THE ATTORNEYS GENERAL OF
NEW YORK, CALIFORNIA, CONNECTICUT, HAWAII, IOWA,
MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE,
NEW MEXICO, OREGON, VERMONT AND WASHINGTON

April 17, 2014

The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U.S. House of Representatives
2452 Rayburn House Office Building
Washington, DC 20515

The Honorable Paul Tonko
Ranking Member
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U.S. House of Representatives
2463 Rayburn House Office Building
Washington, DC 20515

Re: *The Chemicals in Commerce Act Draft Bill*

Dear Chairman Shimkus and Ranking Member Tonko:

We, the undersigned Attorneys General, write regarding the February 27, 2014, discussion draft bill entitled the Chemicals in Commerce Act (the "TSCA Discussion Draft"), which sets out possible amendments to the Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601 *et seq.* ("TSCA").

We join many stakeholders in state and federal government, industry, environmental and public health organizations, and scientific and academic communities in steadfastly supporting efforts to modernize TSCA. The goal of TSCA is to establish an appropriate federal regulatory framework for preventing unnecessary risks of injury to public health and the environment from the manufacture and use of chemicals that present such risks. We recognize the importance of achieving this goal and the critical contribution that TSCA should play in ensuring adequate protection of public health and the environment from toxic chemicals. Unfortunately, in its

current form, TSCA has largely failed to accomplish its crucial purpose. In fact, only a small handful of the approximately 84,000 registered industrial chemicals are currently subject to any federal regulations, and over 60,000 of the registered chemicals have not even been reviewed for safety as mandated by current law.

While we applaud your Subcommittee's interest in reforming TSCA and remedying its well-recognized shortcomings, we are deeply concerned about the TSCA Discussion Draft's sweeping preemption of the authority of states to protect our citizens from the health and environmental risks posed by the production and use of toxic chemicals within the borders of our states. The preemption provisions of the draft bill far exceed the preemption provisions currently in place under TSCA. As discussed more fully below, for chemicals already in commerce, the TSCA Discussion Draft would preempt state regulation of a chemical once the United States Environmental Protection Agency ("EPA") took required action regarding that chemical. For new chemicals, the TSCA Discussion Draft would preempt state regulation of a chemical irrespective of whether EPA took required action regarding that chemical. In addition, the TSCA Discussion Draft would expand preemption to bar states from requesting health or safety information from a company regarding a toxic chemical once EPA has made a risk determination for that chemical. Thus, if enacted, the draft bill's broad preemption language would effectively eliminate the existing federal-state partnership on the regulation of toxic chemicals by preventing states from continuing their successful and ongoing legislative, regulatory and enforcement work that has historically reduced the risks to public health and the environment posed by toxic chemicals.

Our federal laws governing air and water pollution, hazardous waste and pesticides have successfully created a dynamic federal-state relationship in which the authority of states to enact and enforce human health and environmental protections is preserved and thus complements and enhances federal standards. That paradigm should be preserved in any amended TSCA. Thus, consistent with letters that some of the undersigned Attorneys General sent last summer to members of the Senate in connection with S. 1009, we support TSCA reform that would strengthen crucial protections of public health and safety, and the environment, while staunchly opposing any reform that would come at the expense of our states' own ability to protect our citizens and environment from dangerous chemicals, where state action is required to do so.

I. The States' Important Role in Protecting Against the Risks Posed by Toxic Chemicals

The states' responsibilities and powers under our federal system of government include exercising traditional police powers to protect public health and the environment. Historically and currently, states have been leaders in acting to reduce risks to citizens' health and to the environment from toxic chemicals, often acting before the federal government in this regard. For example, Connecticut banned the manufacture and use of polychlorinated biphenyls, or PCBs, two years before EPA's nationwide ban under TSCA. California restricted the use of certain phthalates in children's toys and childcare articles before such chemicals were federally restricted by the Consumer Product Safety Improvement Act, and restricted formaldehyde

emissions from composite wood products years before EPA regulated such products under TSCA. And a number of states, including Iowa, Massachusetts, New York, Vermont, and Wisconsin, instituted broad bans of the toxic pesticide DDT before EPA outlawed non-emergency uses of the chemical under the Federal Insecticide, Fungicide and Rodenticide Act in 1972.

Also, in recent years many state legislatures have introduced or adopted comprehensive chemical management bills, as well as phase-outs of toxic chemicals. Protection of children's health from harmful chemicals has been a particular focus of the states, and many state laws in the area of toxic chemicals have been enacted with strong bipartisan support. *See* Exhibit A (providing examples of state toxics control laws); *see also* Safer States, Safer Chemicals, Healthy Families (Nov. 2010), *available at* www.saferchemicals.org/PDF/reports/HealthyStates.pdf.

II. The Need for TSCA Reform

Congress enacted TSCA in 1976 to give EPA authority to address the risks posed by the production and use of toxic chemicals. But because of limitations in the statute, coupled with lack of adequate funding for implementation, TSCA has largely failed to fulfill its purpose. As a result, our citizens and our environment continue to be exposed to the risks of potentially hazardous chemicals on an ongoing basis, many of which risks are not well understood. As noted above, thousands of chemicals that have never been reviewed for safety are registered for use in the United States.

We believe that strong state and federal efforts are needed to address the risks posed by toxic chemicals. As explained in written testimony that the New York State Attorney General's Office provided to this committee last September, it is important for Congress to amend TSCA to make it more protective of public health and the environment, and also important that any TSCA amendments not expand the preemption of state toxic chemical regulatory and enforcement efforts. However, the preemption provisions of the TSCA Discussion Draft do just that: they would eliminate the states' role in toxic chemical regulation and therefore make TSCA less protective, not more.

III. The TSCA Discussion Draft's Preemption Provisions Imperil Needed Protection

A. Preemption Under TSCA Currently

The TSCA Discussion Draft proposes to greatly expand TSCA preemption, and would serve to cripple states' ability to protect their citizens and the environment from the risks posed by toxic chemicals. Currently, TSCA preempts state regulation only under limited circumstances. TSCA section 18(a)(1)[1] *preserves* state power to regulate a chemical substance,

[1] 15 U.S.C. § 2617(a)(1).

a chemical mixture, or a chemical-containing article *unless* EPA prescribes a rule or order for the substance, mixture or article under TSCA sections 5 or 6.[2]

Even if EPA does prescribe such a rule or order, that EPA action does not necessarily preempt state action. If the state regulation is identical to the EPA rule or order, is adopted under the authority of any other federal law, or bans the use of the substance or mixture in the state, then EPA action does not preempt the state regulation.[3]

In addition, even if the EPA rule or order would preempt a state requirement, TSCA gives a state the power to apply to EPA and obtain an exemption from preemption if the state regulation would not preclude compliance with the EPA regulation, would provide a significantly higher degree of protection than the EPA regulation, and would not unduly burden interstate commerce.[4] Thus, under TSCA, states currently have significant power to regulate toxic chemical manufacture and use in ways that complement and enhance EPA's efforts, as the examples of state action described above demonstrate.

B. Preemption Under the TSCA Discussion Draft

The TSCA Discussion Draft contains preemption provisions that, if enacted, would effectively eliminate the states' power to regulate the manufacture and use of both existing and new toxic chemicals.

Existing Chemicals. Existing chemicals are those already listed in EPA's inventory of chemicals under TSCA section 8(b).[5] For an existing chemical that is actively in use, the TSCA Discussion Draft contemplates a three-step EPA process: (1) EPA determines whether the chemical is "high priority" or "low priority;" (2) if the chemical is high priority, EPA makes a "safety determination" regarding whether the chemical poses an unreasonable risk of harm; and (3) if EPA finds that the chemical poses an unreasonable risk, EPA promulgates a rule establishing restrictions or requirements applicable to manufacture or use of the chemical.[6] As a result, the TSCA Discussion Draft requires EPA to take one of the following three actions for each active existing chemical: determine that the chemical is low priority; determine that the chemical is high priority but does not present an unreasonable risk; or determine that the chemical is high priority and presents an unreasonable risk, followed by promulgation of a rule to regulate manufacture or use of the chemical.

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[2] 15 U.S.C. §§ 2617(a)(2)(B), 2604, 2605.

[3] 15 U.S.C. § 2617(a)(2)(B).

[4] 15 U.S.C. § 2617(b).

[5] 15 U.S.C. § 2607(b).

[6] TSCA Discussion Draft § 6(a)(3) (proposing new subsection 6(a) regarding priority determinations, new subsections 6(b), (c), (d) and (e) regarding safety determinations, and new subsection (f) regarding rules setting requirements or restrictions).

Each of these three actions preempts states from "establish[ing] or continu[ing] in force" any law or regulation that "prohibits or restricts the manufacture, processing, distribution in commerce, or use of [the] chemical substance, mixture or article for its intended conditions of use."[7] Because the TSCA Discussion Draft requires EPA to take one of these three actions for each active existing chemical, all present and future state laws or regulations for each such chemical would eventually be preempted, except for state laws or regulations promulgated pursuant to other federal laws.[8]

This is particularly troubling in the case of chemicals EPA has categorized as low priority. Chemicals may be given that designation even though they pose either a high hazard or a high exposure.[9] And the TSCA Discussion Draft does not require EPA to take any further action on a low-priority chemical.[10] Thus, states would be preempted from protecting their citizens from chemicals that pose either a high hazard or a high exposure that EPA never regulates.

New Chemicals. For new chemicals, once a company has submitted a notification to EPA, the TSCA Discussion Draft contemplates a similar two-step process: (1) EPA determines whether the chemical poses an unreasonable risk of harm; and (2) if EPA finds that the chemical poses an unreasonable risk, EPA promulgates a rule establishing restrictions or requirements applicable to manufacture or use of the chemical.[11]

Under the TSCA Discussion Draft's preemption provision, both of these steps for new chemicals have the same preemptive effect as the three steps for existing chemicals, so no state could "establish or continue in force" any law or regulation governing the "manufacture, processing distribution in commerce, or use" of a new chemical.[12] Moreover, EPA's failure to make an unreasonable risk determination within 90 days also preempts states from establishing or continuing in force any such regulations.[13] Accordingly, since one of these events would

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[7] TSCA Discussion Draft § 17 (proposing new subsections 18(a)(2)(A)(ii), (iii) and (iv)).

[8] TSCA Discussion Draft § 17 (proposing new subsection 18(b) setting out exception to preemption limited to state laws adopted or authorized pursuant to other federal law).

[9] TSCA Discussion Draft § 6(a)(3) (proposing new subsection 6(a)(1)(B), pursuant to which EPA may designate a chemical with a potential for either a high hazard or a high exposure as low priority).

[10] TSCA Discussion Draft § 6(a)(3) (proposing new subsection 6(a)(5)).

[11] TSCA Discussion Draft § 5(a) (proposing new subsection 5(c)(3) & (5) regarding safety determinations and rules setting requirements or restrictions).

[12] TSCA Discussion Draft § 17 (proposing new subsections 18(a)(2)(A)(i) & (iii)).

[13] TSCA Discussion Draft § 17 (proposing new subsection 18(a)(2)(B), which cross-references the 90-day period under new subsection 5(c)(1)).

occur for each new chemical, all present and future state laws or regulations for each such chemical would be preempted, *even where EPA failed to act as mandated by law.*[14]

State Authority to Obtain Information. The TSCA Discussion Draft also would expand preemption of state authority into a new arena: the ability of states to obtain health or safety information about toxic chemicals.[15] Even if EPA has not sought such information, the TSCA Discussion Draft would preempt states from seeking such information if EPA has made a safety determination.[16] But states may have good grounds to seek additional information regarding the health or safety implications of a particular chemical even if EPA has determined that a chemical *does not* present an unreasonable risk, and especially if EPA has determined that a chemical *does* present an unreasonable risk. Information concerning the toxicity of chemicals develops over time, and states should not be foreclosed from obtaining safety information merely because EPA previously made a determination regarding the chemical's safety. This would represent a significant step backward in the realm of the "right to know" about toxic chemicals.

Elimination of Exemptions from Preemption. In addition to expanding the scope of preemption, the TSCA Discussion Draft eliminates two of the three current categorical *exemptions* from preemption, namely, if the state regulation (1) is identical to the EPA rule or order or (2) prohibits the use of the substance or mixture in the state.[17] Without the first of those deleted exemptions, the only means for states to enforce EPA's toxic chemical restrictions would be by citizen suit in federal court, which would deprive states of the critical tool of enforcement by state administrative agencies, the first line enforcers in most states. Removal of the second exemption deprives state residents of additional state-law protection against toxic chemicals when their legislatures or administrative agencies have found sufficient basis to support an in-state ban.

Moreover, the TSCA Discussion Draft eliminates the states' power to obtain exemptions from preemption on a case-by-case basis under TSCA section 18(b).[18] Thus, states would no longer be able to obtain such exemptions, even if the state regulation would provide a significantly higher degree of protection and would not burden interstate commerce.

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[14] As with existing chemicals, state laws or regulations regarding new chemicals promulgated pursuant to other federal laws would not be preempted. TSCA Discussion Draft § 17 (proposing new subsection 18(b)).

[15] TSCA currently preempts states from establishing or continuing in effect requirements for testing a chemical for health and safety effects if EPA has promulgated a rule requiring such testing for similar purposes, 15 U.S.C. § 2617(a)(2)(A), but this provision does not preempt more general requests for health and safety information from states.

[16] TSCA Discussion Draft § 17 (proposing new subsection 18(a)(1)(B)).

[17] *See* 15 U.S.C. § 2617(a)(2)(B) (existing exemptions).

[18] 15 U.S.C. § 2617(b).

IV. The TSCA Discussion Draft's Potentially Grave Impact on State Toxic Chemical Regulation

The TSCA Discussion Draft's preemption provisions would eliminate states' ability to exercise their power to protect their citizens and environment from the dangers of toxic chemicals. Innovative state laws often result in better regulation and more safeguards, especially for vulnerable groups such as children and pregnant women. As noted above, many states have enacted bans or restrictions on the use of toxic chemicals in toys or other items intended for use by, or in households with, children. The preemption provisions of the TSCA Discussion Draft would preempt these important exercises of the states' traditional police powers.

State initiatives have also served as templates for national standards. States have a long history of enforcement of toxic chemical regulatory requirements and contribute a nationwide network of experienced enforcement staff. State regulation and enforcement have not prevented the United States from maintaining its leadership in chemical research and manufacturing, but have helped reduce risk to adults, children and the environment from the manufacture and use of toxic substances.

V. Conclusion

Achieving TSCA's goal of protecting public health and the environment from toxic chemicals is critically important. Preserving the dynamic federal-state relationship that relies on the authority of states to enact and enforce their own protections against those chemicals is a key part of that effort as it complements and enhances TSCA as well as our other national laws governing air and water pollution, hazardous waste, and pesticides.

Accordingly, while we support efforts to improve TSCA, we oppose TSCA reform legislation that includes broad state preemption or otherwise expands the preemptive effect of TSCA. We believe that, rather than bringing TSCA closer to attaining its goal, such provisions would move that goal further out of reach.

We would welcome the opportunity to work with your Subcommittee to craft legislation that provides much-needed TSCA reforms, while preserving the traditional and critical role of states in protecting the health and welfare of their citizens and natural resources.

We thank you for your consideration of our concerns.

Sincerely,

Eric T. Schneiderman
New York State Attorney General

Martha Coakley
Massachusetts Attorney General

Kamala D. Harris
California Attorney General

Joseph A. Foster
New Hampshire Attorney General

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Maryland Attorney General

cc: The Honorable Frederick S. Upton
Chairman, House Energy and Commerce Committee
The Honorable Henry A. Waxman
Ranking Member, House Energy and Commerce Committee

EXHIBIT A

EXAMPLES OF EXISTING STATE REGULATION OF CHEMICAL SUBSTANCES

CALIFORNIA

1. Statewide ban on certain brominated flame retardants used largely in home furnishings (California Health and Safety Code § 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, § 94509).

3. Statewide restrictions on six types of phthalate plasticizers used in toys and childcare articles (California Health and Safety Code §§ 108935-108939).

4. Formaldehyde emission standards for composite wood products (California Code of Regulations, title 17, §§ 93120-93120.12).

5. Proposition 65, a "right to know" law, which has led many manufactures 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.

6. 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, Statues 2008, chapter 560 (S.B.509)).

CONNECTICUT

1. Regulation of cadmium in children's jewelry (Conn. Gen. Stat. § 21a-12d).

2. Prohibition on consumer products with nickel-cadmium batteries (Conn. Gen. Stat. § 22a-256b).

3. Prohibition on sale of zinc-carbon batteries (Conn. Gen. Stat. § 22a-256e).

4. Limits on sale of packaging components composed of lead, cadmium, mercury, or hexavalent chromium (Conn. Gen. Stat. §§ 22a-255g *et seq.*).

5. Prohibition on bisphenol A in reusable food containers (Conn. Gen. Stat. § 21a-12b).

6. Prohibition on bisphenol A in thermal receipt paper (Conn. Gen. Stat. § 21a-12e).

IOWA

1. Ban on sale, distribution, or offering for retail sale of certain household alkaline manganese batteries (Iowa Code §§ 455D.10A(2)(a) and (b)).

2. Restrictions on the sale, distribution, or offering for retail sale of rechargeable consumer products powered by nickel-cadmium or lead batteries (Iowa Code § 455D.10B(1)).

3. Ban on the sale, offer for sale, purchase, or use of plastic foam packaging products manufactured with chlorofluorocarbons or halogenated chlorofluorocarbons (Iowa Code § 455D.14).

4. Restrictions on offering for sale certain mercury switch thermostats (Iowa Code § 455D.16(6)).

5. Restrictions on the sale, distribution, or offering for promotional purposes a package or packaging component which contains lead, cadmium, mercury, or hexavalent chromium (Iowa Code § 455D.19(3)).

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).

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 and 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. 21I).

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).

NEW YORK

1. Ban on bisphenol A in child care products (N.Y. Envtl. Conserv. Law §§ 37-0501 *et seq.*).

2. Ban on the flame retardant tris(2-choloroethyl) phosphate (TRIS) in child care products (N.Y. Envtl. Conserv. Law §§ 37-0701 *et seq.*).

3. Restrictions on the concentration of brominated flame retardants in products (N.Y. Envtl. Conserv. Law § 37-0111).

4. Restrictions on the use of lead, cadmium, mercury, or hexavalent chromium in product packaging (N.Y. Envtl. Conserv. Law §§ 37-0205 *et seq.*).

5. A ban on the import, sale or distribution of gasoline containing methyl tertiary butyl ether (MBTE) (N.Y. Agric. & Mkts. Law § 192-g).

6. Restrictions on the phosphorus content of household cleaning products, and on the sale and use of phosphorus lawn fertilizers (N.Y. Envtl. Conserv. Law §§ 17-2103, 35-0105(2)(a)).

7. A *de facto* ban on the use of n-propyl bromide in dry cleaning; New York will not issue an air facility registration to any facility proposing to use n-propyl bromide as a dry cleaning solvent (New York State Dept. of Envtl. Conservation, Approved Alternative Solvents for Dry Cleaning, *at* http://www.dec.ny.gov/chemical/72273.html).

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 ("OHA") 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).

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-*1*).

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

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

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

5. Ban on heavy metals in packaging (10 Vt. Stat. Ann. § 6620a).

6. Comprehensive mercury management (10 Vt. Stat. Ann. ch. 164).

7. Ban on addition of gasoline ethers (including MTBE) to fuel products (10 Vt. Stat. Ann. § 577).

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).

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

4. Ban on the sale or distribution of certain products containing mercury (Wash. Rev. Code § 70.95M.050).