



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

March 13, 2015

The Honorable Charles E. Schumer
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Kirsten E. Gillibrand
United States Senate
478 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators Schumer and Gillibrand:

I am writing to express my opposition to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, as presently drafted. S. 697 was introduced this 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, I oppose S. 697's broadly expanded limitations on the ability of New York and other 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. I 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, I welcome efforts to reform this important statute.

However, I 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, I 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, New York and other 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.

For example, in 1970 New York banned use of the insecticide DDT, which was devastating many bird populations, including American bald eagles, peregrine falcons, brown pelicans, and ospreys. Two years later, EPA followed New York's lead. Twenty years later, the American bald eagle was up-listed from an endangered species to a threatened species.

More recently, in 2009, New York banned the purchase and incineration of coal "fly ash," a waste product of burning coal to produce electricity. Fly ash is rich in mercury, a highly toxic compound that causes nervous system damage, neurological problems, birth defects, and developmental delays. In 2014, EPA promulgated a final rule on fly ash and other coal combustion waste products under the Resource Conservation and Recovery Act.

Additionally, New York has adopted laws and regulations restricting 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 New York State. These laws and regulations include:

- A prohibition under 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 my office to conduct investigations into violations of that and other laws, and then prosecute and to resolve such violations by agreement. My 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.
- A ban on bisphenol A ("BPA") in child care products, including pacifiers, baby bottles, and sippy cups. N.Y. Env'tl. Conserv. Law § 37-0501 et seq. BPA leaches into liquids

and foods and has been shown to mimic the behavior of estrogens in the human body, causing changes in the onset of puberty and reproductive functioning.

- A ban on flame retardant tris(2-chloroethyl) phosphate (“TRIS”) in child care products, including toys, car seats, nursing pillows, crib mattresses, and strollers. N.Y. Evtl. Conserv. Law § 37-0701 et seq. The Consumer Products Safety Commission classifies TRIS as a probable human carcinogen. Studies have shown that young children are often the group most highly exposed to TRIS, and estimate that children can ingest up to ten times as much of this chemical as adults do because of their tendency to put their hands and other objects into their mouths.
- Restrictions on the concentration of brominated flame retardants (pentabrominated and octabrominated diphenyl ethers) in products manufactured, processed or distributed in New York. N.Y. Evtl. Conserv. Law § 37-0111. Pentabrominated diphenyl ether (“PDBE”) has been correlated with lower birth weight in newborns. Animal studies indicate that pre- and post-natal exposures to PBDE may cause long-lasting behavioral alterations and can affect motor activity and cognitive behavior.
- Restrictions on the use of lead, cadmium, mercury, and hexavalent chromium in inks, dyes, pigments, adhesives, stabilizers, or other additives in product packaging. N.Y. Evtl. Conserv. Law § 37-0205 et seq. EPA has determined that lead and mercury are probable human carcinogens, while cadmium and chromium are known human carcinogens. Exposure to high levels of any of these heavy metals can permanently damage the brain, kidneys, and other vital organs.
- A de facto ban on the use of n-propyl bromide in dry cleaning. See “Approved Alternative Solvents for Dry Cleaning” at <http://www.dec.ny.gov/chemical/72273.html>. N-propyl bromide has been found to cause sterility in both male and female test animals, and harms developing fetuses. It can also damage nerves, causing weakness, pain, numbness, and paralysis. As a result, New York will not issue an Air Facility Registration to any facility proposing to use n-propyl bromide as an alternative dry cleaning solvent as it is not an approved alternative solvent. New York City also bans n-propyl bromide under its fire code because of its flammability. N.Y.C. Admin. Code §§ 27-426, 27-427.

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 for a chemical if a state requirement provides a "significantly higher degree of protection" than the EPA requirement. *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 to 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

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. I 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.

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 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 New York's approach to safeguarding its 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.

² I 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>

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In conclusion, I 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, I oppose the provisions in S. 697 that would greatly expand the limits on state action under state law to provide protections against dangerous chemicals.

I offer the full assistance of my office 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.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric T. Schneiderman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Eric T. Schneiderman
Attorney General of New York