March 15, 2016

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Commissioner, Department of Health
PO Box 70
Burlington, VT 05402

**RE: Chemicals of High Concern in Children's Products; Chemical Disclosure Program Guidance Document**

We appreciate the opportunity to provide comments on the above referenced Guidance Document. Please do not hesitate to contact us regarding these comments and related matters.

**Overview**

The Chapter 6 Rule and Guidance Document represent the most significant data development requirement for children's products of any state in the country. We have several concerns with the draft Guidance Document, including that fact that it runs contrary to very clear legislative intent to not create unduly burdensome or inconsistent requirements, particularly when other states have acted more consistently when addressing the same issues.

**Section 3: Who Needs to Report**

Vague aspects of the Rule and the Guidance Document appear to create reporting obligations for entities within a children's product supply chain, particularly as it relates to the obligation for an entity "whose name is affixed to the product". There can be several names affixed to a product, based upon materials, components, and technology contained within a given product. The result is confusion about who should report and the potential for duplicative efforts with multiple entities attempting to report on the same products.

A finished children's product can have the names of several entities affixed to it that are only associated with components (e.g., buttons, zippers, fabric, fibers, imprints of licensed characters, etc.) of the product. Entities other than the final manufacturer would not be in a position to have sufficient knowledge of the finished product composition to determine whether reporting would be required.

Component manufacturers whose component might contain a chemical of high concern would not have sufficient knowledge of the finished product composition and other required details to meet the reporting requirements. It is unclear from the statutory and regulatory language which entity, in this circumstance, is required to report. The examples provided in the guidance document do not address such a scenario.

The actual manufacturer of the finished product has the best knowledge of the product composition, especially in the case of private label products that carry the brand name of another company. Therefore, it is common practice for the manufacturer to report chemical data under these types of programs – especially in the case of private label manufacturing. Either they or the entity that holds itself out as the manufacturer of the product (e.g., private labeler) is typically responsible for reporting in other states. In other states the manufacturer works within their supply chain to understand the presence or absence of chemicals of high concern and the final concentrations in the finished product. More detailed guidance is needed in Vermont's case to clarify which entity is required to provide that notice and reduce the unnecessary burdens on the Department that could result from over reporting.

We recommend that the Department provide additional examples that include multi-entity branding and private labeling scenarios that clarify that manufacturer or private labeler reporting. We suggest that the following scenarios be added to the guidance as examples:

1. ***U.S. based FUNTOY manufactures a children's product using several components including a material purchased from U.S. based Company B. The finished product bears the brand name of FUNTOY as well as Company B's brand under a licensing agreement with FUNTOY. FUNTOY is considered the manufacturer and is responsible for reporting. Entities that do not have knowledge of the final product composition are not intended to be considered the "manufacturer" for purposes of reporting.***

2. ***U.S. based FUNTOY manufactures a children's product for U.S. based Company A using several components including a material purchased from U.S. based Company B. The finished product is sold under the private label brand of Company A but Company B's brand name also appears on the product under a licensing agreement with Company A. Company A, as the private labeler, is considered the manufacturer and is responsible for reporting. Where private labelers hold themselves out as the manufacturer of the finished product, they are considered the "manufacturer" for purposes of reporting.***

3. ***U.S. based FUNTOY contracts with a third party outside of the U.S. to manufacture or assemble a children's product using components from US based component manufacturer CoolWigit and includes images from BIGMovie on the product, and is sold by KidToyInc. The children's product bears the brand names for FUNTOY as well as the names CoolWigit and BIGMovie under licensing agreements. FUNTOY is considered the manufacturer and is responsible for reporting. Entities who do not have knowledge of the final product composition are not intended to be considered "manufacturers" for purposes of reporting. Even where the brands of manufacturers of components or entities that are only allowing the use of an image in a final product are affixed to the children's product, those entities are not required to report.***

**Section 4(e)7: Brand Name & Product Model Reporting Remains Unclear**

*(We note that Section 4 has two "e" provisions and will need to be renumbered. The comments below and following refer to provisions as numbered in the draft)*

The Guidance Document only seems to indicate that reporting down to a "product model and brand name" level must be descriptive enough to "easily locate" a product and that it cannot be the GPC Brick code level of reporting. Yet given the unprecedented nature of having to report this type of information for children's products, the guidance is insufficient. No examples are specifically given for what would qualify for compliant reporting. SKU or PLU numbers are mentioned, but no generic examples are provided as to what would be deemed compliant. Thousands of different product sizes or variations might have different SKU/PLU numbers but be of one brand name and model. Additionally, multiple different entities can import identical products which will subsequently be sold under different brand names or SKUs/PLUs for different retail customers.

Does every SKU/PLU require a report for every size/assortment or does the brand name and product model suffice to "easily locate" a product? If the Department continues to intend to require such level of reporting, beyond any other jurisdiction in the country, extensive examples must be provided here to ensure consistency and adequacy in reporting.

**Section 4(g): Six-Month Reporting Period**

The six-month reporting period includes a confusing and infeasible requirement that "the six-month reporting period means that by the end of the six month period [initially July 1, 2016], all products that are offered for sale and all products that are planned to be offered for sale until December 31, 2017, should be reported."

For most companies, having to list SKU level details for products 18 months out would violate intellectual property license agreements and, at a minimum, provide confidential information on products that simply cannot be shared that far in advance owing to confidentiality requirements and the market for children's products. This requirement is unnecessary, given that, right above it, the Guidance Document already states "every product that meets the reporting criteria should be reported at the time it is placed on the market or before." Therefore, we recommend that the above referenced sentence of concern should be removed from the Guidance Document or clarified if it misstates the Department's intent.

Additionally, if reporting for a product is required prior to placing a product on the market, this requirement cannot be met for the first six months of 2016, given that products are already on the market and there is no reporting tool currently available. For future reporting years it isn't clear whether products must be reported starting January 1 or if the first six months of products can all be addressed in a report submitted on July 1. The Department must provide clarity on the timing of reporting, such that there is the clear ability for companies to report once during the six-month period for new products brought into the market that year or that will be brought into the market later in the year.

**Section 4(i): Products No Longer Offered for Sale**

It is agreed that products that were offered for sale prior to the reporting dates do not need to be reported. However, it is virtually impossible to determine if *all* products in retailers' inventories are depleted at any point of time prior to a reporting period. Doing so would require full shelf audits at extreme cost to retailers, especially very small retail establishments. Therefore, we recommend that this section be clarified such that it indicates *"…items that are currently offered for sale* ***by a manufacturer*** *need to be reported* ***by July 1, 2016, or re-reported on a biennial report in the future."***

**Section 5(a): Chemical Control Program Reporting Exceeds Statutory Authority**

As provided in 18 VSA §1775(e), manufacturers that have in place a manufacturing control program through which they exercise due diligence to reduce the presence of a Chemical of High Concern to Children (CHCC) that is only present in the product as a contaminant – as defined in 18 VSA §1772(9) – are not required to report the presence of the CHCC. This language was an important and deliberate inclusion in the statute and is consistent with legal provisions in Washington, Maine, and Oregon. We appreciate that the Department recognizes what constitutes due diligence, including compliance with ISO requirements and ASTM International Standards.

However, we are concerned that the Guidance Document states that "Manufacturers who rely on their chemical control program to exempt themselves from reporting chemicals present as contaminants ***should*** provide the Department with a summary of their chemical control program [emphasis added]." This direction is not supported by the statute and exceeds the statutory authority provided to the Department to implement this law. Creating such a data submission requirement is also particularly inappropriate in a guidance document, which does not have the weight of law and is not subject to review and administrative procedures and appeals.

Furthermore, no other state that has a chemical control program provision requires such a submission.

Additionally, because this information would not be protected from public disclosure, such a requirement undermines the intent of this exemption and could essentially result in the release of confidential business information. Specifically, companies have non-disclosure agreements with suppliers regarding chemical composition and would not be able to disclose these manufacturing processes to the Department, unless there was a direct request or active investigation where administrative investigative procedures would allow for some information sharing with some provision for confidentiality.

We recommend that this direction be deleted.

**Section 5(b): Certificate of Compliance Reporting Exceeds Statutory Authority and Confuses Responsible Entity Issues**

As provided in 18 VSA §1775(g), manufacturers may rely on certificates from their suppliers to determine if they need to report the presence of a Chemical of High Concern to Children (CHCC). This language was an important and deliberate inclusion in the statute and is consistent with legal provisions in Washington and Maine.

However, we are concerned that the Guidance Document states that "a manufacturer who relies on the certificate of compliance to negate the need to report ***should*** provide a copy of the certificate to the Department [emphasis added]." As with the suggestion of submitting a manufacturing chemical control program to the Department, this direction is not supported by the statute and exceeds the statutory authority provided to the Department to implement this law, especially in a guidance document, which is not an appropriate venue to create (or imply the creation of) such a putative legal requirement.

Furthermore, no other state that has permits reliance on supplier certifications requires such a submission.

Additionally, this information could contain highly confidential business practices and information that are protected by contractual agreements governed by other jurisdictions. As with the concerns noted above, companies that have non-disclosure agreements with suppliers regarding chemical composition would not be able to disclose this information to the Department unless there was a direct request or active investigation where administrative investigative procedures would allow for some information sharing under some level of confidentiality.

Moreover, a product can be made up of materials from dozens of suppliers. One company can make thousands of products, which could total up to tens of thousands of certificates that might need to be submitted to the Department.

Finally, this potential requirement further confuses the nature of the responsible entity for reporting and creates a potential dual responsibility between suppliers and manufacturers, which is an untenable situation if compliance and enforcement actions are necessary.

Certificates of compliance are confidential business-to-business documents, which are meant to assist the manufacturer in determining their obligations for reporting. They are not documents subject to public disclosure and inspection.

We recommend that this direction be deleted.

**Section 6(a): Data Sharing**

There is clear legislative intent, legislative record, and even statutory language indicating that efforts should be made to share data, whenever possible, with other states. Specifically, Act 188, Section 1, Findings states:

"(6) Other states and countries, including Maine, Washington, California and the European Union, are already taking a more comprehensive approach to chemical regulation in consumer products, and chemicals regulation in Vermont should harmonize with these efforts."

Additionally, 18 VSA §1775(c) encourages the Department to enter into reciprocal data sharing agreements with other states to obtain the information required in the notice required by this law.

As noted in comments submitted by manufacturing parties on the Chapter 6 Rule, and as would apply here to the draft Guidance Document for implementation of the reporting

program, it runs contrary to clear legislative intent for the Department to fail to allow cross-referencing of the baseline data from extensive reporting that has occurred under the Washington Department of Ecology's Children's Safe Products Act.

At a minimum, the Department clearly must afford reporting parties the opportunity to cross-reference GPC Brick code information as a foundation for the reporting for Section 6.1.8 of the Chapter 6 Rule, accommodating additional submissions for the unique information specified by the Department where it has chosen to diverge from all other states on this issue.

Such cross-referencing would reduce burdens associated with baseline reporting, data entry, and unnecessary duplication of entering the same information for the initial GPC Brick code information.

We recommend that the Department make what revisions are necessary to allow for such cross-referencing and other means to harmonize with other states' efforts.

**Conclusion**

Thank you again for the opportunity to provide and your consideration of these comments. Please do not hesitate to contact us to discuss any of these recommendations and related matters further.

Sincerely,

Associated Industries of Vermont

American Apparel & Footwear Association

American Chemistry Council

American Fiber Manufacturers Association

Consumer Technology Association

Fashion Jewelry & Accessories Trade Association

International Fragrance Association North America

Juvenile Products Manufacturers Association

National Council of Textile Organizations

SPI: The Plastics Industry Trade Association

Toy Industry Association

Contact: William Driscoll, Associated Industries of Vermont, 802 223-3441 or wdriscoll@aivt.org