

**THE ATTORNEYS GENERAL OF
MASSACHUSETTS, CALIFORNIA, HAWAII, IOWA, MAINE,
MARYLAND, NEW HAMPSHIRE, NEW YORK, OREGON,
RHODE ISLAND, VERMONT, AND WASHINGTON**

January 19, 2016

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

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

The Honorable Frederick S. Upton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2183 Rayburn House Office Building
Washington, DC 20515

The Honorable Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
237 Cannon House Office Building
Washington, DC 20515

Dear Chairman Inhofe and Ranking Member Boxer, and Chairman Upton
and Ranking Member Pallone:

We, the undersigned Attorneys General, write to commend Congress on undertaking efforts to reform the Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601, *et seq.* (“TSCA”) to help TSCA achieve its goal of protecting public health and the environment from toxic chemicals. As the House of Representatives and Senate have both passed TSCA reform bills, and are now working to reconcile them, we would also like to distill our prior comments into seven core principles regarding the federal-state relationship in TSCA reform, and offer recommendations for addressing issues presented by the differing bills regarding the scope of preemption.

We continue to strongly support the shared goal of reforming TSCA to remove obstacles that have prevented the Environmental Protection Agency from playing a more robust role in protecting the public and the environment from toxic chemicals. At the same time, we believe it is important to recognize that state and local regulation of public health and safety, and environmental effects, is consistent with the traditional allocation of responsibilities and powers under our federal system of government, and that this cooperative exercise of regulatory authority has been an important tool for reducing risks to our residents and the environment from toxic chemicals. Accordingly, we strongly believe that preemption of state actions beyond that of existing TSCA is counterproductive.

In prior correspondence and testimony on behalf of our states, we have said that, to the extent that TSCA reform legislation contemplates preemption of state and local regulation, any

such preemption should be as limited as possible and consistent with fundamental principles regarding the vital, complementary roles that the states and the federal government must play, and historically have played, in chemicals regulation. Our recommendations below on limiting the preemption of each state's authority to protect its citizens and the environment in any final bill are guided by those principles.

We appreciate the invitations we have received to testify in Committee, and the dedicated efforts of Congressional staff members to engage our coalition to discuss our concerns and to attempt to find ways to address them. We believe this has resulted in progress on several of the significant concerns we have raised in this legislative process. For example, in their final form, both the TSCA Modernization Act of 2015 (H.R. 2576) as passed by the House in June 2015 (the "House Bill") and the Frank R. Lautenberg Chemical Safety for the 21st Century Act as passed by the Senate in December 2015 (the "Senate Bill," formerly S. 697, now H.R. 2576, as amended in the Senate December 17, 2015): (i) allow states and political subdivisions (hereafter "states") to co-enforce federal standards through the adoption of identical requirements in state law; (ii) preserve longstanding state chemicals programs from preemption; and (iii) exempt from preemption state water quality, air quality and waste treatment or disposal laws. In other areas, however, such as the timing of preemption and the requirements for obtaining a waiver, the bills differ in the extent to which they have made progress on our core concerns.

Thus, the outcome of the reconciliation process will be crucial in determining whether the new TSCA regimen to a greater extent reflects our goal of having a successful federal-state partnership that both enhances federal authority and protects state interests, and is of deep interest to our states.

State Principles

There are seven core principles regarding the state-federal relationship in TSCA reform reflected in our prior letters and hearing testimony. We believe adherence to these principles is crucial to limit preemption to the greatest extent possible and succeed in spurring an appropriate, beneficial government partnership in chemical regulation – a partnership we resolutely believe is needed to protect the public health and environment both when EPA has access to adequate resources and when the agency does not enjoy such resources:

- 1. States should not be preempted until EPA has taken a final action;**
- 2. Once EPA has taken a final action, the scope of state law preempted should be no broader than the scope of EPA's action;**
- 3. States should not be preempted from continuing to establish requirements on chemicals pursuant to longstanding state laws;**
- 4. States should not be preempted from continuing to enforce existing requirements on chemicals;**
- 5. State laws related to water quality, air quality or waste treatment or disposal should not be preempted;**

- 6. States should be able to obtain a waiver to adopt requirements that are more protective than EPA's if the requirements do not unduly burden interstate commerce and do not make it impossible to comply with both state and federal law; and**
- 7. States should be able to keep "cops on the beat" to co-enforce requirements that have been adopted by EPA.**

We address each state principle in turn below, and make recommendations for reconciling the House Bill and the Senate Bill better to satisfy them.

Preemption Only After Final EPA Action

States should not be preempted until EPA has taken a final action. Existing TSCA¹ and the House Bill² take this approach, which avoids problematic "regulatory void preemption," where the federal government has yet to reach a determination and states are nonetheless prevented from taking action. A regulatory void jeopardizes the state and federal government's shared objective of protecting public health and the environment and intrudes unnecessarily on state authority. In short, there are strong reasons not to deviate from the well-established practice of not preempting states prior to final federal government action, and to avoid regulatory lapses states should not be preempted until the federal government requirement is implemented.

Preemption Limited to the Scope of EPA's Action

Once EPA restricts a chemical, the scope of state law preempted should be no broader than the scope of EPA's action. Existing TSCA preempts any state law that is applicable to the same chemical or article containing such chemical and "is designed to protect against" the same "risk" as the Administrator's rule or order.³ This approach makes good sense. As to most chemicals, the House Bill takes a different approach, arguably broadening the scope of preemption by referring to the "intended conditions of use considered by the Administrator in the risk evaluation . . . [or] a use identified in a notice received by the Administrator."⁴ Thus, for example, a hypothetical EPA action with respect to use of a particular cleaning-product chemical on the basis of long-term cancer-causing potential might be asserted to preclude a state from taking regulatory action on the same chemical designed to protect against, e.g., short-term respiratory effects. The Senate Bill appears to avoid this potential infirmity by limiting the scope of preemption to "the hazards, exposures, risks and uses or conditions of use . . . included in the scope of the safety determination . . ."⁵ This is similar to the approach the House Bill takes with respect to Persistent Bioaccumulative Toxic chemicals ("PBTs").⁶

¹ 15 U.S.C. §§ 2617(a)(2)(A) and 2617(a)(2)(B).

² The House Bill § 7(a)(2) (revising existing TSCA § 18(a)(2)(B) and adding new TSCA § 18(a)(2)(C)).

³ 15 U.S.C. § 2617(a)(2)(B).

⁴ The House Bill § 7(a)(2) adding new TSCA § 18(a)(2)(C)).

⁵ The Senate Bill § 17 (adding new TSCA § 18(c)(2)).

⁶ The House Bill § 4(e), amends TSCA, § 6 (15 U.S.C. § 2605), by adding new § 6(i), which requires that within nine months of enactment, EPA publish a list of chemicals the agency has a reasonable basis to conclude are PBTs. Then, with respect to any PBTs identified under the proposed § 6(i), the House Bill § 7(a), amends TSCA § 18(a)

Preservation of State Authority Under Longstanding State Laws

During the nearly four decades in which EPA has been hamstrung by the limitations TSCA imposes on federal efforts to protect the public from unsafe chemicals, many states have stepped up to take action. In some instances, state laws creating chemical regulatory programs have been in operation for twenty-five years or more. For example, California voters passed the Safe Drinking Water and Toxics Enforcement Act of 1986 (Proposition 65), and in 1989 the Massachusetts legislature passed the Toxics Use Reduction Act (Mass. General Laws Ch. 211). These longstanding programs have been working in conjunction with TSCA and numerous other federal health and safety laws, and there appears to be a clear consensus that TSCA reform should not interfere with the authority of states to continue to establish requirements under such longstanding laws.⁷ While the two bills arrive at this result through different phrasing, we prefer wording closely modeled on prior precedent – section 231(b) of the Consumer Product Safety Improvement Act (CPSIA) – as reflected in the new TSCA sections 18(e)(1)(A) and 18(e)(1)(B) set out in the Senate Bill.

Preservation of Existing State Requirements

Both the House and Senate bills reflect an intent not to undo the good work already done by the states to protect their residents’ health and their environment from the hazards presented by toxic chemicals. Both bills provide that states may “continue to enforce any action” that was taken “before August 1, 2015 under the authority of a State law.” *See the House Bill § 7(b)* (adding new TSCA §18(c)(1)(A)); the Senate Bill § 17 (adding new TSCA § 18(e)(1)(A)). As we understand it, the intent of both houses is to give the word “action” its plain meaning, rather than a narrow legal definition (i.e., a lawsuit). Thus, the word “action” encompasses the adoption of a requirement or regulation implementing state law, so long as those actions were taken prior to August 1, 2015. Thus, for example, pre-August 2015 state laws banning or restricting the use of flame retardant chemicals in upholstered furniture or children’s products, or pre-August 2015 regulations implementing those statutes, would not be preempted, and states would not be preempted from “continuing to enforce” those laws. Here, we believe that the use of the phrase “action taken or requirement imposed” would provide greater clarity.

No Preemption of State Air Quality, Water Quality or Waste Treatment or Disposal Laws

As both bills recognize, in the course of regulating water quality, air quality or waste treatment or disposal, states may have a need to impose requirements on the manufacture, processing, distribution in commerce or use of chemicals. *See the House Bill § 7(a)* (adding new TSCA § 18(a)(2)(C)(iii)); the Senate Bill § 17 (adding new TSCA § 18(d)(1)(A)(iii)). Both bills attach certain caveats to the preservation of these state requirements on chemicals. Of the different formulations of those caveats, the one we prefer limits preemption to those state requirements that “would cause a violation of the applicable action by the Administrator under section 5 or 6.” If there is to be any further articulation of the caveats – e.g., preempting

(15 U.S.C. § 2617(a)), by adding § 18(a)(2)(C). That section, among others, *limits preemption to the risk of injury considered by EPA*, but only as to PBT assessments under the newly added § 6(i).

⁷ See 161 Cong. Rec.—House, H4559 (June 23, 2015) (“Mr. SHIMKUS. Mr. Speaker, that is correct. We do not intend to interfere with the operation of Proposition 65 unless a requirement under that law actually conflicts with a federal requirement under TSCA.”); see also Senate Report 114-67 (June 18, 2015) at 26.

“inconsistent” or “actually conflicting” requirements – we agree that those should be limited to state laws that “address [] the same hazards and exposures, with respect to the same conditions of use.” *See* the Senate Bill § 18(d)(1)(A)(iii)(II)(aa). In addition, both houses have indicated that state requirements implementing a reporting, monitoring, disclosure or other information obligation not otherwise required by the Administrator or by Federal law should fall outside the scope of preemption. *See* the Senate Bill § 18(d)(1)(A)(ii); House Report 114-176, at p. 31. For clarity, we prefer that this exemption from preemption be expressly stated in the bill.

Conditions for State Waivers Should be Clear and the Process Straightforward

Existing TSCA permits the Administrator to exempt (i.e., to grant a waiver from preemption for) state requirements that: (1) would not cause a person to be in violation of a federal requirement for the same chemical, (2)(A) provide a significantly higher degree of protection from risk, and (2)(B) do not unduly burden interstate commerce.⁸ The House Bill does not alter these conditions. The Senate Bill, however, adds two additional conditions for such waiver: first, that the Administrator find that the state has shown “compelling conditions” and second, that the proposed state requirement was identified “consistent with the best available science,” “using supporting studies conducted in accordance with sound and objective scientific practices,” and “based on the weight of the available evidence.” The Senate Bill § 17 (adding new § 18(f)(1)). We are concerned that the Senate Bill’s proposed waiver requirement adds unnecessarily to the number of issues that might be litigated in a challenge to either a grant or denial of a state’s waiver application.

In addition, the framework of existing TSCA, left unchanged by the House Bill, does not clearly require the Administrator to make a timely decision on a waiver request. We would prefer that the statute specify a time period within which the Administrator shall make a reviewable decision regarding a state’s waiver request.

States Must Be Able to Keep Their “Cops on the Beat”

Existing TSCA and many other federal environmental statutes, such as the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the CPSIA, permit states to adopt requirements that are identical to the requirements prescribed by the federal government.⁹ This enables state Attorneys General and other state agencies to complement the resources of the federal government for enforcement. The current versions of both the House and Senate bills wisely continue to allow states to adopt requirements that are identical to EPA’s, although they place limits on the recovery of penalties that we believe hamper the important deterrent value of the statutory penalty scheme. *See* the House Bill § 7(a)(3) (adding new TSCA § 18(a)(3)); the Senate Bill § 17 (adding new TSCA §§ 18(d)(1)(A)(iv) and 18(d)(1)(B)). In this regard, we prefer the language in the Senate Bill, which would restrict a state’s recovery only if EPA has assessed an adequate penalty.

⁸ 15 U.S.C. § 2617(b).

⁹ *See* 15 U.S.C. § 2617(a)(2)(B)(i); 7 U.S.C. § 136w-1; 15 U.S.C. § 2075(a).

Conclusion

The undersigned Attorneys General welcome the opportunity to continue to work with Congress to ensure that this important effort to improve federal regulation of toxic chemicals will not undermine a productive federal-state partnership in protecting the health and welfare of the public and our environment.

Thank you for your continuing consideration of our concerns. Sincerely,



Kamala D. Harris
California Attorney General



Doug S. Chin
Hawaii Attorney General



Tom Miller
Iowa Attorney General



Janet T. Mills
Maine Attorney General



Brian E. Frosh
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Bob Ferguson
Washington State Attorney General

cc: The Honorable Mitch McConnell, U.S. Senate Majority Leader
The Honorable Harry Reid, U.S. Senate Minority Leader
The Honorable Paul Ryan, U.S. House Speaker
The Honorable Nancy Pelosi, U.S. House Minority Leader
The Honorable John Cornyn, U.S. Senate Majority Whip
The Honorable Dick Durbin, U.S. Senate Minority Whip
The Honorable Kevin McCarthy, U.S. House Majority Leader
The Honorable Steny Hoyer, U.S. House Minority Whip
The Honorable Mike Rounds, Chairman, Subcommittee on Superfund,
Waste Management, and Regulatory Oversight
The Honorable Edward J. Markey, Ranking Member, Subcommittee on Superfund,
Waste Management, and Regulatory Oversight
The Honorable John Shimkus, Chairman, Subcommittee on Environment
and the Economy
The Honorable Paul Tonko, Ranking Member, Subcommittee on Environment
and the Economy
The Honorable Tom Udall, U.S. Senate
The Honorable David Vitter, U.S. Senate