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REPRESENTING THE VERMONT INDUSTRIAL AND BUSINESS COMMUNITY SINCE 1920

Testimony on Amendments to Act 188 in S.139

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Overview

Act 188 was finalized after lengthy and involved engagement and debate between interested parties, regulators, and legislators. We remain concerned about a number of aspects of the final act and pending implementation issues. Nevertheless, the Act incorporated substantial compromises intended to balance significant and legitimate concerns from all sides.

The Health and Welfare amendments in S.139 undermine key elements of Act 188. The substance of the amendments are ultimately without merit and risk negative consequences. Arguments that these amendments must be rushed into enactment to avoid federal preemption are without factual basis. The manner in which these amendments were taken up and passed out of Committee without notice to or input from key stakeholders did not reflect appropriate legislative process.

Problems with the Timing and Process of the Amendments

It has been asserted that these amendments are not only necessary but had to be acted on quickly and without notice to all interested parties because action is needed before federal legislation preempts the amendments in question. Such assertions are simply without factual basis.

While bipartisan federal TSCA reform supported by a wide range of stakeholders has been introduced in the Senate and it can be hoped that it will eventually be enacted, the federal preemption provisions in this bill do not support the timing or substance of the Committee's amendments. On the one hand, the legislation in question would preempt state actions taken after January 1, 2015. On the other hand, these preemptions are focused on state actions on specific chemicals, not on the procedural matters addressed by the Committee's amendments. In either context, this federal legislation does not justify the amendments to Act 188.

Moreover, even if the federal legislation was relevant to the proposed amendments, the basic principles and elements incorporated in the recently introduced federal legislation, as well as the fact that it would be introduced, have been well and widely known for weeks and even months. It is simply not credible that the advocates of the Committee's amendments did not have time to propose them and that stakeholders could not have been notified and testimony arranged in a timely manner.

Problems with the Substance of the Amendment

The amendments remove or weaken at several points the standards of science, practical reality, and due process by which the Department of Health is to consider action on specific chemicals and products. This raises the prospect that chemicals and products could be targeted or restricted without sufficient justification, to the potential detriment of consumers and their families, retailers, and manufacturers.

The following are highlights of the key problems with specific changes in the bill as introduced:

- Page 14 line 7. The Commissioner should be focusing on examining the chemicals of highest health concern when considering recommendations for review by the Working Group. This amendment dilutes this focus.

- Page 14 line 21 to Page 15 line 1. Scientific studies can reach differing and even conflicting conclusions. Directing the Commissioner to consider the weight of credible studies helps ensure the consideration and weighing of potentially differing studies and attempts to avoid the risk of subjective selectivity. This amendment takes away this important guidance.

- Page 16 lines 7-8. The question of regulating, including potentially banning, a product raises a number of legitimate and important issues, including health concerns; scientific and technical issues; design, production, and utilization issues; consumer and economic needs and interests; etc. The scope of these issues extends beyond the purview of the Department of Health. That is why one of the key functions of the Working Group is to help bring this full range of expertise and perspective to the decision of whether or not to move toward regulating specific products.[1] This amendment takes away this role of the Working Group and empowers the Department to act on products regardless of Working Group input, thereby removing this key assurance of due process.

The remaining amendments generally raise the same core concerns. The simple presence of a chemical in a product is not the deciding factor in determining threats to human health. Human health is impacted by the degree of toxicity of a chemical and the degree, including amount and frequency, of exposure to a chemical in a manner that can impact health. To be credible and responsible, regulation of chemicals and products must consider and reflect this reality. The underlying statute includes a number of provisions to help ensure this. The Committee's amendments undo or undermine several of these provisions.

- Page 16 lines 11-13. The key problems related to this provision are primarily in the criteria by which the Department is to make the determination in question (see comments on page 17 lines 4-12). Nevertheless, some might suggest that whereas the existing language addresses products that expose children to a chemical of high concern, taken literally the new language could be taken to address any product containing a chemical of high concern that children might be exposed to from any source, not necessarily the product in question.

- Page 16 lines 14-19. This amendment deletes the need to determine an actual threat to human health owing to exposure, and replaces it with the existence of "safer alternatives" to the chemical in question. It thereby removes the most relevant and necessary precondition for rational and responsible regulation, and replaces it with a consideration that has no direct relevance to the safety of a given product.

- Page 17 lines 4-12. These amendments affect how exposure is to be determined as required in the provisions addressed above (see comments on page 16 lines 11-13 above). The underlying statutes directly address various aspects of actual or potential exposure to a chemical in a product. The amendment strikes these considerations and replaces them simply with the amount of a chemical in a product. However, the amount of a chemical does not by itself translate into actual or potential exposure, and is therefore not directly relevant to health risk.

Conclusion and Recommendations

The Committee amendments undo or undermine important provisions of Act 188. They were passed by Committee based on arguments that were ultimately without substantive or factual merit. We recommend that the Committee propose to strike these amendments in their entirety from the underlying bill.

[1] See attached list of Working Group member categories.

Working Group Membership Summarized from Act 188:

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:

- The Commissioner of Health or designee, who shall be the chair of the Working Group;
- The Commissioner of Environmental Conservation or designee;
- The State toxicologist or designee;
- A representative of a public interest group in the State with experience in advocating for the regulation of toxic substances;
- A representative of an organization within the State with expertise in issues related to the health of children or pregnant women;
- One representative of businesses in the State that use chemicals in a manufacturing or production process or use chemicals that are used in a children's product manufactured in the State;
- A scientist with expertise regarding the toxicity of chemicals; and
- A representative of the children's products industry with expertise in existing state and national policies impacting children's products.
- In addition to the members of the Working Group above, the Governor may appoint up to three additional adjunct members. An adjunct member shall have expertise or knowledge of the chemical or children's product under review or shall have expertise or knowledge in the potential health effects of the chemical at issue.