THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

TEL: (617) 727-2200
www.mass.gov/ago

March 12, 2015

The Honorable Edward J. Markey
Senate Environment and Public Works Committee
218 Russell Senate Office Building
Washington, DC 20510

Re: S.B. 697

Dear Senator Markey:

I write to express my deep concerns regarding the preemption provisions in the *Frank R. Lautenberg Chemical Safety for the 21st Century Act*, introduced yesterday afternoon, the latest iteration of the important toxics reform work that Senator Frank Lautenberg began when he introduced the Kid-Safe Chemicals Act in the 110th Congress. On the crucial issue of preserving our state's abilities to protect the health and safety of the citizens within our borders, the sole focus of this letter, the bill strays far from a bill that can adequately protect our citizens from the potential risks that may be posed by certain toxic chemicals in commerce.

My Office received a copy of the bill late last week, and, with its introduction this week, we continue to review the measure. However, we understand that the bill may be on an accelerated track for a vote in the 114th Congress. Therefore, I write you now regarding the effect of the proposed preemption provisions and the serious concerns I have regarding the ability of Massachusetts' public health and environmental agencies to continue to do their important, and at times, groundbreaking work protecting our citizens from potentially risky chemicals if those proposed provisions are allowed to stand.

While I strongly support efforts to modernize the Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601, *et seq.* ("TSCA"), enacted by Congress as the primary means to regulate the production, use and disposal of industrial chemicals (except for those used in pesticides and in firearms and ammunition, and those under U.S. Food and Drug Administration authority), this effort cannot compromise the ability of states like Massachusetts to use our agencies' expertise and experience to address the potential public health risks posed by some chemicals.

As it exists today, TSCA reflects an understanding that we are all better served when states work as partners with the federal government to enhance federal authority and to protect state interests when such action does not unduly burden interstate commerce, allowing states to

identify emerging risks and drive innovations to reduce or eliminate those risks. Under existing law, the possibility of preemption does not arise until the federal government has acted to protect against a risk of injury to health or the environment. TSCA, 15 U.S.C. § 2617(a)(2)(B). And once the United States Environmental Protection Agency has acted to regulate a chemical, states still may adopt new laws or continue to enforce existing laws regarding the same chemical and addressing the same risk – without a waiver – if the state requirement is identical to the federal standard (and therefore the state may enforce federal standards under state law), or if the state acts to ban a chemical for in-state use (other than for use in manufacturing or processing). Further, under existing law, the Administrator may grant a state's application for a waiver from preemption for state regulations that are stricter than the federal standard and that do not unduly burden interstate commerce. TSCA, 15 U.S.C. § 2617(b).

I agree with the conclusion set forth in last week's letter from the California Attorney General to Senator Boxer of your committee, that the issue of most pressing concern regarding the preemption language in the bill is timing: state requirements would be displaced long before any federal ones take effect. Under Section 18(b), any new state chemical restrictions would be preempted on "the date on which the Administrator commences a safety assessment under section 6." Because section 6(a) would provide USEPA with up to three years to conduct its safety assessment, with two more years allowed to promulgate a final regulation, and up to an additional two years to extend the rulemaking process before it is final, the bill allows for up to seven years, plus an additional period of time allowed for the regulated entity to come into compliance. As a result, for that entire period, any new state chemicals restrictions that do not predate the statute would be unenforceable, leaving an inexplicable regulatory vacuum for a chemical that the state and federal government have recognized as potentially high risk—and indeed have been designated "high priority" based on the health or environmental threats they pose.

The preemption provisions in the bill would also undermine the efforts of Massachusetts and other states to work with the federal government and on our own when the federal government is unwilling or unable to act, to protect our citizens from the risks associated with chemicals that may pose significant risk to our public health and the environment. For example, section 18(d)(1)(C)(ii)(I) of the bill would appear to eliminate the state's ability to co-enforce federal TSCA requirements, by precluding states from adopting a chemical rule or regulation that "is already required by a decision by the Administrator . . . ," thus depriving Massachusetts enforcement authorities the opportunity to protect our citizens from the risks identified by the federal government as requiring enforcement action.

The bill also includes unduly burdensome standards for the state to obtain waivers from USEPA for state regulations that are stricter than the federal standard and do not unduly burden interstate commerce. To obtain such a waiver under the language of the current bill, a state like Massachusetts would need to demonstrate that "compelling State or local conditions warrant granting the waiver." Section 18(f)(1). To the extent this language is interpreted to require a showing that the chemical would pose a threat unique to the citizens of the state seeking the waiver, such a burden generally would be difficult to meet under any circumstances, given that risk from exposure to a particular toxic chemical generally does not vary from one location to the next.

The Commonwealth of Massachusetts has long been recognized as a leader in toxics control regulation. The Massachusetts Toxics Use Reduction Act, Mass. General Laws ch. 21I ("MA TURA"), enacted in 1989, requires Massachusetts companies that use large quantities of specific toxic chemicals to evaluate and plan for pollution prevention opportunities, implement them if practical, and measure and report their results on an annual basis. They must also evaluate their efforts and update their toxics use reduction plans every other year. The statute, which garnered the support of both industry and environmental groups, committed Massachusetts to:

- Reduce the generation of toxic waste by 50 percent statewide (this was accomplished by 1998);
- Establish toxics use reduction (TUR) as the preferred means for achieving compliance with federal and state environmental, public health and work safety laws and regulations;
- Provide and maintain competitive advantages for Massachusetts businesses, both large and small, while advancing innovation in cleaner production techniques;
- Enhance and strengthen environmental law enforcement across the state; and
- Promote coordination and cooperation among all state agencies that administer toxics-related programs.

After 15 years of successful program implementation, major amendments to TURA were signed into law by Governor Mitt Romney in 2006. These amendments:

- Streamlined the reporting and planning requirements;
- Established categorization of chemicals as high hazard and low hazard with different reporting thresholds and fees; and
- Provided options for resource conservation planning (e.g., energy, water, materials) and environmental management systems (EMSs) to supplement toxics use reduction plans.

We are very concerned that the scope of preemption in the bill may be used to defeat successful and important toxics use reduction programs, like MA TURA. Although Section 18(d)(1)(B) provides that the general preemption provisions "shall not apply to a statute or administrative action . . . applicable to a specific chemical substance that . . . implements a reporting, monitoring, or other information collection obligation for the chemical substance not otherwise required by [USEPA] or required under any other Federal law . . . ," this exception may not be sufficiently clear or broad to protect multi-faceted programs like those developed pursuant to MA TURA.

We are also concerned about other possible unintended consequences of the severe limitations on states' abilities to regulate potentially hazardous chemicals under the scheme reflected in the bill, particularly in light of the potentially expansive preemption of state action related to water quality, air quality, or waste treatment or disposal, if the statutory or administrative action is "inconsistent with the action of the Administrator." Section 18(d)(1)(C)(ii)(II). For example, following intensive scientific and stakeholder review, Massachusetts regulates certain contaminants in wastewater discharges not otherwise required to be regulated under federal law, and the state's water quality standards for chemicals such as

perchlorate, a chemical found in blasting agents, fireworks, military munitions and other manufacturing processes, and linked to interference with thyroid function, have been adopted to protect against hazards related to these chemicals. Although we understand that Congress may not intend to interfere with these important protections, the TSCA preemption scheme as drafted is confusing and could be subject to an interpretation designed to defeat these types of protections as well.

As our experience over the past few decades demonstrates, industry is fully capable of addressing the concerns of both the federal government and state governments with respect to any chemical it chooses to bring to market. It has done so without undue burden or cost, and the benefits accruing to the public have been substantial. Any suggestion that retaining the existing preemption scheme under TSCA will lead to an unmanageable conflict among state requirements is misplaced. In the nearly 40 years since TSCA was enacted, states have been regulating chemical safety, and the U.S. chemical industry has retained its leadership in chemicals research and manufacturing.

The proper legislative balance would provide that Massachusetts and our sister states are able to continue to enact a higher level of protection so long as it does not unduly burden interstate commerce. Unfortunately, the bill fails to strike the appropriate balance. My Office will continue to work with our partners in other states to preserve states' rights in the face of the overly broad preemption provisions in the bill.

I look forward to continuing to work with you on this important issue.

Sincerely,

Maura Healey
Massachusetts Attorney General

cc: The Honorable Elizabeth Warren