later than January 1, 2018."[18] The notice requirement is for all children's products, as defined in Oregon's law.

Representative Keny-Guyer did provide OHA with a letter during the rulemaking process indicating that OHA was interpreting the definition of "children's product" in a manner that was consistent with the legislature's intent, and that inaccessible components were intended to be included and should not be excluded for purposes of reporting HPCs to OHA.[19] Certainly a legislator's expression of legislative intent after the fact cannot be relied upon when doing a legal analysis of legislative intent. However, the Representative's explanation of legislative intent is consistent with the plain reading of the statute.

Please let me know if you have any follow-up questions or concerns.

JUSTICE-#7603704-v2

[18] ORS 431A.258(1) and (2)(b). Section 16, chapter 786, Oregon Laws 2015 reads:
[19] Letter from Representative Keny-Guyer to OHA (June 1, 2016).

definition and all component parts of those products must be included in the notice that is required to be submitted to OHA.

In interpreting statutes, we also look at the larger statutory context. The TFKA not only requires notice of children's products that contain HPCs, but in the future a manufacturer will be required to remove the HPCs from children's products or make a substitution for the chemical, unless the manufacturer seeks and is given a waiver by OHA.[10] A manufacturer can get a waiver if it can demonstrate that the HPC "is not reasonably anticipated to result in exposure based upon an analysis of leachability and bioavailability of the [HPC] used in children's products."[11] An inaccessible component could still pose a health concern to children through "leachability and bioavailability" regardless of whether a child can put his or her hands on it. It appears that the legislature made a choice by requiring all component parts of children's products with HPCs to be reported to OHA, but exempting a manufacturer from having to remove or substitute a chemical if the manufacturer can provide evidence that the HPC in a component part will not result in an exposure. The availability of this waiver process provides support for the idea that the legislature intended to have a broad reporting requirement but to provide manufacturers with a waiver from the more onerous requirement of removing or substituting a chemical.

AOI has argued that the Legislature intended Oregon's TFKA to be implemented the same way as Washington's similar law. In Washington manufacturers are not required to report HPCs in inaccessible components. This argument is based in part on written testimony from one of the bill's sponsors, Representative Keny-Guyer, that reads: "Our bill intends to cover the same products and the same chemicals, making it easy for manufacturers to comply, and allowing Oregon to build on the rule making and implementation in Washington."[12] Washington's definition of "children's product" does not include "component parts".[13] However, Washington's rules make it clear that HPCs in product components of a children's product do need to be reported and Washington considers inaccessible components to be component parts.[14] What is different is that Washington has delayed the reporting requirements for certain categories of children's products. Washington has created product tiers that must be reported at different times.[15] For example, the largest manufacturers were required to report tier 1 products within 12 months of the adoption of Washington's rule.[16] Inaccessible components fall within tier 4 and Washington has not specified when tier 4 children's products have to be reported.[17] I cannot comment on why or how Washington implemented its law but OHA does not have this flexibility. Oregon law provides that "the first biennial notices required to be submitted to the Oregon Health Authority * * * for chemicals contained in children's products that are included on the list adopted on January 1, 2016, shall be submitted to the authority no

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[10] ORS 431A.260.
[11] ORS 431A.265.
[12] https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/50223.
[13] RCW 70.240.010.
[14] WAC 173-334-040; 173-334-080. Washington defines "product component" as "a uniquely identifiable material or coating (including ink or dye) that is intended to be included as a part of a finished children's product."
[15] WAC 173-334-110(2).
[16] WAC 173-334-110(2).
[17] WAC 173.334-110(2) and (4)(d).

> (Q) Food and beverages and food and beverage packaging regulated by the United States Food and Drug Administration or the United States Department of Agriculture.[5]

The plain reading of the statute is that "*any* component part" of a toy marketed for use by or marketed to children under 12 is a children's product. The definition of children's product specifically excludes certain things such as athletic shoes with cleats, batteries and bicycles, but the definition *does not* exempt inaccessible component parts.[6]

There is no definition of "component part" as that term is used in the definition of "children's product" and I considered whether "component part" could be defined to exclude inaccessible components. Defaulting to the dictionary definitions of these words, the most fitting dictionary definition of component is "a constituent part".[7] The most fitting dictionary definition of "part" is "something less than the whole".[8] Given these broad definitions it is difficult to conceive how OHA could defend a definition of "component part" that excludes inaccessible components since plainly an inaccessible component, regardless of whether a child could get his or her hands on it, is a "component part" of a children's product.

The Associated Oregon Industries (AOI) during the rule making process asserted a number of arguments in support of its position that OHA can exempt inaccessible components from the definition of "component part" as that term is used in the definition of "children's product".

AOI argued that "any" as used in the definition of children's product, does not mean all, but that it can refer to "one, some or all indiscriminately of whatever quantity."[9] The term "any" is used twice in the definition of children's product: It is used to refer to "any" children's product that is listed in the definition; and it is used to refer to "any" component part of any children's product that is listed in the definition. If OHA were to adopt AOI's meaning of "any" not only would OHA have the discretion to exempt certain component parts – like inaccessible component parts – from the meaning of component part, but OHA could exempt some of the listed children's products like car seats or toys from the definition of "children's product", because "any" can mean one, some or all indiscriminately. An OHA rule, for example, that excluded car seats from the definition of "children's product" would be difficult to defend on the basis that the term "any" permits OHA to pick which products specified in the definition of children's product must be included in the notice required to be submitted to OHA. OHA must apply the term "any" consistently unless there is some reason to believe the legislature meant the term to be used differently in the definition of "children's product" and there is no evidence of that. The best reading of the term "any" as that term is used in the definition of "children's product" is that it means "all". Therefore, all children's products specifically listed in the

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[5] ORS 431A.253(3)(emphasis added).
[6] ORS 431A.253(3)(b).
[7] Webster's Third New Int'l Dictionary, 466 (unabridged ed 2002).
[8] Webster's Third New Int'l Dictionary, 1645 (unabridged ed 2002).
[9] Letter from AOI to OHA (April 26, 2016).

would be defined as "internal materials and parts which are inaccessible to a child during reasonable and foreseeable use and abuse of the product."[4]

The statutory definition of children's product reads:

> (3)(a) "Children's product" means:
> (A) ***Any of the following products*** that are made for, marketed for use by or marketed to children under 12 years of age:
> (i) A product designed or intended by the manufacturer to facilitate sucking, teething, sleep, relaxation, feeding or drinking.
> (ii) Children's clothing and footwear.
> (iii) Car seats.
> (iv) Children's cosmetics.
> (v) Children's jewelry.
> (vi) Toys.
> (B) ***Any component part of a product specified in subparagraph (A)*** of this paragraph.
> (b) "Children's product" does not mean:
> (A) Athletic shoes with cleats or spikes.
> (B) Batteries.
> (C) BB guns, pellet guns and air rifles.
> (D) Bicycles and tricycles.
> (E) Chemistry sets.
> (F) Consumer electronic products, including personal computers, audio and video equipment, calculators, wireless telephones and game consoles, handheld devices that incorporate a video screen and are used to access interactive software, and the associated peripherals.
> (G) Interactive software intended for leisure and entertainment, such as computer games, and their storage media, such as compact discs.
> (H) Model rockets.
> (I) Pocketknives and multitools.
> (J) Roller skates.
> (K) Scooters.
> (L) Sets of darts with metallic points.
> (M) Slings and catapults.
> (N) Snow sporting equipment, including skis, poles, boots, snowboards, sleds and bindings.
> (O) Sporting equipment and accessories, including but not limited to bats, balls, gloves, sticks, pucks, pads, helmets and other protective equipment, weight training and exercise aids, protective eyewear, backpacks and tents, raingear, sport bags and luggage, and golf equipment.
> (P) Video toys that can be connected to a video screen and are operated at a nominal voltage exceeding 24 volts.

[4] Letter from AOI to OHA (April 26, 2016).

ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: August 10, 2016

TO: Lynne Saxton, Director
Oregon Health Authority

BethAnne Darby, External Relations Director
Oregon Health Authority

FROM: Shannon K. O'Fallon, Senior Assistant Attorney General
Health and Human Services Section

SUBJECT: Reporting Chemicals in Inaccessible Components under the Toxic Free Kids Act

You have asked whether manufacturers are required to provide notice to the Oregon Health Authority (OHA) of high priority chemicals of concern for children's health ("HPCs") found in inaccessible components of children's products under the Toxic Free Kids Act (TFKA)[1].

Short Answer

Yes, inaccessible components are components of children's products and HPCs in components of children's products must be reported to the OHA.

Discussion

The TFKA, enacted in 2015, requires OHA to establish a list of HPCs when used in children's products.[2] OHA adopted the HPC list in January of 2016. No later than January 1, 2018, a manufacturer of a children's product sold or offered for sale in Oregon must submit a notice to OHA of all product categories of a children's product that contain a HPC in an amount at or above a de minimis level.[3]

As context for your question, certain industry representatives have urged OHA to exempt inaccessible components from the definition of children's product. Thus HPCs in inaccessible components would not have to be reported. As proposed by industry, inaccessible components

[1] The Toxic Free Kids Act (TFKA) is codified at ORS 431A.253 to 431A.280.
[2] ORS 431A.255(1).
[3] ORS 431A.258(1). "De minimis level" is defined at ORS 431A.253(5).

must be reported to the OHA." On page 4 of the Memorandum, DOJ states: "Washington rules make it clear that HPCs in product components of a children's product do need to be reported and Washington considers inaccessible components to be component parts."

The DOJ's concluding paragraph states: "Representative Keny-Guyer did provide OHA with a letter during the rulemaking process indicating that OHA was interpreting the definition of 'children's product' in a manner that was consistent with the Legislature's intent, and that inaccessible components were intended to be included and should not be excluded for the purposes of reporting HPCs to OHA... The Representative's explanation of legislative intent is consistent with the plain reading of the statute."

With further regard to legislative intent, I would like to provide clarification on the exemption from notice requirement for a manufacturing control program (333-016-2070). By providing for an exemption to notice requirements and all future regulatory obligations under the law, the expectation is that a regulated manufacturer is actively working to reduce and ultimately eliminate HPCCCH when they are present as contaminants in their products.

Our intent was that manufacturers should be required to clearly articulate and provide evidence that the actions taken under their manufacturing control programs are in place for the specific purpose of reduction in the near-term, and elimination over a longer period of time, of HPCCCH. This is a logical requirement for granting an exemption that limits the protections for children provided under Oregon's law.

In closing, I would like to thank OHA for its thorough rulemaking process for SB 478 to date. Throughout this process, OHA has worked very hard to understand and accommodate the perspectives of manufacturers. I understand that a significant number of industry trade associations participated in the Rules Advisory Committee, and that their perspectives and concerns were given due time and consideration. *I urge you to maintain the integrity of this law by continuing to put the health of Oregon's children first when finalizing these rules.*

I appreciate your consideration of my comments.

Sincerely,

Rep. Alissa Keny-Guyer

ALISSA KENY-GUYER
STATE REPRESENTATIVE
DISTRICT 46

HOUSE OF REPRESENTATIVES
900 COURT ST NE
SALEM, OR 97301

October 31, 2016

Re: Proposed Oregon Administrative Rules – OAR 333-016: Manufacturer Disclosure of High Priority Chemicals of Concern for Children's Health Used in Children's Products

To Whom It May Concern:

As one of the legislative champions of SB 478 the Toxic Free Kids Act, I am pleased to see Oregon Health Authority (OHA) continuing to move forward with the development of rules for this important law. *Protecting children from health impacts linked to toxic chemicals found in everyday products is an important preventative health strategy.* I appreciate your hard work and diligence in the implementation of this law. I look forward to the next and final phase of your rulemaking.

I would like to provide feedback on the proposed rules for implementation of the Toxic Free Kids Program for public comment. I would like to reiterate my perspective in my June 1, 2016 letter to the Oregon Health Authority (OHA) on the legislative intent for the definition of "children's product" (333-016-2050): the definition should not make distinctions based on the physical accessibility of component parts. I advise against creating a new regulatory exemption for components that may be considered physically "inaccessible" from regulation. In defining "component part" for rules, OHA should also not attempt to make exclusions or exemptions for "inaccessible" components.

Our rationale for this approach to defining a children's product was two-fold: First, we found that a component does not need to be physically accessible to result in exposure through leaching, volatilization, or other physical migration that results in the presence of chemicals of concern in household dust. An example of toxic chemicals used in components that may be considered physically inaccessible, but result in exposure to children, are flame retardants used in foam for products like children's mattresses and furniture.

Second, we intentionally added the exposure assessment exemption included in Section 7 (b) of SB 478 to address the possibility that a children's product containing high priority chemicals of concern for children's health (HPCCCH) does not result in exposure. This was intentionally crafted to provide manufacturers with the opportunity for exemption from the assessment and phase out requirements in Section 5, not from the disclosure requirements included in Section 4.

In its August 10, 2016 Memorandum to OHA Director Lynne Saxton, the Oregon Department of Justice (DOJ) states in its opening statement: "Yes, inaccessible components are components of children's products and HPCs in components of children's products

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circumvent regulatory scrutiny for toxic chemicals used in any part of a product that they claim is inaccessible without requiring them to prove it.

Some chemicals, like flame retardants (which are scientifically linked to brain impacts in kids), can migrate from "inaccessible" components in furniture into household dust and then into kid's bodies.

Industry requested this change during the bill drafting process, but we decided not to make this change in order to protect children from potential exposure.

3. Requiring OHA to reanalyze data: Section 6 (1)

This is an attempt to mire OHA down in an unnecessary and redundant series of resource-wasting reviews that would have the effect of curtailing or eliminating regulation of toxic chemicals in kid's products. The Oregon legislature and agencies, as well as legislatures and agencies in Washington, California, Minnesota, New York, and Vermont, have already reviewed the available scientific data, evaluated the federal policy context, and determined that toxic chemicals used in kid's products represent a threat to their health.

The list of chemicals of concern to children's health included in Oregon's Toxic Free Kids Act was the same as the one used in Washington State under their Children's Safe Products Act. This is one example of many instances where Oregon legislators worked hard to create alignment between state programs.

4. Requiring legislative and gubernatorial approval of law implementation: Section 6 (4)

Forcing OHA to seek legislative and gubernatorial approval to implement the most important and health protective parts of the law (i.e. phasing out harmful toxic chemicals in kids products) is another attempt to prevent the agency from doing its job. It would delay implementation and would waste thousands of taxpayer dollars.

While I strongly oppose SB 836, **I appreciate the opportunity to clarify intent on the issues brought forth in the bill**.

If there is any chance of the bill going forward, I suggest we change our current law, in which we restrict the addition of new chemicals to merely five during every three year review. This was a compromise from the 2015 negotiations; but **I believe that we should align with the Washington law, which allows for many more chemicals of high concern to be added.** As a result, Washington may be adding 21 chemicals to their list of chemicals of high concern to children.

Many thanks for the opportunity to testify.

Alissa Keny-Guyer

legislature on implementation of the Toxic Free Kids law in 2019, we'll have the opportunity to hear their recommendations for improvements.

Myth 5: Oregon has the most complex and expensive law in the nation

Fact: Laws in other states, including California and Vermont, are more comprehensive and complex than Oregon's

The European Union's REACH program and California's Safer Consumer Products program cover far more products and chemicals than Oregon's law.

Those laws, and others like them, are far more complex and expensive than Oregon's Toxic Free Kids law. Other states have recognized gaps in chemicals policy and are taking similar actions to protect families. For example, the State of Washington recently initiated a rulemaking process under their Children's Safe Products Act to add 21 additional chemicals (with a particular focus on flame retardants) to their list of Chemicals of High Concern to Children, based on new scientific data. Washington is also making other changes to their law to further harmonize it with Oregon.

Myth 6: Let the federal government regulate chemicals of concern.

Opinion: I feel even stronger today than I have in the past that we cannot wait for the federal government to act.

While the federal Toxic Substances Control Act (TSCA) was finally reformed in Congress after the passage of our bill (and perhaps in part due to bills in Oregon and other states), we cannot count on the federal government to take action to protect Oregon's children. Like Washington, Maine, Maryland, Minnesota and California—we must act to protect the children in our state.

With Oregon's practical but protective program in place, let's continue to protect some of the most vulnerable among use by **denying the rollbacks proposed in SB 836**.

1. Increasing "de minimis level": Section 1 (3)(a)(5)

Increasing the de minimis reporting level to 100 parts per million from the current levels **would allow manufacturers to avoid reporting** on toxic chemicals that they intentionally use in children's products.

Making this change was discussed during the bill drafting process, but we decided not to make this change.

2. Exempting "inaccessible" components: Section 2 (2)

Making so-called physically "inaccessible" components exempt from regulation would **create a major loophole in the current law** by allowing manufacturers to

Washington law actually does allow for the requiring of disclosure of internal components. They decided not to look at internal components in 2011 because of fear they'd be deluged with data. But by law they can require this in the future.

In the few cases where Oregon's law was not aligned with those other states, the differences address key loopholes and shortcoming in those laws. We also wanted to simplify our law and make it more practical for Oregon businesses, like our exemption for manufacturers with annual sales of under $5 million. We created these changes intentionally, after much input and negotiation, to create a program that is more effective at protecting kids while balancing the needs of small manufactuers.

Myth 2: Oregon can't afford to protect children's health

Fact: The fiscal impact to Oregon taxpayers is mitigated by fees

The agency is working hard to make the best of limited resources and staff. In an effort to stretch limited resources even further, OHA successfully secured a grant from the U.S. Environmental Protection Agency to help build a data collection system. Our investment in this system reflects OHA's responsiveness to industry concerns about the challenge of reporting on their use of toxic chemicals in children's products.

Myth 3: Fees associated with the Toxic Free Kids law are too high

Fact: Fees are reasonable and necessary to protect taxpayers and ensure fiscal responsibility

The schedule of fees developed by the Oregon Health Authority (OHA) was developed through a robust rulemaking process with input from diverse stakeholders and experts. The fees are reasonable and necessary to implement the law, including when it's necessary to hire external consultants with specific expertise not available at OHA.

The fee reductions proposed under SB 836 would significantly impede OHA's ability to implement the law, forcing taxpayers to foot the bill for billion-dollar multinational corporations when outside expertise is needed.

Myth 4: The Legislature needs to review the Toxic Free Kids law before it's even implemented

Fact: OHA is already required to report to the Legislature on implementation progress

Why are we being asked to spend taxpayer dollars to review a program that hasn't even had a chance to work yet? We haven't even started to collect data on toxic chemicals in children's products and now we're being asked to make changes?

Let's not take a step backward by trying to fix something that isn't broken. We already have a process for providing legislative oversight on this law. When OHA reports to the

phalates which are found in soft plastics and cosmetics, and formaldehyde found in fabrics.

- OHA is to publish this list on its website with information about potential health impacts of exposure.

- By Jan 1, 2018 (2 years after OHA publishes the list), the bill requires manufacturers of children's products with gross annual worldwide sales of $5 million or more to tell the Oregon Health Authority when their children's products contain any of these dangerous chemicals.

- These steps mirror the bill passed by the Washington legislature with strong bipartisan support in 2008. Our law intends to cover the same products and the same chemicals, making it easy for manufacturers to comply, and allowing Oregon to build on the rule making and implementation in Washington.

- The main difference between our disclosure and Washington's is that our law exempts manufacturers with global sales under $5 mil/yr, whereas Washington's disclosure requirements apply to manufacturers of any size.

- By Jan 1, 2022 (nearly 6 and ½ years after passage), our law requires these manufacturers to **phase out these toxins in products where the greatest exposure and harm can occur:** products that go in the mouth, products that go on the skin and hair, and products intended for children under 3 years of age.

- Manufacturers can apply for a waiver if they show that children are not exposed to the chemicals in the product, or if there are no technically or economically feasible alternatives on the market.

The point of the law: **if there are safer alternatives to toxic chemicals, large manufacturers should replace them.** And we gave them over 6 years to do so!

Now to the myths about the law:

Myth 1: The Toxic Free Kids law is not harmonized with similar laws in other states

Fact: Oregon's law is very similar to laws in other states including Washington and Maine

The Oregon Legislature worked incredibly hard with experts from other states to ensure that our law was harmonized in many important ways with other laws. Examples of our work to align Oregon's law can be found in our list of chemicals of high concern for children's health, which is identical to Washington's list, the globalized product identification system used for disclosure, the presence of a manufacturing control program provision, and the use of alternatives assessments to help guide decisions about safer chemicals used in products, among others.

ALISSA KENY-GUYER
STATE REPRESENTATIVE
DISTRICT 46

HOUSE OF REPRESENTATIVES
900 COURT ST NE
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April 5, 2017

Testimony in opposition to SB 836

Chair Dembrow and Members of the Senate Environment and Natural Resources Committee:

As many of you know, I have been passionate about protecting children's health and was one of the primary champions of the Toxic Free Children's bills that were introduced in 2012, 2013, 2014 and 2015.

I was delighted when SB 478, the Toxic Free Children's Act, finally passed in 2015 with years of input from all stakeholders, with in-depth negotiation by your former chair, Sen. Chris Edwards; with support from multiple scientists, health care professionals, environmental advocates, businesses and consumers; and with strong bipartisan support on the House side.

I'm here to oppose SB 836, which seeks to weaken some of the provisions set forth in the Toxic Free Children's Act. Some of the changes requested in SB 836 are provisions that some manufacturers wanted in the 2015 negotiations, and did not get. While we accepted many of their suggestions, **we rejected suggestions that we deemed harmful to the intent of the bill: to protect kids from toxic exposure.**

Other proposals in SB 836 are ones requested by industry in the Rules Advisory Committee, which had strong representation from industry. I was in touch with OHA repeatedly during the RAC process, including submitting a letter in October of 2016 to the Committee to clarify intent (see attached). DOJ also submitted a letter (attached) during that process; **DOJ interpreted OHA's draft rules as aligned with the legislative intent of the law**. Again, some manufacturers did not get the changes they sought in that process, and thus they are back with SB 836 to try again to weaken our Toxic Free Children's Act.

While other testifiers may remind the committee why **a bill to protect children from toxics is so important,** I'll reserve my time to help you separate myth from fact by sharing information about the law and its regulations.

What does the Toxic Free Children's Act require?

- By Jan 1, 2016, OHA is to establish a science-based list of "High Priority Chemicals" that pose the biggest threat to children's health.

- The 66 chemicals on the list are the same as the ones in the Washington law and include heavy metals, such as cadmium, arsenic and mercury found in toys;

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