AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

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LEGISLATIVE ALERT

April 13, 2015

Honorable James Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Honorable Barbara Boxer
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Chairman Inhofe and Ranking Member Boxer:

I am writing on behalf of the AFL-CIO to convey our views on the Frank R. Lautenberg Chemical Safety for the 21st Century Act (S. 697).

The AFL-CIO appreciates the efforts of Senator Tom Udall and Senator David Vitter to craft bi-partisan legislation to reform the Toxic Substances Control Act of 1976 (TSCA). The federation was deeply involved with the passage of the original TSCA law and its early implementation. Workers face some of the highest risks from exposure to toxic chemicals, and we were hopeful that TSCA would provide important tools to control these exposures. Like others, we have been disappointed and frustrated that the law has failed to provide meaningful and effective regulation for limiting exposures to toxic substances, and agree that major reform of TSCA is long overdue.

The AFL-CIO, in consultation with our affiliates, has spent considerable time reviewing the proposed Udall-Vitter legislation. While the bill includes a number of improvements over the existing TSCA statute, the legislation has serious flaws and deficiencies that would thwart and undermine future chemical control efforts and fails to adequately protect the public and workers from exposure to toxic chemicals. The AFL-CIO believes that these flaws and deficiencies, which are outlined below and in the detailed review that follows, must be addressed before action on the bill is completed.

In our view, the most significant flaws in the proposed legislation are the preemption provisions which would greatly restrict the ability of states to take action to protect their citizens from toxic chemicals. States are preempted from acting once EPA designates a chemical as a high priority, years before there is any binding federal action to limit exposures, with no guarantee that EPA will actually take final regulatory action. In addition, states are prohibited from even co-enforcing standards that are identical to federal rules, a total departure from the shared state-federal enforcement responsibilities under TSCA and other environmental laws.

Much of the progress that has been made in protecting the public and workers from exposures to toxic chemicals has resulted from state action. States have been at the forefront of identifying chemical hazards, providing warnings and restricting the use of toxic chemicals. State policies and actions have promoted the use of less hazardous substances, the most effective means to limit exposures. The states' ability to take action in the future is critical for continued progress and protection of the public and workers.

In addition to restricting action by the states, the bill has other serious deficiencies that in the AFL-CIO's view would thwart and undermine effective control of toxic chemicals by EPA. The bill fails to define "unreasonable risk," thus leaving the level of protection that must be afforded to the public undefined and subject to challenge. It allows EPA to rely on cost-benefit analysis in its risk management decisions, allowing less protective measures to be relied upon. EPA may only ban substances if other restrictions are insufficient, imposing a high burden on the agency before it may prohibit use. While the bill sets time frames for EPA to act on high priority chemicals, allowing seven (7) years for the promulgation of a final rule, it is not clear that these time frames are enforceable if EPA fails to act. There are no provisions in the bill requiring expedited action on asbestos or other high hazard chemicals. The provisions for taking action on articles that contain hazardous chemicals and imported chemicals also require EPA to make findings that will make it difficult for EPA to act. The bill requires EPA to expend scarce resources identifying and designating low priority chemicals and provides no public right for judicial review of these determinations. These concerns are outlined more fully in the enclosed attachment.

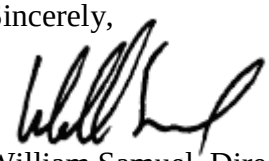
As we have noted, the Udall-Vitter bill includes a number of provisions that are improvements over the existing statute. S. 697 directs EPA to set priorities for assessing and controlling toxic chemicals and outlines time frames for action. It eliminates the requirement for EPA to choose the least burdensome alternative requirement when regulating chemicals, a provision that has blocked the regulation of hazardous substances including asbestos. It authorizes EPA to require or collect information on chemicals without having to demonstrate unreasonable risk, and provides the agency broader authority to require this information. The bill allows EPA to share confidential business information with states and other federal agencies. It also establishes a fees structure for industry to make modest contributions for assessments and safety determinations on chemicals.

But it is the AFL-CIO's view that even with these improvements, the flaws and deficiencies in the bill are so significant, particularly the preemption of future state action, that the legislation fails to provide an effective regulatory framework for protecting workers and the public from exposure to toxic chemicals.

The AFL-CIO stands ready to work with the bill's sponsors and other Senators to address the problems that we have outlined. We hope that working together with those who seek reform of TSCA that final legislation can be crafted that provides effective control of toxic chemicals and meaningful protection for workers and the public.

If you have questions or would like additional information regarding the AFL-CIO's views on this legislation, please contact Peg Seminario in the AFL-CIO Safety and Health Department (pseminar@aflcio.org, 202-637-5366) or Tom Trotter in the Government Affairs Department (ttrotter@aflcio.org, 202-637-5084).

Sincerely,



William Samuel, Director
Government Affairs Department

WS/PS/lkr

AFL-CIO Review of the Frank R. Lautenberg Chemical Safety for the 21st Century Act (S. 697) Key Issues and Concerns

The Frank R. Lautenberg Chemical Safety for the 21st Century Act (S. 697) includes a number of improvements over the existing TSCA statute. S. 697 directs EPA to set priorities for assessing and controlling toxic chemicals and outlines time frames for action. It eliminates the requirement for EPA to choose the least burdensome alternative requirement when regulating chemicals, a provision that has blocked the regulation of hazardous substances including asbestos. It authorizes EPA to require or collect information on chemicals without having to demonstrate unreasonable risk, and provides the agency broader authority to require this information. The bill allows EPA to share confidential business information with states and other federal agencies. It also establishes a fees structure for industry to make modest contributions for assessments and safety determinations on chemicals.

But, it is the view of the AFL-CIO that the legislation has serious flaws and deficiencies that would thwart and undermine future chemical control efforts and fails to adequately protect the public and workers from exposure to toxic chemicals. These problems should be addressed before the legislation is advanced. The key flaws and deficiencies in the legislation are as follows:

- **The preemption provisions severely restrict the ability of states to take future action to protect their citizens from exposure to toxic chemicals (Section 18).**

The bill includes complicated preemption provisions that fundamentally change the federal-state relationship regarding the control of toxic chemicals. States are prohibited from taking action on a chemical once EPA designates a chemical as a high priority, years before there is any binding federal action to limit exposures. Under the bill, EPA is given seven (7) years to act on high priority chemicals, but there is no guarantee that at the end of that process a final regulation will be issued. The bill does grandfather in existing state toxic chemical regulations issued before January 1, 2015. It also includes a provision stating that actions taken under a state law that was in effect as of August 31, 2003 are not preempted. But it is unclear how this provision interacts with the prohibition of future regulatory actions on high priority chemicals.

In addition, the bill prohibits states from even co-enforcing standards that are identical to federal rules. This is a total departure from the shared state-federal enforcement responsibilities under TSCA and other environmental laws. EPA's capacity to enforce TSCA requirements is extremely limited. Prohibiting state co-enforcement will weaken oversight and enforcement, and undermine effective regulation of chemical hazards. The current TSCA law provides for states, with the approval of EPA, to take regulatory action on chemicals that are the subject of EPA rules or orders if the state action does not interfere with interstate commerce or conflict with the federal requirement. Any new TSCA reform legislation should, at a minimum, provide for similar future actions by states and maintain the ability of states to adopt and co-enforce standards that are identical to EPA's.

- **The required level of protection against toxic chemicals is not clearly established.**

The legislation directs EPA to take action on high priority chemicals that do not meet the safety standard which under the bill is defined as a standard that ensures that, without taking into account cost or other non-risk factors no unreasonable risk of harm to health or the environment will result from exposure to the public or susceptible populations (Section 3). While this definition precludes cost in the risk determination, the bill does not define the term "unreasonable risk" thus leaving the types and levels of

harm that must be addressed totally unclear. What is unreasonable – is it a risk of harm of one in a thousand, one in ten thousand, one in a million or some other level of risk?

The failure to establish a clear standard for protection will result in endless litigation to define what is meant by "unreasonable risk" and thwart effective regulation. This is a fatal defect that must be fixed by clearly establishing a high protective standard for the level of risk and harm that must be addressed under the legislation.

- **The risk management of chemicals allows balancing of costs and benefits, weakening protection that must be afforded (Section 6(d)(4).**

The AFL-CIO has long opposed the use of cost benefit analysis in setting standards for safety and health hazards since it undermines the protection of workers and the public. Indeed, the use of cost-benefit analysis is prohibited in setting standards for toxic substances under the Occupational Safety and Health Act. The technological and economic feasibility of rules must be established, but a balancing of costs and benefits is not allowed.

Cost-benefit analysis has repeatedly been used by opponents of rules to argue for a lower degree of protection or less effective control measures, including the use of respirators instead of engineering controls to limit worker exposures. This approach is contrary to long-established occupational health practice to limit exposures at their source, and has been rejected by OSHA since it fails to provide adequate or effective protection. It is appropriate to consider the feasibility of control measures in establishing regulations, but a balancing of costs and benefits should not be allowed.

- **The threshold for banning or prohibiting the use of a toxic chemical is inappropriate and thwarts the use of safer chemicals.**

Under the bill, EPA is directed to impose restrictions by rule to ensure that toxic chemicals meet the safety standard under conditions of use. EPA may only impose a ban or phase out of a chemical if the application of restrictions is insufficient to meet the safety standard (Section 6(c). This threshold is inappropriate. The established hierarchy of controls for limiting exposures is to substitute a hazardous substance with a less toxic alternative. This is the practice in controlling workplace exposures and is the foundation for green chemistry and using safer alternatives to limit public exposures. The bill as introduced turns this hierarchy of controls on its head.

Moreover, in order to ban a chemical EPA must first show that restrictions are insufficient to protect against risk. This is an unreasonable burden that would make it difficult for EPA to ban even the most dangerous of substances including asbestos. Indeed the asbestos industry has argued for decades that asbestos can be used safely if regulated and should not be banned. The legislation should be promoting the use of safer chemicals. But at a minimum it must give EPA the full discretion to ban hazardous substances, without having to first demonstrate that other restrictions are insufficient to public or workers from harm.

- **The timeframes for EPA action on high priority chemicals do not appear to be enforceable.**

The legislation establishes timeframes for EPA to act on high priority chemicals (Section 6(a). No later than 6 months after designating a substance as a high priority chemical, EPA is to define the scope of the safety assessment and safety determination. The safety assessment and determination are to be completed within 3 years of the designation of a high priority chemical. EPA is then directed to promulgate a final

rule within 2 years of completing the safety assessment. EPA is permitted to extend these deadlines for a period not to exceed a combined period of 2 years. But there is no deadline by which final rules issued by EPA must become effective, meaning that the implementation of protections could be delayed.

Moreover, as the bill is drafted, it is not clear that these time frames in the bill are enforceable. The bill provides for judicial review of actual determinations and final regulations, but nowhere in the legislation is there a provision that provides for judicial review if EPA fails to meet the timeframes set forth in the bill (Section 19). For the timeframes to be meaningful, the legislation must include language to make EPA's failure to meet the schedule for action outlined in the bill subject to judicial review.

- **There are no provisions for expedited action on asbestos or other high hazard chemicals.**

  Exposure to asbestos remains a significant threat to workers and the public, not only in the United States, but globally. In the U.S. an estimated 10,000 people die each year from asbestos related diseases, the majority of them workers or their family members. Many of these diseases are from past high exposures, but asbestos exposure continues today. These exposures come from demolition or other activities that disturb asbestos that is in place, but also in the use of new asbestos products. In other countries, particularly in developing countries, the use of asbestos is growing putting millions at risk of exposure, disease and death.

  In 1989 EPA tried to ban asbestos under its TSCA authority, but the rule was struck down. The reviewing court ruled that the agency had not demonstrated that the ban represented the least burdensome regulatory alternative for controlling exposure**.** The inability of EPA to ban asbestos is recognized to be one of the most glaring failures of the current TSCA law.

  Unfortunately, S. 697 includes no provisions requiring expedited action to be taken on asbestos or other high hazard chemicals. The legislation should be amended to provide for expedited action to ban asbestos within 3 years.

- **The provisions for regulating articles that contain hazardous chemicals impose too high a burden on EPA and will prevent effective regulation (Section 3A(h)(3).**

  In order to restrict an article that contains a hazardous substance, the legislation requires EPA to have evidence that there is significant exposure to the chemical substance from the article. This means that if EPA wants to limit or prohibit the use of a chemical in certain products, the agency must have evidence that there will be significant exposure to the chemical from the use of that particular product. This is a very difficult burden to meet. While, the amount of a hazardous substance in a product may be known, exposure information on all the uses of a chemical may not be available. In addition, chemicals in many products may be contained under most conditions, but there may be significant exposures during fires, decomposition or demolition. For example, many asbestos containing products may not pose a danger if they are undisturbed and left in place. However, there are significant exposures if the product is disturbed. Identifying all of the products that contain asbestos and the exposures that may result from them is an impossible task. The language in the bill should be changed to allow EPA to regulate articles that contain toxic chemicals based upon the potential for exposure, not a demonstration of actual exposure for every use.

- **The provisions for controlling exposures to imported articles that contain hazardous substances are less restrictive than the provisions for domestically manufactured articles that contain hazardous substances (Section 13).**

  The legislation gives the Secretary of Homeland Security the authority to refuse entry of imported chemicals that EPA has banned or determined do not meet the safety standard or that are offered for entry in violation of EPA rules or orders. Importers are required to certify that their chemicals or articles are in compliance with EPA rules. However, for articles that contain hazardous substances, EPA is required to specify which articles require certification, and in making such determinations must take into account the degree of risk of the article, the impact on commerce and potential for the certification to impede commerce, among other factors. This is in addition to the requirements that must be met for any regulation of articles that contain toxic substances, which as outlined above are too restrictive. The bill should provide for imported toxic chemicals and articles that contain such chemicals to be subject to the same level of regulation as domestically produced chemicals and articles.

- **EPA is directed to designate a list of low priority chemicals, that the agency determines are likely to meet the safety standard, but the public has no right to challenge these determinations (Section 4A(b).**

  In addition to designating high priority chemicals that pose an unreasonable risk of harm and conducting safety assessments and safety determinations on those chemicals, EPA is directed to designate low priority chemicals that the agency concludes have sufficient information to establish that the chemical substances are likely to meet the safety standard. The bill provides states the right to challenge these low priority designations in court, however, the public is not provided a similar right of review (Section 18(f)(7).

  Given the large number of toxic chemicals in need of review and regulation, mandating that EPA direct limited resources to assessing and designating low priority chemicals in our view is misdirected. But if EPA is required to make such determinations, it is imperative that these determinations can be challenged by the public and subject to judicial review.

Prepared by: AFL-CIO Safety and Health Department