March 12, 2014

FDRA
FOOTWEAR DISTRIBUTORS AND RETAILERS OF AMERICA

State of Vermont
Senate Committee on Economic Development, Housing and General Affairs
115 State Street
Montpelier, Vermont 05633-5301
Attn: Sen. Kevin Mullin, Chair

Re: Comments to Senate Bill 239

Dear Senator Mullin and Fellow Committee Members:

Founded in 1944 by the footwear industry, the Footwear Distributors and Retailers of America (FDRA) is the largest, most effective and respected footwear trade association in the US. We represent and serve the entire width of the footwear industry from small family owned footwear businesses to global footwear companies. We also represent and serve the full supply chain of the footwear industry from research, design and development, to manufacturing and distribution, to retailers selling to consumers all over the globe. FDRA supports more than 100 companies and over 200 brands.

While FDRA members support the overall intent of Senate Bill 239 (S. 239) and share the desire that consumer products be safe and non-toxic, we have concerns with the current language. We wish to provide constructive comments that may offer a workable solution for industry while achieving your overall goals.

Redesign of consumer products is a herculean task that requires coordination, ingenuity, and time. Given the slow pace of federal action and the uphill battle for federal Toxic Substances Control Act reform, state-level product regulatory schemes are an important option at present. These state regulatory schemes can only be effective if harmonized. S.239 has a noble goal—to protect public health and the environment. Yet, its framework strays too far from its sister states with similar regulatory programs, and contains provisions that bump up against the realities of complex manufacturing supply chains.

We hope that the enumerated points below are helpful in crafting an effective approach for the State of Vermont's regulation of harmful chemicals in consumer products.

Comments on S.239

1. The Definition of "Consumer Products" and "Manufacturer" Need to be Refined to Clearly Specify the Responsible Compliance Entity

Section 1772(7) defines "consumer product" as "any item sold for personal use, including any component or packaging." Section 1772(10) defines "manufacturer" as "any person who manufactures a consumer product or whose name is affixed to a

consumer product or its packaging or advertising . . . ." In the current business models, the manufacturers of packaging are wholly distinct from the manufacturers of the consumer product. Even the packaging may have several different distinct manufacturers, such as the plastic bubble containing a pair of scissors, or the insulation material used to protect a fragile vase during shipment, or the colored paper on the outside of the packaging containing the label information. Consumer product manufacturers often have no authority to specify chemicals in the various types of packaging material. Instead, consumer product manufacturers are mere purchasers or end-users of packaging materials. As third-party buyers, they know little about the chemical composition of packaging. And they have even less control over how another entity designs and produces these materials. Yet, under S.239, the manufacturer of the consumer product—the toy or cosmetic that this legislation is intended to reach—becomes liable for a third party's materials. Thus, the inclusion of "packaging" imbues the legislation with a degree of uncertainty that could serve as a litigable issue and could hinder the law's implementation.

By mixing the consumer product with the packaging, S. 239 muddies the well-understood definitions and divisions of labor in the marketplace and imposes compliance obligations on manufacturers with no control over the design or chemical selection in manufacture. Such a scheme would be unworkable for industry.

The definition of "consumer products" should be narrowed to include only consumer *products* (i.e. the good or merchandise that the consumer uses). The definition of "manufacturer" should distinguish between the manufacturer of the consumer good and the manufacturer of the packaging and assign responsibilities accordingly. This will lead to higher compliance rates and safer products for the State's consumers.

2. S. 239 Should Incorporate the GS1 Global Product Classification (GPC) System.

Consistent with the State of Washington's Children's Safe Product Act, S.239 should incorporate the GS1 GPC System. Inclusion of this system gives both the State and manufacturers a common language for instituting and complying with this law.

The benefits of the GS1 GPC System cannot be understated. For the State, the GS1 GPC System increases data's accuracy and integrity, ensuring that Vermont's Department of Health gets the correct information from manufacturers. For manufacturers, the GS1 GPC System accelerates the supply chain's ability to react to consumer needs, facilitates suppliers' reporting processes, and breaks down language barriers along the supply chain.

Washington State is using the GS1 GPC System to define categories of products and to ensure the correct recognition of the product category access the extended supply chain from seller to buyer. Vermont should harmonize S.239 with Washington's approach. By doing so, S.239 will accomplish one of the goals in its finding ("Finding 8"

– Harmonization) and become more workable, thus leading to higher overall compliance rates and reduced costs.

3. Three Years in an Unreasonable Phase-Out Period

Section 1775 establishes a product phase-out period of "three years." No doubt, there is a need to remove harmful chemicals from consumer products expeditiously. But based on years of experience complying with state and international product regulatory authorities, the three-year time frame is infeasible.

Manufacturing is a global business. It takes years to develop and implement a comprehensive strategy to monitor and eliminate restricted chemicals from every component of every product that a manufacturer sends to market, where safer alternatives exist. Where safer alternatives do not exist, it takes even longer to conduct the research and development needed to invent such substitutes, go through regulatory review, pilot test them, and finally, scale them up in a supply chain.

Instead of requiring quick phase-out of these chemicals, FDRA suggests a different approach. The US EPA's Design for the Environment Alternatives Assessment Program evaluates the hazard and exposure characteristics of alternatives to chemicals of concern. They then present their assessments in an easy-to-understand format that allows manufacturers to identify the best substitute for their product or process, and meet the individual realities of their own supply chain without unreasonable phase-out periods. FDRA supports the EPA's approach as a practical and effective method to support the substitution of chemicals of concern, and encourages the State of Vermont to consider how it could model or otherwise support such as effort.

FDRA also notes that neither California nor the European Union have set such ambitious phase-out periods in their consumer production regulations. California expects their program to result in changes in a seven to eight-year period, or longer.

4. The Fees are Too High and Far Exceed Other State Programs.

Section 1774(g) imposes a fee of up to five thousand dollars ($5,000) per disclosure of the use of a chemical of high concern in a consumer product. No other state burdens manufacturers with such a high disclosure fee. We understand that the State will invest these fees into this regulatory program, but these fees need to be reasonable.

Many manufacturers will have to disclose their use of a high chemical of concern for not one, not ten, but hundreds of products. Under S.239's language, a manufacturer will have to pay hundreds of thousands of dollars just to disclose its use of a chemical of concern. Such high fees create a real and cognizable barrier to doing business in the State of Vermont and also invite circumvention of the law, lessening compliance rates and the S.239's beneficial impacts.

5. Clear, consistent definitions would improve S. 239

One of the hallmarks of good legislation is its ability to define precisely the duties of the parties to which it applies. S.239 can be improved by defining more of its terms. Two prime examples are "intentionally adds" and "impurity." *See* §§ 1774(a)(1), 1774(a)(2)(A).

Consistent with Finding 8, S.239 should harmonize its definition of "intentionally adds" with its definition in Washington's Children's Safe Products Act. Washington Administrative Code 173-334-040 defines "intentionally added chemical" as a "chemical in a product that serves an intended function in the product component." This language clearly demarcates a manufacturer's responsibility and adds clarity to the statute's scope, which could reduce administrative costs.

The State of Vermont should also refine its use of word "impurity." Neither California nor Washington use this word in their laws due to its amorphous scope. Instead, both states use "contaminant." Washington defines "contaminant" as "trace amounts of chemicals that are incidental to manufacturing … [that] serve no intended function in a product component." Wash. Admin. Code 173-334-040; *compare* 22 Cal. Code Regs. § 69501.1(a)(26) (defining contaminant). As above, we recommend that the State harmonize S.239 with Washington's Children Safer Products Act, thus changing "impurity" to "contaminant" and defining "contaminant" as Washington does.[1]

At bottom, defining these terms would harmonize state legislation, reduce compliance and administrative costs, and expedite the process of removing harmful chemicals from products.

6. The Creation of the Chemicals of High Concern Fund Will Introduce Conflicts of Interest and Bias into Agency Decisions

S. 239, as currently written, contains a dangerous provision that would allow the Department and the Agency to receive funds and operate outside the democratic legislative process, and to self-fund through bounty-hunting behavior. There are important public policy reasons why the executive branch is limited to those powers and funds granted to it by the legislative branch. The provision that would allow the Department "to accept gifts, grants, or contributions from any public or private source" should be stricken in its entirety. (Section 1776(b).) The activities of the Department and Agency should be based on science, not the highest bidder.

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[1] If the State is unwilling to change "impurity" to "contaminant," we suggest the State to define "impurity" in a manner that is substantially similar to how Washington defines "contaminant."

All monies in the Chemicals of High Concern Fund should be allocated by the Legislature, not generated through bounty-hunting "fees and charges." Thus, we strongly urge that Section 1776(c) also be stricken in its entirety.

Conclusion

FDRA and its members are committed to providing safe, environmentally friendly products to consumers. Over the past decade, member companies have invested time, effort, and money to redevelop products and supply chains utilizing green chemistry and sustainable practices.

We appreciate the State's efforts to develop legislation focused on protecting consumers. Please consider our concerns and comments to avoid unintended consequences that will threaten the law's efficacy as you work to create a practicable and balanced approach. We hope the Committee will give these comments serious consideration and make the refinements suggested herein.

Thank you again for the opportunity to provide comments on S.239.

Sincerely,

Matt Priest
President