S.5648-E (Hoylman-Sigal)/A.3556-D (Zebrowski)

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BILL

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DATE

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OPPOSE

The Business Council opposes this legislation, based on significant concerns with the standards it would apply, and based on practical concerns regarding proposed compliance obligations .

- **Prohibition on PFAS Use** - The bill prohibits the sale of products with "intentionally added" PFAS effective January 1, 2026, or PFAS at or above a level determined by the Department of Environmental Conservation "that is the lowest level that can feasibly be achieved" effective January 1, 2027 We support basing material bans on whether a business intentionally added a material, but we have concerns about the nature and applicability of the second proposed threshold.
  - There is no indication of what "lowest level that can feasibly be achieved" means as a practical matter, and no other state applies this standard. Is this intended to be a measure based on "background," or a level to be achieved through some form of treatment of feedstocks, or something else entirely? Moreover, while a business can obviously control whether it intentionally adds PFAS, it is unclear how it would assess and demonstrate achievement of this "lowest feasible" level, or a business would be required to apply its materials to ongoing testing to assure compliance.
  - The bill authorized DEC to set such standards in regulation and requires DEC to consider updating its standards "at least every five years," but includes no provisions for the implementation of such standards. Businesses cannot be expected to comply with a frequently changing standard with no reasonable advance notice and "sell through" provisions.
  - If this legislation authorizes DEC to set a secondary PFAS limit by regulation, the statute should direct the Department to consider, among other factors, achieving consistency with other federal or state-adopted

standards, to help avoid businesses having to comply with a patchwork of inconsistent mandates.

- An additional concern is, with several PFAS related restrictions already in statute (addressing apparel, food packaging, children's products, and carpets) and several other proposes before the legislature, the state should adopt consistent definitions and compliance mechanisms. For example, this bill cites the definition of "intentionally added" set forth in ECL § 37-0121.4(a), while other statutes and legislative proposals apply the more limited definition set forth in ECL §37-0901.11. Likewise, this bill applies an open-ended definition of "regulated PFAS" that could encompass several thousand separate chemical compounds, while other statutory provisions (ECL § 37-0905) use specific Chemical Abstracts Service, or CAS number for PFOA and PFOS. The state should apply a uniform, specific definition of regulated substances.

- **Post-Production Assessment** - The bill provides that, if the DEC has "a reason to believe" that a covered product contains "regulated PFAS", the product's manufacturer has 30 days to either produce independent, third-part lab results demonstrating that the produce does not contain regulated PFAS, or the manufacturer must notify "persons who sell that covered product in the state" that the sale of that specific covered product is prohibited in New York.
  - The bill provides no criteria as to what can provide the basis of "a reason to believe" the presence of PFAS in a product. It should at least require a reasonable basis for such belief, such as a finding of actual PFAS material use directly by a manufacturer or within its supply chain, or based on documented testing of product, or some other specific, tangible evidence of PFAS in a product.
  - The bill provides no requirements for a DEC notification to a manufacturer of its "reason to believe," and no indication of how a manufacturer would be aware of additional compliance obligations and timetable.
  - The bill requires independent lab results indicating compliance, even during the period from January 1, 2026 to January 1, 2027 when the prohibition only applies to intentionally added PFAS, a factor that cannot be verified through product-specific lab analysis. The bill should include an additional provision allowing for a manufacturer to provided the DEC with information demonstrating that the covered product does not contain intentionally added PFAS.
  - As many products are sold by a manufacturer to a distributor, with the distributor selling products directly retail outlets, it is unclear how the

manufacturer can effectively notify all "persons who sell that [prohibited] covered product in this state." Current DEC guidance on complying with the statutory ban of PFAS in food packaging recognizes this supply chain reality, and recommends that retailers "consult with the manufacturer or supplier," and that "persons selling food in food packaging are encouraged to obtain compliance certifications from their suppliers to demonstrate that their food packaging is compliant."

- **Notice of Compliance** - The bill requires manufacturers of covered products sold into the state to "provide persons that offer the product for sale . . . with a certificate of compliance" that provides "assurance, at minimum, that the product does not contain any regulated PFAS." As discussed above, manufacturers typically sell products to retailers through third-party distributors, so their ability to know, let alone be able to contact, all such retailers is unclear. Experience implementing the state's food packaging restrictions is instructive. While that statute did not actually require compliance certificates, it provides a defense against enforcement if a:
  - manufacturer or distributor . . . relied in good faith on the written assurance of the manufacturer of such packaging or packaging component that [it] met the requirements of this title. Such written assurance shall take the form of a certificate of compliance stating that a package or packaging component is in compliance with the requirements of this title . . . [Note - the statutory defense does not specifically include retailers.]

While this defense provides important legal protection, DEC's compliance guidance imposes an impractical mechanism, saying that "Compliance certifications should be maintained on-site where food packaging is being distributed, sold, or offered for sale." It seems both impractical and unnecessary for each individual retail store to maintain an "onsite" catalogue of compliance certificates. The state should adopt a uniform approach allowing manufacturers to make any compliance certifications through electronic communications, including web sites accessible to all distributors and retailers that may handle their products. We also believe that manufacturers cannot be solely responsible for retailer notifications.

- **Definitions**
  - In the bill's definition of "Cleaning product," it excludes "Industrial products specifically manufactured for, and exclusively used" within specified industrial sectors. We recommend that "exclusively used" be deleted, as there is no practical way to assure that a product is "exclusively used" within specific industrial sectors.

- The bill defines "Fabric treatment" as “a substance applied to a fabric for stain, grease, or water resistance.” This should be amended to add, “ . . . “applied to a fabric after its sale to a consumer . . .” to make clear this is not an additional standard for apparel in addition to existing prohibitions for apparel set forth in ECL §37-0121.

We recognize the state’s interest in assuring protection of public health and the environment from exposure to hazardous materials in consumer products. However, any such restrictions must be based on sound science and apply reasonable, workable compliance provisions. We strongly urge than any further consideration of this legislation address the concerns and recommendations presented above. Otherwise, The Business Council continues to oppose adoption of S.5648-E/A.3556-D.