

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

May 28, 2015

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

Re: H.R. 2576, *the TSCA Modernization Act of 2015*

Dear Chairman Upton and Ranking Member Pallone:

We, the undersigned Attorneys General, write regarding the bill entitled the TSCA Modernization Act of 2015, H.R. 2576 (the "Subcommittee Bill"), introduced and referred to your Committee on May 26, 2015, which would amend the Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601, *et seq.* ("TSCA"). A prior iteration of the Subcommittee Bill was advanced by the Subcommittee on Environment and the Economy on May 14, 2015. This letter primarily addresses the Subcommittee Bill's provisions regarding preservation of state chemicals regulatory and enforcement authority, but also touches on issues of EPA authority. We are continuing our review of the Subcommittee Bill and may have further comments but wished to convey our thoughts thus far.

At the outset, we recognize that the Subcommittee Bill leaves in place two critically important components of the state-federal partnership under existing TSCA: TSCA's express authorization of state co-enforcement, and TSCA's fairly straightforward waiver-of-preemption provision. In addition, we appreciate that the Subcommittee Bill does not preempt states' police powers years in advance of a final action by the EPA Administrator but rather creates preemption only at the moment EPA makes a final determination as to a chemical's safety. However, as described in detail below, we are concerned that the Subcommittee Bill scales back states' police powers in at least two significant ways that go beyond the limits found in existing TSCA. We strongly encourage your Committee to reconsider those provisions and maintain the traditional state-federal partnership that has been forged to protect the public from toxic chemicals.

Context: The Need for TSCA Reform

As many of the undersigned Attorneys General previously stated in our April 17 and June 2, 2014, letters to the Subcommittee regarding previous discussion drafts, we stand with other stakeholders in industry, environmental and public health organizations, state and federal government, and scientific and academic communities in supporting efforts to make TSCA more effective in protecting public health and the environment from toxic chemicals' manufacture and use.

It is widely recognized that TSCA in its current form has largely failed to accomplish its crucial purpose. Only a small handful of the approximately 84,000 registered industrial chemicals in the United States are currently subject to any federal regulation, and the vast majority of these chemicals have not even been reviewed for safety.

Fortunately, current TSCA's limited preemption provision (in existing Section 18) has allowed states to play a critical role in reducing chemical risks that EPA has not addressed. State laws and regulations have caused or accelerated beneficial *national* changes in the use of a number of toxic chemicals, including polybrominated diphenyl ethers (PDBEs), numerous phthalates, formaldehyde, mercury, cadmium, and lead.

And this beneficial state work is continuing. Most recently, Minnesota Governor Mark Dayton signed into law a bill banning four flame retardants that release carcinogens into the air when they catch fire, thereby elevating firefighters' cancer risk. The law, Minnesota Chapter 62, SF 1215, prohibits the manufacture, sale, or distribution of children's products or upholstered residential furniture containing more than 1,000 parts per million of any of the flame retardants TDCPP (tris [1,3-dichloro-2-propyl] phosphate), decabromo diphenyl ether, haexabromocyclododecane, and TCEP (tris [2-chloroethyl] phosphate).

Our Concerns with the Subcommittee Bill

While the Subcommittee Bill recognizes state co-enforcement authority in proposed new Section 18(a)(2)(C)(i), and preserves the existing waiver provision of TSCA, the Subcommittee Bill gives us concern because it scales back the states' police powers and inhibits the traditional state-federal partnership that protects the public from toxic chemicals.

First, under proposed Section 7 (amending TSCA to add a new Section 18(a)(2)(C)), once the Administrator has taken action to restrict a chemical in specified conditions of use under Section 5 or 6, states are preempted from taking action with respect to "exposure to the chemical substance or mixture" in that use, even if they endeavor to address a different health impact than that tackled by EPA (except as to Persistent Bioaccumulative and Toxic (PBT) chemicals regulated under the proposed new Section 6(i), as to which preemption may attach only to a requirement imposed to protect against a risk considered by EPA in imposing its requirement). Thus, for example, a hypothetical EPA action with respect to use of a particular cleaning-product chemical on the basis of its long term cancer-causing potential might be asserted to preclude a state from taking a regulatory action designed to protect against, *e.g.*, short-term respiratory effects. We do not see any conceptual justification for making preemption

more expansive than the scope of EPA's regulatory action. We accordingly recommend a more narrowly tailored provision specifying that state action is precluded only where it addresses the same health effects from the uses or conditions of use that are ultimately included in the scope of the safety determination, a Section 6 rule, or a Section 5 or 6 rule or order.

Second, the Subcommittee Bill departs from current TSCA in that it neither permits states to ban in-state use of a chemical, nor allows states to maintain existing regulations of a chemical for which EPA, after analysis, finds the safety standard is met under the same conditions of use. Although the Subcommittee Bill purports to spare at least those state laws that fall within the temporal scope of the Savings provision (Subcommittee Bill, Section 7), we believe that provision is confusing as written and may lead to varying interpretations and corresponding litigation.

To simplify the Savings provision, we urge the division of portions pertaining to pre-August 1, 2015, and pre-August 31, 2003, enactments into separate subparagraphs, which will make the text easier to follow. We also suggest that the word "requirement" be added to the word "action" in describing the nature of state activity preserved, so that it is unambiguous that state laws and regulations, and not merely already-initiated enforcement activities, are grandfathered and may continue to be enforced. Finally, we urge that the "actually conflicts" language regarding preemption be replaced with a straightforward, narrowly drawn test for preemption that will minimize interpretive controversy: whether dual compliance with state and federal standards is impossible for regulated parties.

We also note that the Subcommittee Bill does not exempt from preemption state requirements for disclosure, information reporting, and monitoring, an exemption that we believe should be included in the bill to foster the production of information about toxic chemicals.

As a final matter, in focusing on the important ongoing partnership role for states in toxics regulation and enforcement, we in no way wish to downplay the critical importance of enhancing EPA's authority to regulate toxic chemicals on a nationwide basis. We accordingly hope that as the Subcommittee Bill evolves, the Committee will address, in particular, the ongoing marked imbalance between EPA's mandate to perform industry-requested assessments of chemicals (which remains unlimited [Section 4(b)(3)(A)(ii)]), and its charge and capacity to address priority toxic threats (which remains both limited, and "[s]ubject to the availability of appropriations" [Section 4(b)(7)]).

Conclusion

We would welcome the opportunity to work with your Committee to ensure that TSCA amendments to improve federal regulation of toxic chemicals will also preserve a productive state-federal partnership in protecting the health and welfare of the public and our environment.

Thank you for your consideration of our concerns.

Sincerely,



Kamala D. Harris
California Attorney General



Maura Healey
Massachusetts Attorney General



Doug S. Chin
Hawaii Attorney General



Eric T. Schneiderman
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Tom Miller
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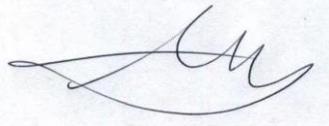
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cc: The Honorable John Shimkus
Chairman, Subcommittee on Environment and the Economy
The Honorable Paul Tonko
Ranking Member, Subcommittee on Environment and the Economy