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To: Senate Committee on Finance

From: Jill Rickard, Director of Policy, Department of Financial Regulation
Pat Murray, Senior Rate & Form Analyst, Department of Financial Regulation

Date: March 15, 2018

Re: S.197, an act relating to liability for toxic substance exposures or releases

Thank you for the opportunity to testify on Draft 4.1 of S.197. While the bill would strengthen existing civil remedies available to Vermonters harmed by exposure to toxic chemicals, the bill would also significantly impact the markets for commercial and personal lines insurance. This is because the bill imposes strict liability upon any person, whether a manufacturing company, a small business, or your own neighbor, who intentionally or unintentionally releases any substance classified as toxic.

As the State’s insurance regulator, DFR is concerned about both the effect of S.197 on Vermont’s stable and affordable insurance market and the potential for significant uninsured losses for Vermont citizens.

I. Commercial Insurance

S.197 may impact commercial general liability, commercial auto, professional liability, and umbrella/excess liability policies.

- These types of commercial policies provide for legal defense by the carrier for the insured in case of a “covered occurrence,” which is generally limited to bodily injury and property damage, and payment on the insured’s behalf (indemnity) if the insured is “legally obligated” to pay damages. If strict liability were imposed, an insurance company would have no opportunity to assert defenses on behalf of the insured, including



an affirmative defense that another party is actually responsible for the release. This would significantly increase insurance payouts and would likely result in insurance carriers becoming reluctant to insure risks where there is any chance for a toxic release.

- If the underwriting risk becomes too high, insurers might (1) broaden their pollution exclusions, (2) significantly increase rates, and/or (3) pull out of the market completely.

II. Personal Lines Insurance

Because S.197 subjects “any person” to strict liability for the release of a toxic substance, the bill may impact personal lines policies, including homeowners’ (which includes renters’ insurance, condominium unit owners’ insurance, mobile home owners’ insurance), auto, watercraft, and umbrella/excess liability policies.

- The issue of an inability to provide defenses where the standard is strict liability would also apply in the case of personal lines policies.
- DFR does not permit pollution exclusions in personal lines policies. In other words, any personal lines policy issued in Vermont must provide coverage for the toxic releases addressed by this bill. Therefore, insurance companies may choose not to underwrite certain policies if a release of toxic substances is possible. For example, insurance companies could refuse to underwrite or significantly increase homeowners’ insurance rates for properties with above- or below-ground heating oil storage tanks.
- This bill establishes a standard of strict liability for “any personal injury or property damage” resulting from the release of a toxic substance. “Property damage” is not defined in the bill but may be interpreted to include loss of property value. In personal liability policies, property damage is typically defined as “physical injury to tangible property, including all resulting loss of use of that property.” Insurance companies have typically rejected claims for loss of market value. Therefore, homeowners may be subject to uninsured liability for releases, including accidental ones, that negatively affect property values.