IBM Testimony on S.239
Regulation of Toxic Substances
Senate Health and Welfare Committee
Ruma Kohli, Product Stewardship Mgr, Jan 30, 2014

Thank you for the invitation to testify today regarding S.239, a bill proposing the restriction of chemicals in consumer products. I am Ruma Kohli, Product Stewardship Program Manager for the IBM Corporation in Essex Junction, Vermont. My responsibilities are to ensure that IBM's Microelectronics Division products meet worldwide chemical content and product stewardship regulations.

IBM has established itself as a leader in the elimination of its use of hazardous chemicals from its manufacturing processes and products. IBM's product specification defines over 100 chemicals which have been banned and/or restricted from our supply chain. However, this bill, as written lacks **clarity, certainty and predictability**.

The following are some of our key concerns with the bill. These concerns are not limited to IBM. Many other electronics manufacturers would share our concerns with the proposed bill.

Harmonization with Existing Global Chemical Management Regulations & Requirements

The overall environment for the regulation of chemicals throughout the world has been one of significant activity in both the U.S. and globally. Regulations continue to identify chemicals for which regulatory restrictions are being tightened in different states. In addition, the U.S. House and Senate are actively engaged in Toxic Substances and Control Act (TSCA) reform along with the EPA and other stakeholders.

It is important for Vermont to clearly understand what these other laws and regulations require before legislating in this area. Otherwise, there is a strong likelihood that Vermont's requirements will conflict with the requirements of these other laws, create confusion for those tasked with compliance and enforcement, and unnecessarily restrict the provision of environmentally safe goods into Vermont.

Harmonizing proposed new Vermont chemical restrictions with other chemical regulatory programs is a more efficient way to implement chemical restrictions and avoids placing Vermont at a competitive disadvantage in the global marketplace.

Clarity of definitions in Section 1772:

*** Definition of "Chemical" :**

The proposed bill defines "Chemical" as an element or 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 or metabolism.

Our concern is that the definition for chemicals should have more specificity on what is a group of structurally related substances and what are the breakdown products of the substance or substances. The proposed definition is too encompassing. Structurally related chemicals may not have the same hazards or chemical characteristics.

*** Definition of "Consumer Products"**

The proposed bill defines "Consumer product" as any item sold for personal use, including any component or packaging.

This definition of "consumer product" is much too broad. It is important to get a precise definition, so as not to have the unintended consequence of the bill covering beyond the general meaning of consumer products. Regulation at the component level rather than the final product as used by the consumer adds unnecessary complexity.

*** Definition of "De minimis level"**

The proposed bill defines "de minimus level" to mean 100 parts per million unless another level is determined by the Commissioner, in consultation with the Secretary, to be anticipated reasonably not to pose a threat to the human health and the environment.

The compliance level for the chemicals of concern should be consistent with other regulations, such as the European Union's REACH regulations that specify a limit of 1000 ppm or 0.1% threshold that applies as a weight percent of the final article. Any inconsistency is potentially problematic for any Vermont manufacturer that exports. Many manufacturers of products design, manufacture, market and distribute on a global basis and do not separate products for sale in specific jurisdictions. Inconsistencies across jurisdictions represent a serious concern for compliance, market access and global flow of commerce. Vermont should recognize and not conflict with current regulatory requirements which are globally implemented and based on extensive review by chemical authorities.

Disclosure of Information on Chemicals of High Concern:

As specified in the proposed bill, some of the information requested in this section such as the function of the chemical in the product may be considered proprietary by the manufacturer. There must be considerations for the Confidential Business Information (CBI) protection of intellectual property of the material and its use in the product.

Imposing Monetary Impacts on Manufacturers:

The proposed bill imposes a payment by manufacturers for every disclosure of a chemical of high concern in a product. This is likely to cause business to avoid the Vermont market. Manufacturers could have multiple chemicals of high concern to report in a single product.

Currently, the proposed bill would result in a fee for every chemical of high concern identified in the product.

In addition, the proposed default de minimis level is quite low when compared to de minimus levels in other regulations; the fee description of "up to $5000" is ambiguous and potentially arbitrary.

If this fee is enacted, manufacturers may not only be saddled with multiple payments for many of their products to be sold in Vermont, but should other states adopt such a provision, the fees could consume the entire profit margin for such products sold in the US. Producers may be forced to withdraw the goods from those markets.

Harmonizing with other State Legislation:

Harmonizing legislation with other states has to consider the possibility of different product scopes. The Vermont proposal is for all consumer products, while Washington state is a considerably smaller subset defined as children's products.

Consideration of Potential Exposure to Chemicals of High Concern in Products:

Toxicity determination must consider clear identification of the chemical, the minimum concentration of the chemical which may create risk, and the types of exposures to humans which can cause harm.

The exposure should focus on the question of whether the chemical is in a form or substance that would allow absorption by a human at or above the threshold level. For example, if the chemical in question is completely encapsulated in an impervious substance and is inaccessible during normal and foreseeable use of the product, it is not a risk factor (provided disposal is managed appropriately). S.239 ignores consideration of these criteria and seeks an absolute ban on substances in all products. Regulation should be focused on actual risks rather than perceived risks.

Alternatives Assessment Methodology:

Vermont should develop clear guidance on the alternative assessment methodology, taking into consideration the work that is being done by other states in this arena. The guidance should have the necessary flexibility and be modular (allow focusing on parameters relevant to the product being evaluated). It should result in comparable or improved product performance, value consumer acceptance, include informed decision making, allow for gradual and measured implementation, and include a feasibility check to make sure that proposed alternatives actually meet goal sets. The Alternates assessment process should avoid regulatory mandates that stifle innovation.

The reference on p 6 (lines 17-18) to a peer reviewed hazard assessment tool used by government or business entities suggests that multiple tools may be acceptable. Will these be specified? Can companies "peer review" other new tools for this purpose? Who are the authorities qualified to provide peer review for such tools?

Specific Concerns with Section 1775 Removal, Replacement and Waivers:

(b) (1) When Manufacturer of a consumer product removes a chemical of high concern from a consumer product by replacing it with another chemical, the manufacturer shall submit to the Department an assessment that demonstrates that the proposed replacement is a safer alternative.

Vermont should be providing clear guidance on what would constitute an acceptable alternate assessment submission.

(b) (2) If the department determines the replacement chemical is not a safer alternative, the manufacturer shall submit a revised assessment within 60 days, or seek a waiver as described in subsection (c) of this section.

In our opinion and based upon our experience with chemical process substitution, this is an unrealistic timeline for submitting a revised assessment. Vermont needs to include provisions for an extension should they be required.

(d) The department shall assess whether the manufacturer has replaced the Chemical of High Concern with a safer alternative. The department shall approve or disapprove a safer alternative assessment or waiver application, or offer alternative remedies such as labeling, within 180 days of its submittal.

There is a concern that the implementation of the legislation would severely challenge the limited resources of the Dept of Health. The legislation requires significant evaluation and research on even a single chemical to make a determination of an acceptable substitute across a diverse industrial base.

If department disapproves a safer alternatives assessment or waiver application, the manufacturer may submit a revised safer alternative assessment or waiver application for consideration within 180 days of the disapproval.

In our opinion and based upon our experience with chemical process substitution, this is an unrealistic timeline for submitting a revised assessment. Vermont needs to include provisions for an extension should they be required.

Thank you for your consideration. For additional information or questions, please contact:

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