

Vermont just joined the posse of states taking chemical regulation reform into their own hands in the face of inaction in Congress. Last week the Green Mountain State enacted a new law covering chemicals in children's products. (A children's product is defined as "any consumer product, marketed for use by, marketed to, sold, offered for sale, or distributed to children in the State of Vermont.") The law, which is modeled on a similar program in Washington State, requires manufacturers of children's products to report each chemical of high concern in such products. The statute sets out a list of 66 chemicals of high concern (including bisphenol A, various phthalates, and certain flame retardants) and authorizes the Commissioner of Health to add or remove chemicals from the list. The law goes further than Washington State's program, though, adding the authority to regulate the sale or distribution of children's products where exposures lead to certain listed adverse health effects. Those adverse effects include developmental toxicity, cancer, genetic damage, endocrine disruption, and various forms of systemic toxicity. In such circumstances, the Commissioner may ban the product or require labeling.

Now let's give credit where credit is due; the Vermont program is a significant step forward in chemical regulation. It takes clear action regarding a specific set of chemicals. Unlike the California program, it is in this regard "shovel-ready;" no waiting as the state reviews and prioritizes thousands of chemicals. Unless the Commissioner of Health establishes a different schedule, come July of 2016 the notices will come rolling in. And the state will have the clear authority to prohibit toxic chemicals by systematic rulemaking, avoiding the chemical-by-chemical legislative process in place in most states. So we have two bites at the policy apple: an information disclosure regime that will hopefully leverage the marketplace to reduce risk and the backstop of direct regulation to deal with dangers that slip through the fingers of the market's invisible hand.

But—you just knew there was a "but" coming—perhaps more notable about this law is what it doesn't do. Here are a few features that substantially diminish its likely impact:

- Despite aspirational language about "reducing exposure of its citizens and vulnerable populations, such as children, to toxic chemicals, particularly when safer alternatives exist," Vermont's new law is more about conventional risk assessment and management than prevention and safer alternatives. The bill as introduced essentially required manufacturers to demonstrate that there were no safer alternatives to the chemicals they used in children's products. This would have aligned Vermont with the progressive European Union REACH

regulation and California's Safer Consumer products program. Instead the law as enacted places the burden on the Commissioner of Health to prove that the chemical is unsafe.

- The standard that the Commissioner must meet is potentially onerous. To regulate a chemical, the Commissioner must demonstrate that: (1) children will be exposed to a chemical of high concern in the product; and (2) a **probability** that . . . exposure **could cause or contribute to** one or more of the [listed] adverse health impacts." The level of certainty implied in this formulation is troubling. Typically public health programs look for potential or threatened exposures rather than relying solely on showings of actual exposure. Likewise, the ambiguous reference to the "probability" that the exposure could "cause" disease will likely create substantial mischief, and will lead to either inaction by the agency or extensive litigation by affected stakeholders.
- The program appears to be underfunded. Although the original bill called for a meaningful fee of up to \$5,000 for each notice submitted by a manufacturer, by the time of enactment that amount was carved down to just \$200. The law does require the agency to submit a report to the legislature by 2015 regarding the annual cost of the program and an estimate of "additional funding that the Department may require to implement the chemicals of high concern to children program." California took essentially the same tack, acknowledging in pre-enactment reports that further funding would be needed. But the California legislature never established dedicated funding to support the Safer Consumer Products program.

As Mick Jagger wisely observed, you can't always get what you want. This is politics and compromise is almost always needed to move forward. The real question for the Vermont statute is whether the children of the state will get what they need.