ASSOCIATED INDUSTRIES OF VERMONT

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Comments on S.55

House Human Services Committee

William Driscoll, Vice President

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Thank you for the opportunity to provide comments on S.55. We are concerned that S.55 would undermine the integrity and credibility of Vermont's regulation of chemicals in children's products (Act 188) by eliminating key scientific and health criteria and regulatory requirements, making it easier to require testing and reporting on additional chemicals and to ban or otherwise restrict products in Vermont without appropriate scientific, health-based, or other necessary justification.

Interagency Committee on Chemical Management

With regard to the provisions in S.55 addressing the interagency committee and stakeholder advisory group tasked with reviewing and considering a number of ways to improve and possibly expand Vermont's chemical laws and regulations, we would simply note that the Interagency Committee on Chemical Management and its Citizen Advisory Panel have already been established and done a significant amount of work. Although there would not appear to be any pressing need to pass these provisions in statute, to the extent that they are consistent with the existing ICCM make up and charge, we have no objection to them.

Changes to Act 188

The provisions of particular concern in S.55 are those making harmful changes to Act 188 in Sections 4 and 4a of the bill as passed by the Senate:

Weight of scientific evidence:

When the Commissioner of Health proposes rules to add chemicals to the scope of Act 188, 18 VSA §1776(b) requires that the Commissioner determine that additions are supported by the "weight of credible, scientific evidence" to help ensure that the Commissioner does not simply selectively cherry-pick evidence that he or she claims to be credible to add chemicals.

The addition of chemicals should be firmly based in solid science, and citing the weight of credible scientific evidence is not an unusual or unduly difficult guiding standard to use. No credible evidence has been provided to back up claims that "weight of scientific evidence" is an unworkable standard -- indeed, the Department of Health has proposed adding 20 chemicals to the list of Chemicals of High Concern to Children and it does not appear that the statutory criteria for adding chemicals has presented any unwarranted obstacles or burdens for the Department.

S.55 would weaken this criterion. The inclusion of "peer-reviewed" is not necessarily in and of itself problematic, but it is not a sufficient substitute for weight and credibility. There have been controversies surrounding peer-review, and different peer-reviewed studies can conflict or have different levels of confidence and credibility. The fact that S.55 as passed by the Senate now retains "credible" scientific information is an improvement over past proposals, but we still strongly recommend leaving the existing statutory language in place.

Role of the Working Group:

Under Act 188, a Working Group of agency, environmental, manufacturing, and other stakeholders is responsible for recommending consideration of banning or restricting products before the Commissioner of Health initiates such rulemaking. Such decisions should be based on several considerations. Health risk is clearly a significant factor. However, considerations like economic impacts, customer needs, available feasible alternatives, and others are also important, especially if health concerns are not at critical levels.

These additional considerations are outside the core competency of the Health Department. These regulatory decisions have traditionally been made by the Legislature, which can receive input and make decisions based on the full range of considerations. Because Act 188 took the Legislature out of this role, the Working Group was intended to ensure that broader perspectives are responsible for initiating rulemaking.

S.55 would remove this role of the Working Group and authorize the Health Commissioner to ban or restrict products on his or her own rulemaking authority. Such broad regulatory discretion for a single agency, especially with the lowered standards discussed below, would be largely unprecedented. Although the joint Legislative Committee on Administrative Rules reviews new regulations, LCAR's opposition to a rule does not necessarily block that rule, and LCAR cannot simply apply standards and criteria to new rules that are not based in statute. Despite its role in rulemaking, therefore, its review of rules is not a meaningful substitute for the full legislative process, meaningful statutory criteria, or the current role of the Working Group. Again, we strongly recommend leaving the existing statutory language in place.

Exposure:

Act 188 establishes two key criteria for proposing rules to ban or restrict children's products containing chemicals of high concern to children: (1) whether children will be exposed to the chemical, and (2) whether that exposure is at a level that raises health concerns. It has been claimed by supporters of the provisions in S.55 that the criterion that children will be exposed to a chemical in a product provided in 18 VSA §1776(d)(1)(A) requires an unreasonable degree of specific certainty:

(A) children will be exposed to a chemical of high concern to children in the children's product; and

However, this is not the case. In fact, what is required to determine exposure is explicitly outlined in 18 VSA §1776(d)(2):

(2) In determining whether children will be exposed to a chemical of high concern in a children's product, the Commissioner shall review available, credible information regarding:
(A) the market presence of the children's product in the State;
(B) the type or occurrence of exposures to the relevant chemical of high concern to children in the children's product;
(C) the household and workplace presence of the children's product; or
(D) the potential and frequency of exposure of children to the chemical of high concern to children in the children's product.

By allowing a very broad review of whether potential exposure pathways exist, this would not appear to be the unobtainable or unreasonable standard claimed by critics, and the changes to make this standard weaker in S.55 are not warranted.

Probability of health risks:

The second, and most important, question essential to whether a product should be banned or otherwise restricted is whether exposure to a chemical in the product actually poses a health risk. If the chemical is not present in levels that raise health concerns or exposure is so limited as to not trigger health concerns, there are not necessarily grounds to ban or restrict the product. This is currently addressed in 18 VSA §1776(d)(1)(B):

(B) there is a probability that, due to the degree of exposure or frequency of exposure of a child to a chemical of high concern to children in a children's product, exposure could cause or contribute to one or more of the adverse health impacts listed under subdivision (b)(1) of this section.

S.55 would strike this standard entirely, so that there would not be any required consideration of whether a real health risk from a product exists. This is unreasonable and inappropriate, and is a potentially dangerous precedent in foregoing any requirement to demonstrate an actual health or environmental basis for product or other regulations. Once again, the existing statute should remain.

Reporting on products between biennial reporting deadlines:

Act 188 requires manufacturers to test children's products and report on the detectable presence of listed chemicals on a biennial basis. There have been calls to change the statute to require that testing and reporting take place before new products are first made available for sale if this occurs in between the regular reporting deadlines.

However, the testing and reporting required under Act 188 are expensive and administratively burdensome, and this would be compounded with rolling, product by product testing and reporting deadlines prior to sale rather than regular, biennial reporting -- especially for smaller manufacturers. It would also run counter to the statutory policy directive to attempt to conform as much as possible with other states (18 VSA §1771), which would include the goal of attempting to align reporting requirements.

Given that the reporting required under Act 188 is based on the detectible presence of listed chemicals, and is not based on whether that presence presents a health risk (indeed, the statute requires a disclaimer[1] to consumers stressing this point), as well as the extensive existing array of regulations addressing product safety, there is not a demonstrable compelling public policy need to require this specific reporting prior to sale.

AIV would recommend retaining the biennial reporting schedule in existing statute. Nevertheless, if S.55 were to pass with the provision proposed in Section 4 (18 VSA §1776(f)(1)(D)) to require rulemaking on when and how to address products made available for sale between biennial reporting periods, AIV would of course work with the Department and stakeholders to determine what if any alternative requirements might be reasonable and appropriate.

Let Act 188 Work

Act 188 was developed and enacted in 2014 following extensive discussion, debate, and deliberation in an attempt to craft an ambitious and unprecedented law in as balanced, fair, and credible a manner as possible. The law has been in place, companies have complied with the law, rules have been developed and further rulemaking is proceeding, and there has been no evidence that any problem claimed by advocates for the changes represented in S.55 has manifested.

AIV would recommend that the Committee either not act on S.55 or strike Sections 4 and 4a. Although we would be willing to discuss possible alternatives to provisions in existing statute that might address critics' concerns while still maintaining the credibility and integrity of Act 188, we believe the existing statutory language provides important guidance, standards, and criteria that should not be weakened or removed.

Thank you for your review and consideration of these comments and recommendations.

[1] "The reports on this website are based on data provided to the Department. The presence of a chemical in a children's product does not necessarily mean that the product is harmful to human health or that there is any violation of existing safety standards or laws. The reporting triggers are not health-based values." 18 VSA §1775(i)