STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
MICHAEL A. TRONCOSO
SENIOR COUNSEL TO THE ATTORNEY GENERAL

Testimony of Michael A. Troncoso
Senior Counsel to the Attorney General of California, Kamala D. Harris
Before the United States Senate Committee on Environment and Public Works
July 31, 2013

Chairman Boxer, Ranking Member Vitter, and distinguished members of the Committee, my name is Michael Troncoso, and I serve as Senior Counsel to California Attorney General Kamala D. Harris. Thank you for the opportunity to appear before you today.

Attorney General Harris has asked me to testify to ensure that the Committee is aware of the very serious consequences that will result if the Chemical Safety Improvement Act – S. 1009 – is enacted in its current form.

As currently written, S. 1009 will not give us more protection. To the contrary, it would cripple the states' power to protect our environment and the health and welfare of our citizens. If the law is adopted in its current form, it will set aside decades of California laws in the areas of consumer and environmental protection, and mark the end of the federal government's long partnership with state regulators and state Attorneys General in guarding against the harmful effects of toxic chemicals.

The preemption provisions of S. 1009 threaten to strip the states' long-standing ability to protect their citizens from dangerous chemicals by, for example, adopting protections where the federal government has adopted none, enforcing within their borders state toxic requirements that are identical to federal requirements, and banning in-state use of dangerous chemicals.

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Preempting states in the absence of any enforceable federal rule – as S. 1009 would do – creates a regulatory vacuum that endangers public health and safety. While some may argue that states can always obtain a waiver of preemption, the bill's waiver provision is illusory. It does not allow the states to adopt and enforce a stricter standard than the federal government, and it requires a showing of a "compelling local interest" that most state chemical laws today could not meet.

To illustrate what is at stake if state laws are preempted, let me outline some of the successes that California has had under its laws. These types of laws could be stopped in their tracks if S. 1009 is not substantially overhauled.

In 2003, California passed a statewide ban on certain flame retardants,[1] known as polybrominated diphenyl ethers or "PBDEs." PBDEs are found everywhere – in foams in furniture and automobiles, in electronic printed circuit boards, in carpet backing, and in upholstery. PBDEs do not stay in these products, though. They end up in our environment and in our bodies. PBDEs may disrupt thyroid hormones, harm the developing fetus, and cause cancer. A recent study, funded in part by the National Institute of Environmental Health Sciences, reported that median levels of certain PBDEs in California pregnant women were the highest reported to date among pregnant women worldwide.[2] In California, we are taking action to reduce these harms. S. 1009 threatens to undo this progress.

California has also enacted strong laws to reduce exposure to toxic chemicals in the environment. Ozone, a component of smog, is a powerful reactive chemical that can damage respiratory tissues. High levels of ozone increase the risk of serious respiratory disease,

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[1] California Health and Safety Code section 108922.
[2] Pham, *Highest Levels of Flame Retardant Chemicals Reported in California Pregnant Women*, NIEHS Environmental Factor (Sept. 2011) http://www.niehs.nih.gov/news/newsletter/2011/september/science-chemicals (as of July 23, 2013).

including asthma. The top five metropolitan areas nationwide with the worst ozone problems are in California.[3] About one in eight people in California have been diagnosed with asthma, and it is particularly acute in California's African American population, whose members have a 40 percent higher asthma rate and are twice as likely to die from asthma.[4]

We take the ozone problem seriously in California. Ozone is created in part by chemicals known as volatile organic compounds or "VOCs." Consumer products such as deodorant, hair spray, and cleaning products contribute a significant amount of VOCs to the environment. California has enacted regulations limiting the use of VOCs in consumer products,[5] resulting in an anticipated 48 percent decrease in VOC emissions from such products.[6] S. 1009 could override these regulations, putting millions of people across the state at increased risk of respiratory disease, as well as substantially increasing health care costs.

The California Safe Cosmetics Act[7] was the first state cosmetics regulatory program in the country. It requires manufacturers of cosmetics and body-care products to disclose added ingredients that are carcinogens or reproductive toxicants. As of 2011, 700 different companies reported some 17,060 different cosmetic and body-care products that contain chemicals known or suspected to be carcinogens or reproductive toxins.[8] Many consumers have no idea that the products that they put onto their own and their children's bodies contain these harmful chemicals.

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[3] http://www.stateoftheair.org/2013/city-rankings/most-polluted-cities.html (as of July 24, 2013).
[4] Milet et al., *Asthma in California: A Surveillance Report* (May 2013), California Department of Public Health http://californiabreathing.org/asthma-data/burden-report (as of July 23, 2013) (hereafter "*Asthma in California*").
[5] California Code of Regulations, title 17, section 94509.
[6] *Asthma in California, supra.*
[7] California Health and Safety Code sections 111791 *et seq.*
[8] Examining the Current State of Cosmetics, Hearing before House Comm. on Energy and Commerce, Subcomm. on Health (March 27, 2012), written testimony of Dr. Michael DiBartolomeis, Chief, Safe Cosmetics Program, California Department of Public Health http://www.cdph.ca.gov/programs/cosmetics/Documents/Testimony.pdf (as of July 23, 2013).

The first lawsuit brought under the Safe Cosmetics Act was against the manufacturers of a popular hair straightener that, it turned out, contained high levels of formaldehyde. Formaldehyde – the same chemical used in embalming – is a known human carcinogen that can cause severe respiratory problems and even death.

The stylists who applied this product did not know it was causing exposure to a dangerous gas because it was labeled "formaldehyde-free." The product sickened stylists and the women who came in for hair straightening. Customers and stylists complained of burning eyes, nose, and throat; asthma episodes; and skin blisters. California's lawsuit was the first government enforcement action in the United States to address the exposure to formaldehyde gas from this product. As a result of the state's action, the company reformulated the product to substantially reduce the formaldehyde level, stopped falsely advertising the product as formaldehyde-free, and provided warnings on the material safety data sheets provided to stylists. The lawsuit was a major step forward in protecting stylists and consumers from immediate and longer-term injuries from this product. S. 1009, however, threatens to undo the Safe Cosmetics Act's protection.

Proposition 65 – a "right to know" law – was enacted by California voters in 1986.[9] It requires that businesses warn consumers if the products they sell expose individuals to carcinogens or reproductive toxins. Consumers can then make a choice about whether to continue to use the product. Proposition 65 does not mandate that a manufacturer change a product. But, in practice, many manufacturers reformulate their products to eliminate the toxic chemical and eliminate the need to warn.

In exercising the Attorney General's enforcement authority under Proposition 65, our office is especially concerned about chemical exposures to children. Children are particularly

[9] California Health and Safety Code sections 25949.5 *et seq.*

sensitive to a range of toxins, and, because of their habits and activities, are more likely to be exposed to chemicals in products and in the environment. Accordingly, the Attorney General has enforced Proposition 65 to target products that put the most vulnerable among us at risk. I will provide a few examples.

- We discovered that vinyl "bounce houses" were causing lead exposures to children. Bounce houses are those colorful blow-up structures our children and grandchildren play inside at birthday parties and in amusement parks. Previously, bounce houses in California were made with lead-containing vinyl. Children touching the vinyl surfaces and breathing the dust created by the aging vinyl were exposed to significant levels of lead, which is a carcinogen, a reproductive toxin, and a potent neurotoxin. Because of Proposition 65, manufacturers of bounce houses started using low-lead vinyl, thereby protecting our children from a significant and completely unnecessary lead exposure.
- In a similar example, manufacturers previously used wood treated with chromated copper arsenate in children's playground structures. The treated wood created a strong and durable structure, but inorganic arsenic – a carcinogen and potent poison – leached out of the wood as it aged. Children touching and climbing on the structures and breathing the dust from the ground were exposed to significant levels of inorganic arsenic. Again, faced with our Proposition 65 suit, manufacturers were able to switch to non-arsenic wood preservatives and to build safe and durable play structures without exposing our children to arsenic.
- The Attorney General was disturbed to learn that children's jewelry contained lead in the painted surfaces or in the metal and plastic materials used to make the jewelry. In many cases, the jewelry was sold with labeling indicating that the jewelry was "lead-free," but

testing by the California Department of Toxic Substances Control confirmed that the jewelry contained high levels of lead. Because children often handle their jewelry throughout the day and put it in their mouths, leaded children's jewelry was particularly problematic. As a result of our Proposition 65 enforcement, manufacturers have switched to low-lead materials, and they must use better manufacturing practices to protect consumers from unnecessary lead exposure.

I will close with one final example, one that shows significant promise for changing the entire way we deal with toxics. California has created a Green Chemistry Program and is in the beginning stages of implementing it through regulations.[10] Green chemistry is an innovative new approach to environmental and consumer protection. It fundamentally changes the way we deal with toxic chemicals by encouraging companies to find safer alternatives for toxic chemicals in their products. It will allow us to move away from a system where we are constantly reacting to problems, to one where government and industry work together to avoid problems in the first place.

Many California companies have shown a voluntary commitment to implementing green chemistry principles. For example, one California company reformulated its body-care products to eliminate toxic chemicals and petroleum based ingredients. A second company has removed over 24 million pounds of hazardous chemicals and more than 10 million pounds of ozone-causing chemicals from its processing since 2001, and continues to remove more than 2.6 million more pounds each year.[11] In anticipation of the state's green chemistry regulations, many more

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[10] See Hazardous Materials and Toxic Substances Evaluation and Regulation, Statutes 2008, chapter 559 (A.B. 1879); Toxic Information Clearinghouse, Statutes 2008, chapter 560 (S.B. 509); see also California Green Chemistry Initiative, Frequently Asked Questions (Dec. 2008), Department of Toxic Substances Control http://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/upload/FAQs_greenchem.pdf (as of July 23, 2013).

[11] *Id.*

companies are seeing the value of green chemistry and changing their practices. S. 1009 will, however, jeopardize this innovative program.

These are only a few examples of the California laws that S. 1009 threatens. A more detailed discussion is contained in the letters from Attorney General Harris, from the Secretary of the California Environmental Protection Agency, from the Deputy Director for Legislation of the California Department of Toxic Substances Control, and from the Secretary for the Labor and Workforce Development Agency, which I have attached. These are not just the concerns of California; they are shared by other states as well. Also attached is a joint letter from the Attorneys General of Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Oregon, Vermont, and Washington, who, along with California, set forth their concerns with the preemption provisions of S. 1009 and urge Congress not to undermine the traditional role of the states in protecting their citizens from toxic chemicals.

California shares the goal that is behind the effort to reform the Toxic Substances Control Act. The federal government must regulate chemical safety so that there is a minimum level of protection across the nation. At the same time, we urge the Committee to recognize and honor the long-standing authority of the states to act alongside the federal government to protect the health, safety and welfare of their citizens – to act as laboratories of innovation in the area of toxics regulation, and to tackle the problem of dangerous chemicals as a partner with the federal government. We urge you reject any amendment to the law that would undermine that authority and undermine our existing state and federal partnership.

On behalf of Attorney General Harris, I thank you for the opportunity to testify before this Committee.

Exhibit 1

KAMALA D. HARRIS
Attorney General

State of California
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June 11, 2013

The Honorable Barbara Boxer
Chairwoman, Senate Environment
and Public Works Committee
112 Hart Senate Office Building
Washington, D.C. 20510

RE: Concerns with Preemption Language in Chemical Safety Improvement Act, S.1009

Dear Senator Boxer:

I write to convey the concerns of the California Attorney General regarding the proposed Chemical Safety Improvement Act, S.1009. Although we recognize that the Toxic Substances Control Act (TSCA) is in need of substantial reform, we believe that S.1009, as currently drafted, cripples the police powers that California relies on to protect public health and the environment and, in addition, severely compromises California's authority to supplement and complement federal efforts to regulate the safety of chemicals. As a leader in chemical safety and consumer protection, California has a direct stake in the outcome of any reform of TSCA. We respectfully request that S.1009 be amended to address the problems outlined below.

California's Role in Protecting Public Health

California has been a leader in enacting laws that protect public health and the environment, and has served as a laboratory for innovation for other states and the federal government. Many of the innovative laws that California has enacted are jeopardized by S. 1009.

Green Chemistry

Over the past several years, California has undertaken to implement ground-breaking "green chemistry" programs, reflecting an approach to environmental and public health protection that focuses on reducing or eliminating the use and generation of hazardous substances. Green chemistry marks a sharp departure from managing hazardous substances after they already have entered consumer products and our environment. In 2005, the State enacted the California Safe Cosmetics Act, becoming the first state in the nation to regulate toxic ingredients in cosmetics. The next year, California established the California Environmental Contaminant Biomonitoring Program to identify toxics accumulating in California residents and, in 2007, banned plasticizers called phthalates in children's products. In 2008, California enacted

two bills that together created the State's comprehensive Green Chemistry Program. Under that program, the Department of Toxic Substances Control (DTSC) is in the final stages of promulgating regulations that will establish a process for identifying chemicals of concern in consumer products and their potential alternatives, in order to determine how best to limit exposure or to reduce hazard levels.

Proposition 65

The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), was enacted as a ballot initiative in November 1986 by 63% of the voters. Proposition 65 was designed to protect California citizens and drinking water sources from chemicals known to cause cancer, and birth defects or other reproductive harm. Proposition 65 requires the Governor to publish, at least annually, a list of chemicals known to the State to cause cancer or reproductive toxicity. Businesses may not discharge these chemicals to sources of drinking water and must warn individuals about exposures to the listed chemicals. The Attorney General is the only official with statewide authority to enforce Proposition 65, and actions by the Attorney General in the name of the People are brought under the sovereign authority of the State.

Using this authority, the Attorney General's Office has taken a number of steps over the years to protect public health, including:

- Required manufacturers to reformulate the "Brazilian Blowout" hair straightener which contained high levels of formaldehyde that sickened hair stylists and their customers, and to provide warnings and accurate labeling of such products.

- Required manufacturers, sellers, and distributors of vinyl "jump houses" for children, to lower the levels of lead in the vinyl. Children playing in the jump houses were previously exposed to significant levels of lead from the vinyl.

- Required terminal operators at the Los Angeles and Long Beach Ports to provide a strong warning program about diesel fumes emitted into surrounding neighborhoods, and to implement a Clean Trucks Program to reduce diesel emissions from Port operations.

- Required manufacturers to reduce the lead in calcium supplements, multi-vitamins, and other nutritional supplements, including prenatal supplements, supplements for women of childbearing age, and supplements for children to levels below where Proposition 65 requires point-of-sale warnings, an area in which the Federal government has not taken regulatory action.

- Required manufacturers of wooden playground structures to stop using wood treated with chromated copper arsenate, which exposed children to high levels of arsenic.

- Required manufacturers of Mexican chili candies to reduce the high lead levels in their candies by improving their manufacturing processes, including washing the chilies before manufacture. The candies are eaten extensively by children in the Mexican-American community in California.

California's Programs are Threatened by S.1009's Overreaching Preemption Provisions

States Must Not Be Preempted in the Absence of Federal Regulation

Among the bedrock powers reserved to the states under the Tenth Amendment to the U.S. Constitution is the exercise of police powers to protect the health and safety. The courts have long recognized that regulation of health and safety matters is historically a matter of significant state concern, and the federal government has traditionally granted the states great latitude to protect the health and welfare of their citizens. To take away those historical police powers through preemption in instances where the federal government has yet to regulate or will not be regulating a chemical substance serves only to increase the risk to public health. Under S.1009:

- States are prohibited from enforcing existing state laws or from adopting new laws regulating chemical substances determined by U.S. EPA to be "high priority" even before federal regulations or orders become effective, creating a period of months or potentially years where such chemical substances are unregulated. See S.1009, § 15(a)(2).

- States are barred from adopting and enforcing new laws regulating "low priority" chemical substances – of which there will be tens of thousands – even though the U.S. EPA Administrator is also expressly prohibited from regulating those substances and has made only a preliminary safety assessment that is immune from judicial review. This creates a gaping and permanent regulatory vacuum. See S.1009, §§ 4(e)(3)(H)(ii), 4(e)(5) and 15(b)(2).

States Must Retain the Ability to Ban Use of a Chemical Substance In-State

Even where the federal government has acted to regulate a chemical substance, states must retain the ability to ban the use of that chemical substance in-state, in order to protect its residents' health and safety. In-state use bans – which do not prohibit the manufacture or processing of the chemical substance for export – do not unduly burden interstate commerce.

- Existing law gives states authority to prohibit the use of a chemical substance in-state without having to apply to the U.S. EPA for a waiver. See 15 U.S.C. § 2617(a)(2)(B)(iii). S.1009 revokes this authority by preempting state prohibitions or restrictions on the use of a chemical substance. See S.1009, §§ 15(a)(2), 15(b)(1) and 15(b)(2).

States Play a Vital Role as Co-Enforcers of Federal Standards

In numerous areas of environmental law, states and their political subdivisions play a vital role in enforcing federal standards. For example, under the nation's solid hazardous waste law – the Resource Conservation and Recovery Act (RCRA) – once state programs are certified by the federal government, states assume primary responsibility for enforcement. With respect to consumer product safety, federal law provides states with the ability to enforce federal regulations and orders. Under existing TSCA provisions, states are allowed to enact requirements that are "identical to the requirement prescribed by the Administrator," gaining the ability to enforce that requirement without having to apply for a waiver.

- S.1009 provides none of the above avenues for state enforcement. Rather, enforcement of all new prohibitions or restrictions on chemical substances is wholly dependent on the resources, priorities, and discretion of the U.S. EPA and the U.S. Department of Justice.

States Should Have a Reasonable Opportunity to Obtain a Waiver to Enforce a Higher Degree of Protection Within Their Borders

Under the existing provisions of TSCA, where the Administrator has adopted a rule with respect to a chemical substance, states are allowed to apply for an exemption to provide a higher degree of protection, so long as state requirements do not make it impossible to also comply with federal law (i.e., create a conflict) or unduly burden interstate commerce. See, e.g., 15 U.S.C. 2617(b).

- S.1009 has no directly analogous provision. The bill allows states to apply for a waiver to enforce a prohibition or restriction, if the application is filed prior to the Administrator's completion of a safety assessment/safety determination. But, depending on the timing of the state's application, the waiver either terminates automatically after completion of the safety assessment/safety determination or terminates if it "conflicts" with the Administrator's safety assessment/safety determination (which itself is not a restriction or prohibition). See S.1009, § 15(c)(6).

- Even then, S.1009 sets up an unrealistic test if a state seeks to obtain a waiver to adopt and enforce its requirements. Specifically, a state must certify that "the State has a compelling local interest to protect human health or the environment." See S. 1009, §§ 15(d)(1)(B)(i) and 15(d)(2)(B)(ii). It is unclear what is meant by "local interests" or what showing would be required. It is likely not possible to show unique circumstances that differentiate health risks by geography, since dangerous chemicals don't act differently in different locations. Risks from exposure to chemicals in the home, at the office or at retail establishments do not vary from one state to the next. Under this standard, it is unclear whether a waiver could ever be granted.

Thank you for your consideration of our comments. Please feel free to contact me if you have any questions or need further information.

Sincerely,

Brian Nelson (SM)

BRIAN NELSON
Special Assistant Attorney General

For KAMALA D. HARRIS
Attorney General

cc: The Honorable Diane Feinstein

Exhibit 2

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

MATTHEW RODRIQUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

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EDMUND G. BROWN JR.
GOVERNOR

June 25, 2013

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Barbara Boxer
United States Senate
112 Hart Senate Office Building
Washington, D.C. 20510

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

RE: S. 1009, Chemical Safety Improvement Act (CSIA) – Concern with Preemption Language

Dear Senators Feinstein, Boxer, and Gillibrand:

I am writing on behalf of the California Environmental Protection Agency (Cal/EPA) to express serious concern about the effects of S. 1009 on California's ability to protect its residents from toxic chemicals, air pollution, and threats to drinking water. You have previously received letters from the California Department of Toxic Substance Control and the California Attorney General's Office expressing reservations about this proposed legislation. (See attached letters of May 31 and June 11, 2013.) We agree with the concerns stated in these letters and write separately to note that as currently written, S. 1009 also could jeopardize California's ability to control greenhouse gases and thereby meet the State's targets under AB 32, the California Global Warming Solutions Act of 2006. Although the Toxic Substances Control Act (TSCA) is clearly in need of reform, we respectfully request that S. 1009 should not be adopted unless amended prior to moving forward in the Senate to address major concerns with the legislation, including the provisions governing preemption of state laws.

The existing and more reasonable preemption provisions currently in TSCA have allowed California to take necessary action over the past three decades to reduce toxic chemicals and protect public health and the environment. Many of our regulatory actions have resulted in beneficial changes in product composition and chemical use that extend far beyond the borders of our state. As an example, California's Safe Drinking Water and Toxic Enforcement

Act (Proposition 65) stimulated nationwide reformulation of numerous products to remove chemicals known to the State of California to cause cancer or reproductive harm. Successes under this law include removing lead from water faucets, eliminating trichloroethylene (TCE) from liquid correction fluid, and more recently removing flame retardants from infant nap mats.

California laws or regulations have also provided a model that is followed in other states or nationally. For instance, California legislation, adopted in 2007 to ban certain phthalates in toys and children's products [Cal. Health & Saf. Code, §§ 108935-108939, Stats. 2007, c. 672, A.B. 1108], was the inspiration for Senator Feinstein's legislation, S. 2663, banning these same chemicals nationally in the Consumer Product Safety Improvement Act of 2008.

After consulting with scientific and legal experts who work for the boards and departments within Cal/EPA, we have identified dozens of California laws and regulations that may be at risk of preemption under the current provisions of S. 1009. Information concerning each of these laws and regulations could be provided at your request, and several examples are highlighted here:

- Global Warming Solutions Act of 2006 (AB 32): Some very potent greenhouse gases, such as sulfur hexafluoride and methane, are of relatively low toxicity. If the EPA Administrator designates any of these chemicals as "Low Priority" under S. 1109, states will be barred from any "prohibition or restriction on the manufacture, processing, distribution . . . or use" of these chemicals. This provision could bar state actions to regulate or control potent greenhouse gases and could undermine California's efforts to achieve our reduction targets under AB 32.

- Reducing Ozone Pollution: California contains major geographic areas in "Extreme" ozone non-attainment. Ozone is a Criteria Air Pollutant that causes or contributes to respiratory disease, asthma, emergency room visits, hospitalizations, and premature death. Nonattainment areas are required to take aggressive action to reduce ozone pollution, including reducing the emissions of ozone precursors such as volatile organic compounds (VOCs). S. 1009 sec. 15, subsection (c) states that the preemption does not apply to a state regulation that is "... adopted under a law of the State . . . related to . . . air quality . . . that (A) does not impose a restriction on the manufacture, processing, distribution in commerce, or use of a chemical substance." The California Air Resources Board, however, has a number of regulations that would not be able to take advantage of the exception in subsection (c) because they impose restrictions on the "use" or "distribution in commerce" of specific VOCs in products. This could significantly impair California's efforts to come into attainment with the Clean Air Act and could put millions of people in the Los Angeles area and San Joaquin Valley of California at increased risk of respiratory disease.

- Drinking Water Safety: More than 60 California water systems contain hexavalent chromium or perchlorate. It is reasonably likely that these will be designated as "High Priority" chemicals under S. 1009, thereby immediately preempting all future state actions, and retroactively preempting existing state laws and regulations once U.S. EPA has acted. This puts future California activities to protect sources of drinking water in immediate jeopardy, and also may endanger historic regulations, including our 1989 ban on the use of hexavalent chromium in cooling towers; our 2007 strict performance and emissions requirements for the chrome plating industry; and the Perchlorate Best Management Practices regulations of 2006.

- Consumer Product Safety: Numerous California laws and regulations have collectively worked to increase the safety of consumer goods and reduce the use of toxic chemicals in products. Specific examples include the 2006 ban on certain flame retardants, which has been replicated or expanded in at least a dozen states; bans on mercury in products ranging from thermostats to thermometers, which are now in place in more than 20 states; a phase-out by 2014 of toxic substances including copper, cadmium, hexavalent chromium, lead, mercury and asbestos in automobile brake pads; and a ban on toxic chemicals in art supplies for young school children. The California Safer Consumer Products regulations, slated for release next month, will constitute the most ambitious effort to date to systematically address the issue of toxic chemicals in consumer products by promoting innovation in safer alternatives and green chemistry. Depending on the scope and interpretation of S. 1009 and the resulting actions of the EPA Administrator, components of the above laws and regulations will be put at risk.

In addition to the above issues, we are concerned that the lack of clarity of some of the preemption provisions in S. 1009 would open the door to extensive litigation. For example, the preemption of state actions that prohibit or restrict "the manufacture, processing, distribution in commerce or use of a chemical substance" in §15(a) and (b) should not be understood to limit states from requiring that information be provided to the public; however we recognize that the ambiguity of the language could cause others to claim that a label or warning to consumers is an indirect "restriction on the . . . distribution . . . or use". This issue requires clarification.

I am confident that this legislation is not intended to invalidate or undermine existing California laws and regulations governing public health and the environment, nor is it the intent to block future innovation and health protection at the state level. Accordingly, we respectfully request that you reconsider the provisions of S. 1009 to ensure that it is written in a manner that will be successful in protecting the public from toxic chemicals, in a reasonably expeditious manner, without unintentionally restricting the ability of states to protect consumers, health, and the environment.

Sincerely,



Matthew Rodriquez
Secretary for Environmental Protection

Attachments

cc: See next page.

cc: Ms. Katie Wheeler Mathews
Deputy Director
Washington D.C. Office of California Governor Edmund G Brown, Jr.

Mr. Cliff Rechtschaffen
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California Department of Justice

Ms. Debbie Raphael, Director
California Department of Toxic Substances Control

Mr. Richard Corey
Executive Officer
California Air Resources Board

Mr. George Alexeeff, Director
California Office of Environmental Health Hazard Assessment

Exhibit 3

Department of Toxic Substances Control

Matthew Rodriquez
Secretary for
Environmental Protection

Deborah O. Raphael, Director
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Edmund G. Brown Jr.
Governor

May 31, 2013

Felix S. Yeung, Esq.
Legislative Assistant
Office of Senator Dianne Feinstein
Felix_Yeung@feinstein.senate.gov

Dear Mr. Yeung:

I am writing to you to convey initial comments from the California Department of Toxic Substances Control (DTSC) regarding the proposed Chemical Safety Improvement Act ("the Act"). DTSC is extremely concerned about this bill. DTSC recognizes that the Act includes some positive reforms to the Toxic Substances Control Act ("TSCA"), but at this point, the areas of concern overshadow these improvements. While most of DTSC's concerns center around the Act's preemption provisions, DTSC also has broader concerns regarding the functionality and effectiveness of the Act.

Areas of concern:

- **The expansion of the preemptive effect of EPA action under TSCA.**
    - The Act would broaden vastly the scope and conditions of preemption by TSCA of state and local chemical regulations.
    - There is a need for clarification regarding what constitutes a "prohibition or restriction on the manufacture, processing, or distribution in commerce or use of a chemical substance," in order to clearly define what types of state actions are intended to be preempted under the Act.
        - Industry may argue that a labeling requirement could be considered a restriction on the use of a chemical substance, which is far too broad an interpretation of this phrase.
    - States would be barred from enforcing existing chemical regulations after issuance of a safety determination by US EPA, even when state regulations are consistent with the findings of US EPA's safety determinations.
        - States should be allowed to continue to enforce their regulations until the Administrator for US EPA promulgates a rule establishing necessary restrictions after making a determination.
    - States would be barred from imposing new prohibitions or restrictions on chemical substances that are identified as "high-priority" as of the time the

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Administrator of US EPA publishes a schedule for conducting a safety assessment, not as of the time that such a determination is actually made.
        - States should not be barred from imposing regulations on chemical substances for which they have already evaluated the safety and determined that prohibitions or restrictions are necessary to protect public health or the environment merely because the Administrator has released a schedule by which US EPA will conduct its own assessment.
    - The criteria for a state waiver are nearly impossible to meet.
        - The requirement that "compelling State or local conditions" warrant the waiver is unreasonable, as the risks presented by exposure to chemical substances are unlikely to present localized risks.
- **The safety standard to be used in making safety determinations**
    - There is a need for clarification of the definition of "unreasonable risk of harm to human health or the environment," which is central to the regulatory standard of US EPA's safety determination.
- **The lack of deadlines for US EPA actions both in making the initial determinations of high-priority and low-priority chemicals, and in acting upon unreasonable risks that are identified**
    - Proposed language only says that the US EPA Administrator "shall make every effort to complete the prioritization of all active substances in a timely manner."
        - There is conflicting language in Section 4, subparagraph (e)(3)(E)(i) and (ii) under "Identification of High-Priority Substances." These provisions state that the Administrator both "shall" and "may" identify a chemical substance that has the potential for high hazard or exposure as a high-priority substance.
    - Deferring safety determinations until after receipt of additional test data and information may allow the chemical industry to actively stall the assessment process if no deadline is included.
    - There is no proposed deadline by which the US EPA Administrator must promulgate a rule establishing necessary restrictions after making a determination that a chemical substance does not meet the safety standard under current intended conditions of use.

Background:

The Act first requires US EPA to identify all active chemicals, which are those in use in non-exempted products in the last 5 years. These chemicals will represent US EPA's initial list of chemicals, and EPA will then consider existing information, and where more is needed, will solicit this information from the public. EPA is then charged with conducting a prioritization screening of these chemicals. This screening designates chemicals as either low-priority, when they are "likely to meet the safety standard," or high-priority, indicating that they present a high hazard and exposure or high hazard or high exposure. EPA can also prioritize chemicals that lack sufficient information as high-priority.

Once prioritized, the Administrator of US EPA will publish a schedule for the completion of a safety assessment of high-priority chemicals on a chemical-by-chemical basis. The assessments will result in a safety determination by the Administrator as to whether a chemical substance meets the safety standard under the intended conditions of use. The safety standard is defined as "a standard that ensures that no unreasonable risk of harm to human health or the environment will result from exposure to a chemical substance." If there is a determination that there is insufficient information to make this determination, the Administrator may obtain new data by request, rule, testing consent agreement, or order.

If a chemical does not meet the safety standard under current intended conditions of use, the Administrator may impose, by rule, necessary restrictions or prohibitions on use of the chemical, or a ban or phase-out of the chemical. The latter must be based on a cost-benefit analysis.

The Act significantly changes the preemption provisions in TSCA (currently found in section 18). Under TSCA, a state may apply to the Administrator for an exemption from preemption for a state requirement

> "designed to protect against a risk of injury to health or the environment associated with a chemical substance, mixture, or article containing a chemical substance or mixture if (1) compliance with the requirement would not cause the manufacturing, processing, distribution in commerce, or use of the substance, mixture, or article to be in violation of the applicable requirement under [TSCA], and (2) the State or political subdivision requirement (A) provides a significantly higher degree of protection from such risk than the requirement under [TSCA] and (B) does not, through difficulties in marketing, distribution, or other factors, unduly burden interstate commerce."

Under the proposed Act, however, States are preempted from enforcing existing requirements, or establishing new requirements, once the Administrator has issued a completed safety determination for a chemical substance, or published a schedule for conducting a safety assessment of a chemical identified as high-priority, respectively. The preemption provision would apply to State requirements that represent "a prohibition or restriction on the manufacture, processing, or distribution in commerce or use of a chemical substance…", as well as certain requirements for the development or test data or information that would produce information similar to that required under section 4, 5, or 6 of the Act.

The Act does include a section on state waivers from the preemption provisions, but the criteria to qualify for such a waiver make obtaining one nearly impossible. The Act provides that if the State "determines in cannot wait until the end of the period specified in the established schedule and deadline for the completion of a full safety assessment and determination," the Administrator may provide a waiver from the preemption provisions upon a determination that:

> "(i) compelling State or local conditions warrant granting the waiver to protect human health or the environment;
> (ii) compliance with the proposed requirement of the State or political subdivision of the State does not unduly burden interstate and foreign commerce in the manufacture, processing, distribution in commerce, or use of a chemical substance;
> (iii) compliance with the proposed requirement of the State or political subdivision of the State would not cause a violation of any applicable Federal law, rule, or order; and

(iv) the proposed requirement of the State or political subdivision of the State is based on the best available science and is supported by the weight of the evidence; or

(2)(A) the Administrator finds a safety assessment or determination has been unreasonably delayed; and

(B) the State certifies that—

(i) the State has a compelling local interest to protect human health or the environment;

(ii) compliance with the proposed requirement of the State does not unduly burden interstate and foreign commerce in the manufacture, processing, distribution in commerce, or use of a chemical substance;

(iii) compliance with the proposed requirement would not cause a violation of any applicable Federal law, rule, or order; and

(iv) the proposed requirement is grounded in reasonable scientific concern."

DTSC is very concerned that the bar has been set too high for obtaining state waivers from the expanded preemption provisions in the Act. The preemption provisions would potentially impact the ability of DTSC to implement certain regulatory responses under the Safer Consumer Products regulations, including product information for consumers, use restrictions on chemicals and consumer products, product sales prohibitions, engineered safety measures or administrative controls, end-of-life management requirements, and advancement of green chemistry and green engineering.

Thank you very much for reaching out to DTSC and allowing us the opportunity to provide input on these important issues.

If you have any questions, please feel free to contact me at (916) 324-7663 or Joshua.Tooker@dtsc.ca.gov

Sincerely,

Josh Tooker
Deputy Director for Legislation
Department of Toxic Substances Control

Exhibit 4

STATE OF CALIFORNIA
Labor & Workforce Development Agency

GOVERNOR Edmund G. Brown Jr. · SECRETARY Marty Morgenstern

Agricultural Labor Relations Board · California Unemployment Insurance Appeals Board
California Workforce Investment Board · Department of Industrial Relations
Employment Development Department · Employment Training Panel

July 23, 2013

Re: S. 1009, Chemical Safety Improvement Act – Preemption Language

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

Dear Senator Feinstein:

On behalf of the California Labor and Workforce Development Agency (LWDA), I am writing to express serious concern about potential adverse effects of S. 1009 on California's current, ongoing programs to protect workers from hazardous exposures to toxic substances and prevent chemical accidents. We respectfully request that S. 1009 not be adopted unless amended to ensure these programs are not restricted or invalidated.

The Federal Occupational Safety and Health Act of 1970 allows any state to submit a plan and request approval to assume responsibility for development and enforcement of occupational safety and health standards. A state plan may be approved if it provides for the development and enforcement of safety and health standards that are at least as effective as Federal OSHA standards governing the same issues (29 USC § 667(c)(2)). In addition, the OSH Act explicitly allows adoption of standards concerning occupational safety and health issues for which no Federal OSHA standard has been promulgated (29 USC § 667(a)). In other words, not only does the OSH Act not preempt state standards, it explicitly allows states to promulgate standards that are more effective or broader in scope than federal standards.

Federal OSHA approved California's state plan in 1973. Within the LWDA, the California Department of Industrial Relations (DIR), through the Division of Occupational Safety and Health (also known as Cal/OSHA), operates California's state plan.

The OSH Act has allowed California to develop comprehensive occupational safety and health laws and regulations that go beyond federal standards. In some cases, our standards have served as a model for consideration by other states and Federal OSHA. The attached fact sheet, published in 2011, lists areas in which Cal/OSHA standards are more protective than related federal standards, issues covered by Cal/OSHA standards that are not addressed by federal standards, and other innovations.

Notable examples of California laws and regulations that help ensure greater protection of workers than federal standards include the following:

- The California Occupational Carcinogen Control Act of 1976 established a legal framework to protect employees during the use of a carcinogen. Among its provisions are requirements that employers report use of a carcinogen to Cal/OSHA, a requirement that does not exist in federal regulation. Due to this requirement to report use, Cal/OSHA can locate places of employment that use the specific carcinogens, and ensure that protective measures are in place.

  - For example, after an inspection of an establishment that manufactured gallium arsenide wafers for use in the semi-conductor industry found significant overexposures to arsenic, a regulated carcinogen, Cal/OSHA was able to use the carcinogen registrations to prepare a list of similar establishments. Programmed inspections were then conducted at ten facilities. While most were found in compliance, at other facilities significant problems were also found. In this way, we were able to protect this group of California workers from an increased risk of respiratory cancers.

- California's fee-funded regulation of asbestos contractors has helped to prevent abuses such as the use by unregistered contractors of untrained workers, often informal day laborers to remove asbestos. In addition to protecting workers, this program has prevented the contamination of homes, schools and other buildings due to incompetent work practices.

- California has a number of chemical-specific standards for which there are no federal counterparts. For example, in response to two cases of serious, and potentially fatal, lung disease in flavoring manufacturing workers, Cal/OSHA and the California Department of Public Health (CDPH) investigated exposures, control measures, and disease involving the use of diacetyl. As a result of this research, which uncovered many more instances of impaired respiratory function and lung damage, Cal/OSHA proposed a standard regulating exposure to diacetyl in flavoring manufacturing and food processing, which was adopted in 2010. Among the requirements of this standard are control measures to reduce exposure, training and labeling, and the reporting of use to Cal/OSHA. Other substances comprehensively regulated in California, but not under federal regulations, include the carcinogens ethylene dibromide (EDB) and 4,4'-methylenebis(2-chloroaniline) (MBOCA).

Our concern regarding preemption of occupational safety and health regulations is not speculative. California enacted the first "right-to-know" law concerning chemical hazards when the California Legislature passed the Hazardous Substances Information and Training Act in 1980. California's hazard communication standard was adopted to implement the Act. In 1986, California voters adopted Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, which included a requirement to notify employees who were exposed to chemicals known to the State of California to cause cancer or reproductive toxicity.

In 1991, a new subsection was added to our hazard communication standard creating enforcement authority within Cal/OSHA over certain requirements of Proposition 65 as applied to employees. California was then sued over the issue of federal preemption under the OSH Act. Various cases, over a period of several years, were finally concluded when Federal OSHA, in 1997, published a supplemental approval of California's state plan as it incorporated Proposition 65. The US Court of Appeals ruled that Federal OSHA approval of these state plan provisions settled the issue of preemption under the OSH Act. We are seriously concerned that the broader preemption provisions of the S. 1009 may generate litigation over preemption of our programs generally.

Protection of California's workers is also potentially threatened by preemption of state and local environmental regulations and actions, because the application of several Cal/OSHA standards relies upon an action by a local or state environmental agency. For example, the application of California's hazardous waste and emergency response (Hazwoper) regulation to a hazardous waste site relies upon the site being so designated by the US Environmental Protection Agency or by a state or local agency acting under California's Health and Safety Code.

Similarly, the California's tiered permitting system for hazardous waste treatment facilities allows Cal/OSHA to ensure that workers in those operations are trained and protected. Several years ago, California adopted laws and regulations regarding the handling, treatment and disposal of treated wood wastes. These regulations provide additional protection to workers in those operations. Other laws requiring surveys for asbestos-containing materials in public buildings, for lead containing coatings, and other hazardous substances also make California a safer place for its workers.

Finally, we note that as a result of a recent investigation and interim report issued by the US Chemical Safety and Hazard Investigation Board concerning the August 2012 toxic chemicals release and fire at the Chevron refinery in Richmond, California, which sent 15,000 local residents to nearby hospitals, California may improve Cal/OSHA's process safety management standard to better protect workers and may make similar improvements to environmental regulations to better protect public health and the environment. These improvements may not be allowed under the current preemption language of S. 1009.

We recognize that the Toxic Substances Control Act of 1976 needs to be clarified and strengthened, as S. 1009 intends, and that it is important that state regulation of toxic substances not contradict related federal programs. On the other hand, we believe it is also important not to quash state-level innovation that can serve as model for the rest of the country. I respectfully request that S. 1009 be amended to allow states to continue operating existing programs and to develop new programs that are not inconsistent with, and may even be more protective than, federal regulations promulgated under the new law.

Sincerely,

Marty Morgenstern
Secretary

cc: Christine Baker, Director, Department of Industrial Relations, DIR
Ellen Widess, Chief Division of Occupational Safety and Health, DIR
Ralph Lightstone, Director of Legislation, LWDA

Attachment: Fact Sheet Comparison of Cal/OSHA and Federal OSHA programs

California Department of Industrial Relations

FACT SHEET

Comparison of Cal/OSHA and Federal OSHA programs

GREATER LEVELS OF PROTECTION UNDER CAL/OSHA

Permissible Exposure Limits (air contaminants) – Federal OSHA is still using their original 1970 permissible exposure limits (PEL). Cal/OSHA reviews PELs continuously to determine if they should be updated. Since the original federal OSHA PELs from the 1970s, Cal/OSHA has added to or revised its PELs more than 20 times.

Examples include:

- Acetone (a widely used solvent)
  – California's PEL @ 500 ppm, federal PEL @ 1000ppm
- Aniline (used to produce the chemical MDI, and used in rubber processing, herbicides, and dyes and pigments)
  – California's PEL @ 2.0 ppm, federal PEL @ 5.0 ppm
- Manganese (used in steelmaking, and production of stainless steel and aluminum)
  – California's PEL @ 0.2 mg/m3, federal PEL @ 5.0 mg/m3

Cal/OSHA standards (non-PEL) more protective than Federal OSHA

- Control of Employee Exposure to Concrete and Masonry Dust (including silica)
- Washing Facilities at Construction Jobsites
- Notification to the Division of Lead-Related Work
- Hand Weeding, Hand Thinning, and Hand Hot Capping Operations in Agriculture
- Ventilation Requirements for Laboratory-Type Hood Operations
- Confined Spaces
- Bloodborne Pathogen amendments
- Hazard Communication amendments
- Aerosol Transmissible Disease/Zoonotics

High Rise Window Cleaning – Cal/OSHA has a very active program – one of only two programs in the country. Cal/OSHA's serves as a model for the country and has prompted changes in American National Standards Institute standards that govern window cleaning equipment.

Ergonomic Standard – California's has had an ergonomic standard since the late 1990s

Process Safety Management – Cal/OSHA has two offices focused solely on PSM with dedicated staff. The Feds inspect under a National Emphasis Program which only provides a 'snapshot' of operations at the time of the inspection. Cal/OSHA makes regular visits to facilities, to conduct Program Quality Verification reviews, respond to complaints, conduct fatality investigations, evaluate chemical releases and fires, and investigate explosions. The unit is very active in outreach, participating in quarterly safety summits and seminars, and working closely with other agencies.

Mining and Tunneling Unit – Cal/OSHA has regulatory authority over mining, milling and finishing operations whereas the federal Mine Safety and Health Administration only covers mining and milling. Critical standards applicable to these operations are better defined and more stringent in California with regard to guardrails, ladder way openings, fall protection and crane operator certifications. In tunnel safety, Cal/OSHA has higher standards than Fed/OSHA in that we require all tunnel construction jobs to have a State-certified safety

representative and gas tester on site. We also require a pre-construction meeting and the Labor Code mandates compliance inspections every 2 months when a tunnel is under construction.

CAL/OSHA COVERAGE WHERE THERE IS NO FEDERAL COUNTERPART

Diacetyl – Cal/OSHA adopted a standard in 2010 that regulates employee exposure to this food flavoring used extensively to flavor microwave popcorn and other food products. Acute exposure to diacetyl can lead to pulmonary problems, including bronchiolitis obliterans, a permanent and irreversible lung condition. Federal OSHA has no comparable standard.

High-rise Window Cleaning – Cal/OSHA has one of only two programs in the United States and is considered a national model. Our work in this area has resulted in changes to the American National Standards Institute standards used throughout the United States. Our standard requires an annual inspection of equipment on buildings which support window cleaning by a third-party inspector approved by the Division. Federal OSHA has no comparable program.

Injury and Illness Prevention Program (IIPP) – Implemented in the early 1990's, the California program has served as a model that Federal OSHA is now evaluating for possible adoption at the national level. This program requires every employer to have a safety and health program tailored to their specific workplace. California employers have found that the benefits of these programs include improved workplace safety and health, better morale, increased productivity and reduced costs of doing business.

Ergonomics – California adopted a Repetitive Motion Injury (RMI) standard in the late 1990's. The standard applies to a job, process, or operation where a RMI has occurred to more than one employee under certain conditions. Every employer subject to this section must have a program that includes worksite evaluation, control of exposures and training of employees. Federal OSHA has no comparable standard.

Economic and Employment Enforcement Coalition (EEEC) – In 2005, California launched an effort to suppress the underground economy by conducting enforcement "sweeps" in targeted industries employing low-wage workers such as agriculture, car washes, pallet operations, and the garment industry. Citing and penalizing unscrupulous employers is perceived as a way to reduce the profile of these operations thereby benefiting law abiding employers. Cal/OSHA has eleven staff members assigned to the EEEC. There is no permanent U.S. Department of Labor counterpart.

Heat Illness Prevention Program – In 2006, Cal/OSHA promulgated an emergency standard to protect outdoor workers from the hazards of working in high heat environments. Since that time, thousands of inspections have been conducted as well as thousands of outreach, training and education sessions all intended to raise the awareness of the employer community and employees to how they can protect themselves. An encouraging trend has been noted since 2006 in that the rate of in-compliance inspections has been increasing. From a high of twelve heat related fatalities to one last year, it has become apparent that an experiment such as this underscores the value of a concentrated effort with equal areas of emphasis in enforcement and voluntary compliance. Federal OSHA has no comparable program.

Aerosol Transmissible Disease – In 2009, California adopted the nation's first standard to safeguard workers from the spread of airborne diseases. The standard is designed to protect workers in healthcare and related industries from the spread of diseases such as tuberculosis, measles, influenza and other pathogens by coughing and sneezing. It focuses on healthcare and related workplaces that typically treat, diagnose, or house individuals who may be ill such as hospitals, clinics, nursing care facilities, correctional facilities, and homeless shelters. It also covers emergency responders. The ATD standard requires healthcare employers and others at increased risk to develop exposure control procedures and train employees to follow them. Federal OSHA has no comparable standard.

California
Department of
Industrial Relations

INNOVATIONS

Special Advisory Committees – Cal/OSHA has a long history of reaching out to a range of stakeholders through the Cal/OSHA Advisory Committee. Additionally, special advisory committees are convened to address specific emerging issues such as re-evaluating PELs (Health Expert Advisory Committee), Aerosol Transmissible Disease, Heat Illness Prevention, and others.

Partnerships – California has enjoyed great success through partnership programs. The Division pioneered the partnership excellence process now called the Voluntary Protection Program by OSHA. Through a partnership agreement with the California Department of Transportation, several heavy bridge projects were successfully managed with no fatalities. Recently, a 7,000 ton section of the San Francisco-Oakland Bay Bridge was replaced over the Labor Day weekend with no fatalities and no serious injuries. An additional success story is the San Diego Ship Repair Association Shipyard partnership. We conduct annual audit inspections of each of the four shipyards. Injury and Illness rates have shown substantial declines for the four participating yards.

Permit requirements – Cal/OSHA requires affected employers to obtain permits in the following areas:

- **Construction** – permits must be obtained for all trenches and excavations five feet or deeper where employee entry is required; for the construction/demolition of any building, structure, scaffolding or falsework more than three stories high or equivalent to 36" high; and erection/dismantling of vertical shoring systems more than three stories or equivalent to 36'.
- **Tower Cranes** – permits are required for fixed and mobile cranes
- **Tunneling or Underground Mining** – the use of diesel engines in mines and tunnels requires a permit
- **Pressure Vessels** – permits are required for air tanks, LPG propane storage tanks over 125 gallons, and high pressure boilers over 15 psig steam

Registration Requirements – Affected employers must register with Cal/OSHA for operations in the following areas:

- **Asbestos Abatement Contractors** – employers or contractors engaged in asbestos-related work by disturbing more than 100 square feet of asbestos-containing material (greater than 0.1 percent asbestos by weight).
- **Carcinogen Users** – under certain circumstances, employers using a regulated carcinogen must file a report of use

Certifications – Cal/OSHA requires certification for the following equipment, operations, and personnel:

- **Cranes** – certification is required for operating cranes with a rated capacity of over three tons
- **Mining and Tunneling** – all underground mining and tunneling operations require certification of safety representatives and/or gas testers
- **Asbestos Consultants and Technicians** – any person who contracts to provide consulting activities relating to asbestos-containing construction material greater than 100 square feet must be certified

Notifications – Employers involved in certain operations or when certain events occur, must notify Cal/OSHA as follows:

- **Asbestos Abatement** – employers or contractors must send notification at least 24 hours prior to each asbestos job, regardless of the amount of material to be moved
- **Lead Work Pre-job Notification** – under certain circumstances, employers or contractors involved in lead work must send notification prior to the start of the job

- **Annual Permit-holder** – prior to beginning the construction activity, each annual permit holder shall complete a notification form and submit to Cal/OSHA
- **Serious or Fatal Accident** – employers must report work-related or suspected work-related fatalities, catastrophes, and serious injuries or illnesses immediately to the nearest District office
- **Mine Notification** – the owner, operator, or person in charge of any mine shall notify the Mining and Tunneling Unit before commencing operations
- **Underground Mine and Tunnel Notifications** – responsible management officials must notify the Mining and Tunneling Unit immediately in instances of fire, hoisting mishaps, sudden inflows of dangerous gases or water, and ground instability whether or not persons are injured; and, tunnel operators must notify the Mining and Tunneling Unit if a fire breaks out and injures employees within 24 hours

Heat Illness Prevention Network Calls – convened during the hot weather months in California, these monthly calls are designed to provide all stakeholders with an opportunity to speak with the Designee, Chief of Cal/OSHA and the Deputy Chief for Enforcement. After short updates by these three individuals, the call is open for any questions or issues related to the Heat Illness Prevention standard. Over 200 callers were on the line during the August HIP Network call.

PUBLIC SAFETY

Permit requirements – Cal/OSHA requires affected employers to obtain permits in the following areas:

- **Elevators** – the new installation and operation of passenger/freight elevators and other passenger lifts and conveyances requires a permit and annual renewal
- **Portable Amusement Rides and Bungee Jumping** – the operation of all amusement rides including bungee jumping requires a permit
- **Aerial Passenger Tramway** – an operating permit is required

Certifications – Cal/OSHA requires certification for the following equipment, operations, and personnel:

- **Permanent Amusement Rides (Qualified Safety Inspector):** no person shall perform the services of a QSI for permanent amusement rides unless they hold a valid QSI certificate issued by Cal/OSHA

Exhibit 5

STATE ATTORNEYS GENERAL

A Communication from the Chief Legal Officers of the Following States:

California · Connecticut · Delaware · Hawaii · Maryland Massachusetts · Oregon · Vermont · Washington

July 31, 2013

Dear Chairwoman Boxer and Senate Environment and Public Works Majority Committee Members:

We, the undersigned Attorneys General, write to express our deep concerns about the unduly broad preemption language proposed in S.1009, the Chemical Safety Improvement Act. S.1009 would amend the Toxic Substances Control Act (TSCA) in a manner that we believe could, in its current form, seriously jeopardize public health and safety by preventing states from acting to address potential risks of toxic substances and from exercising state enforcement powers.

Protection of its citizens' health and environment is a traditional state duty and power. States have historically been at the forefront of protecting against the harms from toxic chemicals and driving innovation in the development of safer products, often acting before the federal government. Most recently, many state legislatures have introduced or adopted comprehensive chemicals management bills, as well as phase-outs and bans on harmful chemicals, such as cadmium, in children's products. Protection of children's health from harmful chemicals has been a particular focus of the states, and many laws in this area have been enacted with strong bipartisan support. *See Exhibit A (providing examples of State laws); see also Safer States, Safer Chemicals, Healthy Families* (Nov. 2010).[1]

States recognize the need for reforms to make TSCA more effective, and indeed many states have adopted resolutions to that effect. However, reforms that come at the cost of sweeping preemption of state authority – as in S.1009 – do not advance the protection of our citizens' health and the environment. As the chief law enforcement officers of our states, we have concluded that the preemption provisions of S.1009 described below would seriously impair our ability to protect our citizens.

TSCA's current provisions recognize that Americans are better served when states work as partners with the federal government to enhance federal authority, and when states are allowed to identify emerging risks to health and the environment and drive innovations that 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. 15 U.S.C. § 2617(a)(2)(B). In contrast, S.1009 would preempt states from enforcing existing laws or from adopting new laws regulating chemicals that EPA designates as "high priority" months or even years before *any* federal regulations protecting health and the

[1] Available at www.saferchemicals.org/PDF/reports/HealthyStates.pdf.

environment become effective. S.1009, at § 15(a)(2). In addition, states would be barred from adopting and enforcing new laws regulating "low-priority" chemicals, even as the bill precludes any federal regulation of these chemicals and prohibits judicial review of the EPA's priority designation. *Id.*, at §§ 4(e)(3)(H)(ii), 4(e)(5) and 15(b)(2).

Also, under existing law, once the Administrator 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 fits in one of three classes. 15 U.S.C. § 2617(a)(2)(B). S.1009, however, eliminates two of these classes. First, S.1009 eliminates the ability of states to adopt requirements identical to the federal standard, and therefore enforce federal standards under state law. Second, S.1009 revokes state authority to ban any in-state use of chemicals that the Administrator has regulated; under existing law, the states may ban in-state use other than use in manufacture or processing of other substances or mixes. S.1009, at §§ 15(a)(2), 15(b)(1), and 15(b)(2). Loss of this existing authority impairs the states' ability to maximize enforcement resources and protect their citizens from dangerous chemicals.

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. 15 U.S.C. § 2617(b). S.1009 replaces this provision with a waiver that is illusory. Under S.1009, waivers are temporary and in some cases expire automatically, before any federal regulation is adopted or becomes effective. In addition, S.1009 requires a state to certify "a compelling local interest" in order to obtain a waiver. S.1009, at §§ 15(d)(1)(B)(i) and 15(d)(2)(B)(ii). Although the meaning of this provision is unclear, if it is intended to require a showing of circumstances unique to a particular state, we are concerned about its potential to be interpreted to create a complete barrier to a waiver, because the risks from exposure to chemicals in the home or workplace may be seen as not varying from one state to the next.

Any argument that existing preemption provisions will lead to a multitude of conflicting state requirements is misplaced. Over nearly 40 years, dating back to before the adoption of TSCA, states have been regulating chemical safety, and America has retained its leadership in chemicals research and manufacturing. We fully support Congress amending TSCA to enhance EPA's resources and its ability to regulate chemicals, and we believe that if the existing TSCA preemption provisions are left in place, history has shown that the states will seek to harmonize state laws with federal requirements, and will enhance the effectiveness of federal law by devoting state resources to enforcement. Uniformity of regulation should not be achieved by sacrificing citizens' health and the environment.

Our citizens are better served when states are allowed to complement the federal government's efforts. Innovative state laws often result in better regulation and more safeguards, particularly for vulnerable subpopulations such as children and pregnant women. State initiatives have served as templates for national standards. Further, states have a long history of enforcement and can contribute a nationwide network of experienced enforcement staff.

We urge members of the Committee to recognize and respect the long-standing authority of the states to act alongside the federal government to protect the health, safety and welfare of their citizens. Amendments to TSCA should preserve the existing authority of the states to

enforce federal law; continue to allow states to adopt and enforce their own chemicals laws without restriction where the federal government has not acted or will not be acting; and protect the ability of the states to obtain a waiver to enact stricter standards.

Very truly yours,

Kamala D. Harris
California Attorney General

George Jepsen
Connecticut Attorney General

Joseph R. Biden, III
Delaware Attorney General

David M. Louie
Hawaii Attorney General

Martha Coakley
Massachusetts Attorney General

Douglas F. Gansler
Maryland Attorney General

Ellen F. Rosenblum
Oregon Attorney General

William H. Sorrell
Vermont Attorney General

Bob Ferguson
Washington State Attorney General

EXHIBIT A

EXAMPLES OF EXISTING STATE REGULATION OF CHEMICAL SUBSTANCES BY STATE

CALIFORNIA

1) State-wide ban on certain flame retardants (California Health and Safety Code section 108922);
2) Limits on the use of volatile organic compounds (VOCs) in consumer products – a significant cause of ozone pollution, which contributes to high rates of asthma in California (California Code of Regulations, title 17, section 94509);
3) The state's Safe Cosmetics Act, enforcement of which has led to a drastic reduction in the levels of formaldehyde gas in certain hair care products (Health and Safety Code sections 111791 *et seq.*);
4) Proposition 65, a "right to know" law, which has led many manufacturers to reformulate their products to reduce levels of toxic chemicals, including the reduction of lead in children's bounce houses, playground structures and play and costume jewelry; and
5) The state's Green Chemistry Program, a new and innovative set of laws designed to encourage companies to find safer alternatives for the toxic chemicals currently in their products (Hazardous Materials and Toxic Substances Evaluation and Regulation, Statutes 2008, chapter 559 (A.B. 1879); Toxic Information Clearinghouse, Statutes 2008, chapter 560 (S.B. 509)).

MARYLAND

1) Regulation of products with brominated flame retardants (Md. Code Ann., Envir. § 6-1202);

2) Ban on manufacture and sale of lead-containing children's products (Md. Code Ann., Envir. § 6-1303); and

3) Regulation of cadmium in children's jewelry (Md. Code Ann., Envir. § 6-1402).

MASSACHUSETTS

1) Ban under the MA Mercury Management Act (Ch. 190 of the Acts of 2006, amending MA General Laws ch. 21H), on the sale of certain mercury-added products, such as, without limitation and subject to certain exemptions: thermostats; barometers; flow meters; hydrometers; mercury switches; and mercury relays (310 C.M.R. 75.00);

2) Regulation of certain lacquer sealers, flammable floor finishing products, including clear lacquer sanding sealers (MA General Laws ch. 94, § 329);

3) The state's comprehensive chemicals management scheme that requires companies that use large quantities of particular toxic chemicals to evaluate and plan for pollution

prevention, implement management plans if practical, and annually measure and report the results (MA General Laws ch. 211); and

4) MA General Laws ch. 94B Hazardous Substances Act, providing for ban of any toy, or other article intended for use by children, which contains a hazardous substance accessible to a child, or any hazardous substance intended or packaged in a form suitable for use in households (105 C.M.R. 650.000).

OREGON

1) Ban on any product containing more than one-tenth of one percent by mass of pentabrominated diphenyl ether, octabrominated diphenyl ether and decabrominated diphenyl ether, flame retardant chemicals (ORS 453.085(16));

2) Ban on art and craft supplies containing more than one percent of any toxic substance, as identified on a list of hazardous substances promulgated by rule (ORS 453.205 to 453.275);

3) The Oregon Health Authority may ban from commerce products that contain hazardous substances that OHA concludes are unsafe, even with a cautionary label, and can ban toys or other articles intended for use by children that make a hazardous substance susceptible to access by a child (ORS 453.055); and

4) Ban on mercury use in fever thermometers, novelty items, certain light fixtures, and commercial and residential buildings (exceptions not referenced; ORS 646.608, 646A.080, 646A.081, and 455.355).

VERMONT

1) Ban on lead in consumer products (9 Vt. Stat. Ann. § 2470e-l [the last character is the letter "l," not the number "1."]);

2) Ban on brominated and chlorinated flame retardants (9 Vt. Stat. Ann. §§ 2972-2980);

3) Ban on phthalates (18 Vt. Stat. Ann. § 1511); and

4) Ban on bisphenol A (9 Vt. Stat. Ann. § 1512).

WASHINGTON

1) Ban on the manufacture, distribution or sale of certain products containing polybrominated diphenyl ethers (Wash. Rev. Code 70.76);

2) Ban on the sale or distribution of sports bottles, or children's bottles, cups, or containers that contain bisphenol A (Wash. Rev. Code 70.280); and

3) Ban on the distribution or sale of children's products containing lead, cadmium, and phthalates above certain concentrations (Wash. Rev. Code 70.240).