chemicals of high concern to children.
- S.239 also authorizes DOH to adopt by rule requirements for the sale of a children’s product containing a chemical of high concern to children, including labeling or prohibition on sale.
- S.239 is designed to be substantially similar to a Washington state law. California and Maine also require notice of chemicals in children’s products.

What is a Children’s Product?

- Under 18 V.S.A. § 1772(4), “child” or “children” means an individual under 12 years of age.
- In 18 V.S.A. § 1772(7), a children’s product is defined as a consumer product marketed for use by, marketed to, sold, offered for sale, or distributed to children in Vermont, including:
 - toys;
 - children’s cosmetics;
 - children’s jewelry;
 - products designed or intended to help a child with teething or sleep (e.g. pacifiers);
 - products designed for the feeding of child;
 - products worn as clothing by children; and
 - child car seats.

First Instance of Amendment in Senate Further Proposal amends definition of children’s products to include “any consumer products whose substantial use or handling by children under 12 years of age is reasonably foreseeable”

- For consistency with Washington’s program, multiple products are defined in 18 V.S.A. § 1772(7) and (8) as not being children’s products. Products that are not children’s products include:
 - products primarily used or purchased for industrial or business use;
 - food and beverage;
 - tobacco, pesticides, drugs, biologics, medical devices, and supplements;
 - ammunition, firearms, and hunting and fishing equipment;
 - aircraft, motor vehicles, or vessels;
 - batteries;
 - consumer electronic products and interactive software;

Second Instance of Amendment in Senate Further Proposal moved exemption for consumer electronic and interactive software from definition of children’s products to definition of consumer product.

- snow sporting equipment;
- inaccessible components of a consumer product;
- used products sold in second-hand markets; and
- the packaging of products.

What Chemicals are Listed?

- S.239 lists in statute, 18 V.S.A. § 1773, 66 chemicals of high concern to children. These listed chemicals are the chemicals listed in Washington.
- Under 18 V.S.A. § 1776, DOH may adopt by rule additional chemicals of high concern to children.
- A chemical may be added to the list if, based on scientific evidence, the Commissioner determines that accredited government or university research demonstrated that the chemical:
 1. harms the development of a child; causes cancer, genetic damage, or reproductive harm; disrupts the endocrine system; damages the nervous system, immune system, or organs; or is a persistent bioaccumulative toxic; and
 2. has been found through biomonitoring to be present in blood, breast milk, and human tissues; has been found through sampling to be present in the home environment; or has been found through monitoring to be present in the natural environment.
 - The 66 chemicals listed in Washington met these two criteria.
- Under 18 V.S.A. § 1773(b), DOH shall review the list biennially to determine if additional chemicals should be added.
- Under 18 V.S.A. § 1773(c), DOH shall post the list of chemicals to the DOH website.
- Under 18 V.S.A. § 1773(d), any person may request DOH adopt a rule to add or remove a chemical from the list.

Manufacturer Notice

- Under 18 V.S.A. § 1775, beginning on July 1, 2015, and biennially thereafter, a manufacturer of a children's product containing a chemical of high concern to children shall notify DOH of the presence of the chemical in the product.

Fifth proposal of Amendment in Senate Further Proposal moved the date for reporting chemicals in children's products from 2015 to 2016.

- Under 18 V.S.A. § 1775(a)(1) and (2), notice is not required for:
 - an intentionally added chemical that does not exceed a de minimis threshold, known as the practical quantification level; or

Third and Fifth Instance of Amendment in Senate Further Proposal strikes "intentionally added" as a standard for notice and replaces it with "present in"

- a chemical present in a product as a contaminant at a concentration of less than 100 ppm.
- Under 18 V.S.A. § 1775(b), DOH shall specify the format of notice. It shall include the name of the chemical, its registry number, a description of the children's product containing the chemical, the amount of the chemical by weight in the product, contact information, any information the manufacturer deems relevant, and any other information required by DOH.
- Under 18 V.S.A. § 1775(c), DOH may enter reciprocal data sharing agreements with states that collect similar data.

- Under 18 V.S.A. § 1775(d), DOH may waive reporting requirements if:
 - the manufacturer submitted data to a state that DOH has a data sharing agreement with; or
 - the manufacturer submitted information to an independent third party and the information is publicly available through the DOH website.

Fifth Instance of Amendment in Senate Further Proposal strikes a subsection that allows manufacturers to rely on a certificate of compliance from a supplier in determining whether notice is necessary. There were concerns about whether the Attorney General could effectively enforce or validate any certificate of compliance.

- Under 18 V.S.A. § 1775(i), DOH shall post on the DOH website the information submitted in a manufacturer's notice.
- Under 18 V.S.A. § 1775(f), a manufacturer can notify DOH at any time that their product no longer contains a chemical of high concern to children or is no longer sold in the State.
 - Upon verification of the notice, DOH shall promptly remove the product from the website.
- Under 18 V.S.A. § 1775(j), a manufacturer shall pay a fee of \$2,00 to DOH per chemical of high concern to children for which notice is provided.
 - The fees are deposited in a special fund created in 18 V.S.A. § 1777 to pay program costs.

Chemicals of High Concern to Children Working Group

- 18 V.S.A. § 1774 establishes a Chemicals of High Concern to Children Working Group within DOH to provide DOH with advice and recommendations regarding implementation of the requirements for chemicals of high concern to children.
- The Working Group consists of nine members:
 - the Commissioner of Health;
 - the Commissioner of Environmental Conservation;
 - the State toxicologist;
 - representatives of public interest groups with expertise in toxic chemicals or health related issues;
 - representatives of business that use chemicals;

Fourth Instance of Amendment in Senate Further Proposal reduces the number of members on the Working Group by reducing the number of representatives from businesses from two to one

- a scientist with experience in toxic chemicals; and
- a representative of the children's product industry.
- The Governor appoints the non-ex officio members. The Governor may also appoint an additional three adjunct members.
 - The adjunct members shall have particular expertise with the chemicals before the group.
- The Working Group shall:
 - upon request of the Commissioner of Health review proposed chemicals for addition to the list of chemicals of high concern to children; and
 - recommend to the Commissioner whether rules should be adopted to regulate the sale or distribution of a children's product containing a chemical of high concern to children.

Rules to Regulate Children's Products Containing a Chemical of High Concern to Children

- Under 18 V.S.A. § 1776(d), DOH is authorized, upon recommendation of the Chemicals of High Concern to Children Working Group, to adopt a rule to regulate the sale or distribution of a children's product containing a chemical of high concern to children upon determining that:
 - children will be exposed to a chemical of high concern to children in the children's product; and
 - there is a probability that, due to the degree of exposure or frequency of exposure to a chemical of high concern to children, exposure could result in an adverse health impact.

Sixth Instance of Amendment in Senate Proposal struck the requirement that the Working Group make a recommendation prior to the Commissioner adopting a rule to regulate the sale of labeling of a children's product

- In determining whether a child will be exposed to a chemical of high concern to children, DOH will review multiple criteria, including its market presence, its presence in households, and potential frequency of exposure.

Sixth Instance of Amendment provides that DOH shall review one or more of the listed criteria, instead of all of the criteria for determining if the sale of a children's

Sixth Instance of Amendment also requires DOH as part of its required rulemaking to provide criteria by which a chemical shall be prioritized for addition or removal from the list of chemicals of high concern to children or for regulation or sale or labeling

- In any rule regulating the sale of a children's product, DOH shall include reasonable time frames for compliance.
- Under 18 V.S.A. § 1776(d)(4), no prohibition on sale shall take effect sooner than two years from adoption of the rule.
- Under 18 V.S.A. § 1776(f), the Commissioner shall adopt by rule the process and procedure for listing a chemical or for regulating a children's product.
- The Commissioner may adopt by rule reporting ranges or phased in reporting.

Violations

- Under 18 V.S.A. 1779, a violation of the requirements of 18 V.S.A. chapter 38A relating to Chemicals of High Concern to Children shall be a violation of the Consumer Protection Act.
- The maximum penalty for a violation of the Consumer Protection Act is a civil penalty of not more than \$10,000.00 per violation.
- The Attorney General shall have the same rights and authorities for enforcement under the Consumer Protection Act to enforce the requirements of 18 V.S.A. chapter 38A.
- There is no private right of action.

Appeals

- Any act or decision of DOH may be appealed under 18 V.S.A. § 128 to the State Board of Health.
 - An appeal from the decision of the State Board of Health is directly to the Vermont Supreme Court.
- A person can appeal an enforcement action by the Attorney General in the civil division of the Superior Court.

Confidentiality

- Under 18 V.S.A. § 1778, trade secrets, confidential business information and other confidential information shall not be public.
- If a chemical in a children's product is a trade secret, the Commissioner shall not post the specific chemical, but shall post the class of the chemical and its health effects.

The Seventh Instance of Amendment in the Senate Further Proposal provides that DOH can publish trade secret information in an aggregate form if the published information does not identify the manufacturer or disclose a business advantage.

The Eighth Instance of Amendment in the Senate Proposal of Amendment strikes a requirement for the packaging of liquid nicotine sold in the State. Similar, but different, language was passed by the Senate already.

The Eighth Instance of Amendment also amends the Effective Date section to reflect that the section of liquid nicotine was removed.