

“Regulation of Existing Chemicals and the Role of Pre-Emption under Sections 6 and 18 of the Toxic Substances Control Act”

September 18, 2013

Questions for the Record for William Rawson

1. Question by Chairman John Shimkus

**Why do you think the Toxic Substances Control Act (TSCA) included a pre-emption provision when environmental statutes enacted around that time actually allowed the states to act more stringently than the Federal Government? What is different about TSCA?**

The preemption provision in the Toxic Substances Control Act struck a reasonable balance considering the nature of the actions EPA can take under the Act and the purposes of preemption generally. Similar approaches are taken in other federal statutes discussed in my written testimony.

Preemption applies only when EPA takes action under section 4 (testing of existing chemicals), section 5 (approval and regulation of new chemicals) or section 6 (regulation of existing chemicals). States had not historically been active in these areas. It would be burdensome, disruptive and wasteful to have conflicting federal and state chemical testing requirements, and equally problematic to have differing federal and state standards for approving new chemicals. Further, developing such programs would be very costly to the states. Similarly, while EPA has taken few actions under section 6 for reasons addressed at the hearing, once EPA has taken action under section 6 following a public process that gives all interested stakeholders opportunity to participate, it would be very costly and very burdensome to interstate commerce if states could then pursue their own rulemakings and impose different and conflicting requirements. Having said that, the preemption provision in TSCA allows for various exceptions and exemptions described in my written testimony and discussed further below.

In short, the scope of preemption in TSCA was tailored to fit the nature of the actions EPA was authorized to take under the Act, applies to only a subset of those actions, and appears designed to avoid conflicting state standards where such conflicting standards could be particularly burdensome and disruptive to interstate commerce. And as noted, the Consumer Product Safety Act (CPSA)<sup>1</sup>, the Food, Drug, and Cosmetic Act (FDCA)<sup>2</sup>, and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)<sup>3</sup> contain preemption provisions that operate in a similar manner to TSCA. Three of these statutes’ four preemption provisions were enacted at about the same time as TSCA.

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<sup>1</sup> 15 U.S.C. § 2075.

<sup>2</sup> 21 U.S.C. §§ 360k, 379r.

<sup>3</sup> 7 U.S.C. § 136v.

2. Question by Chairman John Shimkus

**TSCA Section 18 includes exceptions to the general pre-emption accorded to rules issued by EPA under Sections 5 and 6. Please discuss these exemptions to the Section 18 preemption provisions. Do you consider these exemptions to be broad?**

I do consider the exemptions and exceptions to be broad enough to serve their intended purposes. Exemptions may be granted if EPA determines the proposed state or local action would provide a higher degree of protection and would not unduly burden interstate commerce. Among the exceptions, state and local laws governing disposal are not preempted, reflecting the local impacts of disposal activities. States also are permitted to enact rules identical to EPA rules, which would make them subject to state as well as federal enforcement. States also are not precluded from adopting rules under authority granted by other federal laws, such as the Clean Air Act, and a state or local law also may prohibit the use of a substance or mixture, other than its use in the manufacture or processing of other substances or mixtures. Finally, the preemption provision does not apply at all to actions taken by EPA under section 8 (various chemical-related reporting and information-gathering requirements), such that states are not preempted from imposing information-gathering requirements of their own.

I consider these various exemptions and exceptions to be quite broad. I also consider them for the most part to be in line with the objectives of TSCA, stated in section 2(b), to prevent unreasonable risks to health or the environment without impeding unduly technological innovation, and with the statement in Executive Order 13563 (January 11, 2011), that “Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.” However, the ability of a state or local jurisdiction to ban a particular use of a substance even after the responsible federal agency has conducted an open and transparent review and determined that the use is safe, raises obvious concerns. As I stated in my oral testimony, one could argue that preemption should apply to situations where EPA has determined through a public process that no action is needed to protect health and the environment.