TESTIMONY ON SB 836
BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

April 5, 2017

Support SB 836
YES to Improving Consumer Product Regulation

Thank you for the opportunity for Associated Oregon Industries (AOI) and Oregon Business Association (OBA) to testify on SB 836. Collectively, AOI/OBA are the state's largest business association representing nearly 1,600 Oregon businesses that employ approximately 250,000 Oregonians statewide. Out of that 1,600 member businesses, AOI/OBA represent the largest group of Oregon manufacturers and retailers, many of which are regulated by the Toxic Free Kids Act of 2015 (TFKA).

There is no question that our member companies are strongly committed to providing safe products to all consumers – especially children. Likewise, it is important that consumers of all ages, at all income levels have an opportunity to enjoy safe, affordable products. To meet those goals, AOI/OBA members strongly believe the TFKA can be improved upon – maintaining strong consumer protections while limiting unnecessary, expensive regulatory burdens. Those improvements are included in SB 836.

Since the passage of the TFKA, AOI participated in the Rules Advisory Committee (RAC) process to assist the Oregon Health Authority (OHA) in preparing implementable regulations. In advance of the RAC meetings, AOI provided comments and recommendations to help the agency understand areas of the law that the regulated community preferred additional clarity through rule. Even with the advance notice, the RAC process failed to deliver an acceptable regulatory program. Rather, many critically important issues were ultimately disregarded and even introduced at the last minute without adequate discussion, analysis, or understanding of likely business and agency impacts. This has led to a set of rules that do not address the needs of consumers or the regulated community and will likely unnecessarily burden the agency. For those reasons, and the reasons set forth below, the Legislature must act to provide the agency important direction and control costs of this program by passing SB 836.

Senate Bill 836 aligns the reporting provisions of Oregon "Toxic Free Kids Act" (TFKA) with similar laws in Washington State, Maine and Vermont.

In 2015, proponents claimed that the first regulatory phase – reporting requirements – would align with similar reporting programs in other states. Unfortunately, the rule adopted by OHA does not align with other states and is unnecessarily unique, burdening manufacturers and retailers.

To align Oregon with other states, SB 836 provides a reporting exemption similar to programs in other states which have prioritized product information that companies are required to report, and have excluded “inaccessible parts or components.” Additionally, both international regulations and federal laws, under the Federal Hazardous Substances Act and the Consumer Product Safety Improvement Act, acknowledge that “inaccessible components” pose little to no exposure risk. This would result in a significant regulatory improvement for consumers, regulators and the regulated community without compromising consumer safety.

This program has become more complex and more expensive than OHA and bill proponents projected in 2015.

In the rulemaking process, OHA provided a Statement of Need and Fiscal Impact attempting to explain the total anticipated program costs. The statement states that the Legislature delegated general funds to support the program, $87,673 for FY 2015-2017 and $229,389 for the 2017-2019 biennium. However, the statement did not indicate the total program budget or what proportion of the budget will be supported by the general fund or how much fees will cover.

Instead, as AOI pointed out during the rulemaking, the program costs appear to significantly exceed OHA’s previous fiscal impact projections. The rule indicated that the agency will need 2.4 Full Time Equivalent (FTE) to implement the program. That is nearly double the anticipated FTE identified in the 2015 fiscal impact statement of 1.25 FTE. Importantly, neither of those estimates include the number of FTE required to review Manufacturing Control Program (MCP) applications. The program will actually require more FTE and expertise than the agency appears willing to acknowledge.

Due to the unanticipated program growth, the agency has shifted toward increasing fee support. This shift is contrary to the agency’s position in 2015. The fiscal impact statement for SB-478 (2015) states the following:

> *“This fiscal analysis assumes the fund source for these expenditures to be General Fund because although the bill permits OHA to assess a fee to manufacturers of children's products, based on the experience of other states which have passed similar legislation, there is significant concern regarding the ability to collect enough revenue to support the cost of this work. The manufacturers of children's products include those out of state and out of the country, making revenue collection difficult.”*

Based on the rule, OHA has not only grown this program, but has also shifted from a program intended to be funded primarily by the General Fund to a program supported by fees. This contradicts the information the Legislature relied upon to support SB 478 (2015).

In addition, the adopted rule and accompanying supporting material failed to identify how much revenue will be generated from the proposed fees or even

how that revenue projection was developed. AOI/OBA presumes that OHA has a projection for how much this fee will generate for purposes of carrying out the program. Otherwise, how did the agency understand whether the fee schedule meets agency needs – those projected in 2015?

In short, this program already has over doubled in size and scope from the 2015 projections. Moreover, where convenient, the agency has failed to publicly disclose the total programmatic needs or acknowledge that the agency's 2015 projections are markedly off and what that means for future program elements. The Legislature must act to provide proper oversight and regain control of an already overstressed agency budget.

Senate Bill 836 provides for reasonable fees for OHA outside consultants.

The current Manufacturer Control Program review fees are excessive and will deter companies from utilizing an important program element. The Legislature provided responsible manufacturers an opportunity to implement Manufacturing Control Programs (MCP) to comply with certain provisions in the adopted rule. AOI/OBA members have indicated an interest in utilizing this program element. This is evidenced by the significant comments AOI made during the rules advisory committee process. During that same process, OHA indicated it does not have the in-house expertise to analyze or review MCPs to determine whether or not the MCPs should be approved or otherwise comply with the statutory mandates. For that reason, the fee proposal will seek fees for third-party consultants to do the analysis and review and make recommendations to the agency. It is unclear, however, whether or not the agency will have the necessary expertise to then approve or disapprove the private consultant reports. Nevertheless, under this proposal, each applicant will be responsible for paying for third-party consultant's time and efforts. The consultant will be given direction by OHA, but OHA will not have any cost responsibility. Therefore, it is impossible to know how much this review will cost applicants or how cost controls will be put in place.

The current fee schedule provides that businesses seeking an MCP approval must pay a non-refundable $1,500 fee plus a down-payment of $12,000 for a consultant at $200 per hour to review the MCP application. The $1,500 does not appear to be connected to any agency need and it is unclear what exactly this fee is for. In addition, the agency has not provided sufficient detail or explanation for the $12,000 fee that has no cost controls and could cost an applicant even more than the initial $12,000.

We do not argue that it makes sense for the agency request the necessary help from relevant experts on this issue. However, OHA should have made that point clear in its testimony and fiscal impact statement to the Legislature during SB 478 (2016) TFKA consideration. Unfortunately, the agency failed to acknowledge it was not adequately staffed or prepared to implement this program. Therefore, the agency should not ask manufacturers and retailers to pay for the entire review conducted by a third-party without the ability to independently put cost

controls and limits in place. SB 836 will properly constrain the agency's fee authority to more closely mirror the original intent of TFKA.

Senate Bill 836 gives the Legislature the opportunity to review the program before the costliest portion of the law becomes effective.

SB 836 does not "rollback" any actual safety measures in the TFKA. For instance, the TFKA would still require companies to report the presence of 66 chemicals in their products by December 31, 2017; the state will be required to study, analyze and advise the legislature on future program elements to ensure consumer safety and fiscal responsibility; companies will still be required to submit documentation to the OHA of a Manufacturing Control Program; any reported presence of listed chemicals will still be made available to the public; companies will still be required to pay fees that are not required in other states, and will still be subject to additional fees related to alternative and other costly assessments in the next phase of the program; and small businesses will continue to be exempt from the program.

Instead, passage of this bill will more closely align the program with other states and requires the OHA to analyze the data collected, and provide a report to the Legislature prior to implementing the costliest phase of TFKA which bans certain materials and products. The cost and complexity of this program requires direct Legislative oversight to ensure success.

OHA will still be charged with implementing regulations that go beyond the requirements of any other state, federal or international law. As a result, Senate Bill 836 does not repeal the Toxic Free Kids Act, and Oregon will still have the most expansive and complex program for children's products in the nation.

Conclusion.

AOI/OBA strongly believes in an effective regulatory environment that meets consumer expectations. SB 836 will help meet those goals and more importantly, meet Oregonian's shared objectives – consumer safety and efficient government.

Thank you.

Associated Oregon Industries and Oregon Business Association