

**THE ATTORNEYS GENERAL OF
NEW YORK, IOWA, MAINE, MARYLAND, OREGON AND WASHINGTON**

March 16, 2015

Honorable James M. Inhofe, Chairman
Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, DC 20510-6175

Honorable Barbara Boxer, Ranking Member
Senate Committee on Environment and Public Works
456 Dirksen Senate Office Building
Washington, DC 20510-6175

Dear Chairman Inhofe and Ranking Member Boxer:

We, the undersigned Attorneys General, are writing to express our opposition to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, as presently drafted. S. 697 was introduced last week as an amendment to the Toxic Substances Control Act of 1976 (“TSCA”), our national law to protect our citizens and the environment from the risks posed by chemicals and chemical mixtures. In particular, we oppose S. 697’s broadly expanded limitations on the ability of states to take appropriate action under state laws to protect against these risks.

In contrast to the existing law, S. 697 would prevent states from adopting new laws or regulations, or taking other administrative action, “prohibiting or restricting the manufacture, processing, distribution in commerce or use” of a chemical substance deemed by the U.S. Environmental Protection Agency (“EPA”) to be a “high-priority” for federal review even before any federal restrictions have been established. As a result, a void would be created where states would be prevented from acting to protect their citizens and the environment from those chemicals even though federal restrictions may not be in place for many years. S. 697 also eliminates two key provisions in the existing law that preserve state authority to protect against dangerous chemicals. One is the provision that provides for “co-enforcement” – allowing states to adopt and enforce state restrictions that are identical to federal restrictions in order to provide for additional enforcement of the law. The second is the provision that allows states to ban in-state use of dangerous chemicals.

The goal of TSCA is vitally important: to establish necessary and appropriate restrictions on the manufacture and use of chemicals that present an unreasonable risk of injury to human health or the environment. We strongly support this goal, and recognize the essential contribution that TSCA could make in ensuring the adequate protection of public health and the environment from toxic chemicals. Unfortunately, in practice, TSCA has largely failed to live up to its goal and, as a result, we welcome efforts to reform this important statute.

However, we cannot support S. 697's broad expansion of limitations on the authority of states to protect our citizens from the health and environmental risks posed by toxic chemicals within our states in the name of "reform." In fact, as detailed below, we believe that, rather than bringing TSCA closer to attaining its goal, the draft legislation's greatly expanded limitations on state action would move that goal further out of reach.

I. Preemption of State Action Under TSCA

Historically and currently, states have been leaders in protecting public health and the environment from toxic chemicals. That exercise of traditional state "police powers" has allowed states to protect their citizens and natural resources, and serve as laboratories for nationwide solutions for threats to human health and the environment.

Our states have adopted laws and regulations that restrict the sale or use of products containing harmful chemicals. Those laws and regulations play a critical role in protecting the health and welfare of our citizens and the natural resources of our states. These laws and regulations include:

- Iowa's restrictions on the sale, distribution, or offering for promotional purposes of a package or packaging component which contains lead, cadmium, mercury, or hexavalent chromium, Iowa Code § 455D.19(3), and its restrictions on the sale, distribution, or offering for retail sale of rechargeable consumer products powered by nickel-cadmium or lead batteries, Iowa Code § 455D.10B(1).
- The 2008 Maine Act to Protect Children's Health and the Environment from Toxic Chemicals in Toys and Children's Products, codified at 38 M.R.S.A. §§ 1691-1699-B. The legislation directs Maine to publish a list of chemicals of high concern, imposes disclosure requirements for in-state distribution of children's products containing priority chemicals, and authorizes the state to prohibit the distribution of those products for which safer alternatives exist.
- A prohibition under New York's General Business Law, § 396-k, on the import, manufacture, sale or distribution of toxic children's products, and authorization under Executive Law § 63(12) for the New York Attorney General to conduct investigations into violations of that and other laws, and then prosecute and resolve such violations by agreement. The New York Attorney General's Office has taken recent action under these

laws to ensure that retailers in New York do not sell toys and other articles for children that contain dangerous levels of toxic chemicals.

- Oregon’s and Iowa’s restrictions on use of mercury-containing thermostats. Or. Rev. Stat. § 455.355; Iowa Code § 455D.16(6).
- Washington’s and Oregon’s restrictions on the toxic flame retardant Deca-BDE. Wash. Rev. Code § 70.76.030; Or. Rev. Stat. § 453.085(16).

These examples underscore the importance of maintaining the complementary, symbiotic relationship between federal and state chemical regulation in any TSCA reform. TSCA currently provides that a state may regulate any chemical unless and until EPA regulates the chemical under § 6. 15 U.S.C. §§ 2617(a)(1) and (a)(2)(B). Once EPA regulates a chemical because it has found that the chemical presents an unreasonable risk, TSCA provides that a state may not enforce an existing regulation or establish a new regulation “which is designed to protect against such risk” after the effective date of that federal regulation. *Id.* § 2617(a)(2)(B). However, existing § 18(a)(2)(B) exempts a state restriction on a chemical from preemption if the state restriction is: (1) identical to EPA’s restriction; (2) enacted pursuant to another federal law; or (3) a complete ban on in-state use of the chemical. *Id.* Thus, by allowing states to enact restrictions identical to EPA’s, TSCA allows states to “co-enforce” the federal restrictions on toxic chemicals. In addition, subject to EPA approval, existing § 18(b) allows states to establish requirements to protect public health or the environment with respect to a chemical if a state requirement provides a “significantly higher degree of protection” than the EPA requirement, as long as it presents no overt conflict with federal requirements and does not over-burden interstate commerce. *Id.* § 2617(b)(2).

II. Preemption of State Action Under S. 697

a. High-Priority Chemicals

S. 697 would greatly expand TSCA’s scope of state preemption. Substantively, § 4A of the act as proposed would require EPA to categorize all existing chemicals as either “low priority” or “high priority.” § 6 as proposed would require EPA to make safety assessments and determinations regarding high-priority chemicals and issue restrictions on high-priority chemicals that do not meet the safety standard because they present an unreasonable risk of injury to health or the environment.

§ 18(a) as proposed in S. 697 would not preempt existing state restrictions on high-priority chemicals until EPA has either found that the chemical meets the safety standard or

imposed restrictions on a chemical that does not meet the safety standard. It would also allow states to maintain existing restrictions or impose new restrictions on low-priority chemicals.¹

However, under § 18(b) as proposed in S. 697, states would be preempted from imposing any new restrictions on a high-priority chemical once EPA starts its safety assessment. Thus, even though EPA has designated a chemical as high-priority under proposed § 4A(b)(3) because it has the “potential for high hazard or widespread exposure,” states would not be able to protect their citizens and environment from that chemical even though any federal restrictions on it are likely years away. Under proposed § 6(a), EPA may take up to three years after a chemical is categorized as high-priority to conduct a safety assessment and up to two years after a safety assessment is completed to issue restrictions on a chemical. Those deadlines may also be extended by an aggregate length of no more than two years.

Thus, assuming no additional unauthorized delays, S. 697 itself allows up to seven years between a chemical’s high-priority designation and its federal restriction – a period during which states are denied the ability to restrict the chemical in order to protect the health of their citizens and the environment. And history suggests that additional, unauthorized delays will indeed occur.²

b. Additional Forms of Preemption

S. 697 also would eliminate two provisions of the existing law that preserve the ability of states to take action under their own laws. Under § 18(d)(1)(C)(ii)(I) as proposed, state restrictions identical to restrictions issued by EPA under TSCA would no longer be exempt from

¹ Specifically, § 18(a) would provide that a state may not establish a new restriction or enforce an existing restriction on a chemical “found to meet the safety standard and consistent with the scope of the determination made under section 6.” Section 6 applies only to high-priority chemicals. When a chemical is categorized as low-priority under § 4A(b) because it is “likely to meet the applicable safety standard,” no finding whether it meets the standard is required. We note, however, that low-priority status is not necessarily permanent. Under proposed § 4A(b)(9)(A), states must notify EPA of proposed administrative actions, enacted legislation and final administrative action regarding low-priority chemicals, and under proposed §§ 4A(b)(8)(A) and 4A(a)(3)(A)(iii)(III), EPA could respond to such notification by re-designating a low-priority substance as a high-priority one.

² We note, for example, that Congress amended TSCA in July 2010 by adding Subchapter VI that sets forth specific formaldehyde standards for composite wood products. Congress directed EPA, “[n]ot later than January 1, 2013,” to promulgate regulations to implement the standards. 15 U.S.C § 2697(d)(1). Presently, EPA anticipates promulgating the regulations by December 2015. See <http://www2.epa.gov/formaldehyde/formaldehyde-emission-standards-composite-wood-products#proposedrule>.

preemption. Without this exemption, the only means for states to enforce EPA's restrictions on toxic chemicals in their states would be through a citizens' suit in federal court. That would eliminate critical state enforcement tools – state administrative proceedings and judicial actions in state courts – that work in tandem with federal enforcement in states all across the nation to protect our air, water, lands, and citizens from toxic pollutants. Additionally, S. 697 would remove TSCA's current preemption exception for state bans on the in-state use of chemicals, which – as discussed above – has been an important part of states' efforts to safeguard their citizens and natural resources from dangerous chemicals.

While § 18(d)(1)(C) as proposed would add an exception for state restrictions on chemicals relating to air quality, water quality, or waste treatment or disposal, that exception would not cover restrictions that “impose a restriction on the manufacture, processing, distribution in commerce, or use of a chemical substance.” Some chemicals that cause air or water pollution can be controlled before they are emitted or discharged into the environment, and would arguably fit within this exception. However, the risks of many other harmful chemicals – particularly those that are highly toxic, or difficult to control or treat as pollutants – can be effectively reduced only by restricting their use, and such use restrictions by states would be preempted under S. 697.

* * *

In conclusion, we believe that achieving TSCA's goal of ensuring the adequate protection of public health and the environment from toxic chemicals is as important as ever. However, we oppose the provisions in S. 697 that would greatly expand the limits on state action under state law to provide protections against dangerous chemicals. We note that the Attorneys General of California and Massachusetts have sent separate letters to their Senators in which they express their similar opposition to the preemption provisions of S. 697.

We offer the full assistance of our offices to you and your colleagues to craft TSCA reform legislation that would improve federal regulation of toxic chemicals while preserving the traditional and critical role of states in protecting the health and welfare of their citizens and natural resources.

The Honorable James M. Inhofe
The Honorable Barbara Boxer
March 16, 2015
Page 6 of 6

Sincerely,



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