STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
BRIAN E. NELSON
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March 5, 2015

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

RE: State Concerns with "Frank R. Lautenberg Chemical Safety for the 21st Century Act"

Dear Senator Boxer:

I write to convey the concerns of the California Attorney General regarding the proposed Frank R. Lautenberg Chemical Safety for the 21st Century Act ("Act"), as proposed in a Working Draft dated March 4, 2015. Our office has previously described to you and the Committee our compelling interest in preserving California's role in public health and environmental protection through its green chemistry program, Proposition 65 enforcement efforts, and Air Resources Board regulations, among others, during any reform of the federal Toxic Substances Control Act (TSCA). (See attached letter of June 11, 2013, and testimony of July 31, 2013, regarding the Chemical Safety Improvement Act (CSIA), S. 1009, as introduced in the last congressional session.) Our review of the March 4, 2015 Working Draft of chemicals safety legislation causes us to reiterate a number of serious concerns with respect to its excessive displacement of states from the promulgation and enforcement of chemicals health and safety regulations. We here restrict our comments to those matters pertaining to the regulatory and enforcement relationship between the states and the U.S. Environmental Protection Agency (EPA).

Although we have had less than 24 hours to review the Working Draft, we have significant objections to three items: (1) the preemption of state authority to enact new protections with respect to high priority chemicals *years before* federal regulations take effect; (2) the unduly burdensome standards applicable to state waivers from preemption; and (3) the elimination of state authority to replicate federal standards in state statute. Of these, item (1) presents the most significant and – absent amendment – insurmountable concern.

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1. <u>Premature preemption of state authority to enact new protections with respect to high priority chemicals</u>

We have previously expressed our grave concern with any regulatory scheme in which state requirements are displaced *before* federal ones take effect, a phenomenon known as "regulatory void preemption." This timing issue is particularly critical with respect to chemicals that the states (through their regulatory actions) and EPA (through formal prioritization screening) have both determined are "high priority" based on the health or environmental threats they pose. For <u>existing</u> state laws restricting high priority chemicals, the Working Draft sensibly ties the timing of preemption to the "*effective date of* the applicable action . . . taken by the [EPA] Administrator." (See subsection 18(a)(2); emphasis added). For any <u>new</u> state chemicals restrictions, however – such as those forthcoming under California's green chemistry initiative – the Working Draft preempts state restrictions woefully prematurely: on "the date on which the Administrator *commences a safety assessment* under section 6." (Subsection 18(b); emphasis added.)[1]

This asymmetry is conceptually illogical, and is deeply troubling given the enormous time lag certain to occur between the beginning of an EPA assessment and the effective date of any federal safety rule. Proposed subsection 6(a) of the Act permits EPA up to three years to conduct a safety assessment, up to two more years to promulgate a final regulation, and an additional two years to extend the rulemaking process. Proposed subsection 6(d) thereupon requires only that the regulation specify a compliance deadline that is "as soon as practicable." Thus, the draft allows for <u>more than a seven-year gap</u> between the commencement of a safety assessment and the effective date of an enforceable federal regulation, an interval during which any new state regulation is inexplicably displaced with respect to *those chemicals presenting greatest exposure concerns*. In California's view, this constitutes poor public policy that undermines the fundamental health and environmental protection purposes of TSCA reform.

Furthermore, although the Working Draft purports to spare from preemption state regulation of chemicals that are designated "low priority" by EPA or are as-yet-undesignated, this apparent regulatory room for states appears largely illusory. Given the process set in motion by proposed subsection 4A(b)(9) – in which states must notify EPA of even "proposed" actions

[1] Timing-of-preemption concerns also exist with respect to states' ability to control pollution in environmental media, such as air, given the drafting ambiguity in subsection 18(d)(2).

on low priority chemicals, whereupon EPA is required to conduct a prioritization screening of state-regulated chemicals under any one of a number of scenarios – it appears highly likely that EPA would, upon state notification, promptly redesignate many such chemicals as high priority,
commence a risk assessment, and thereupon take 7-plus years to promulgate an enforceable regulation. These would be years during which, yet again, health-protective state regulation would be precluded.

It thus appears that the Draft will ultimately restrict states' ability to regulate nearly all TSCA chemicals in commerce, *even in the absence of final, enforceable federal regulations*. Our office accordingly believes that any preemption of state authority with respect to high priority chemicals must be postponed until the effective date of federal action.

2. Unduly burdensome waiver-from-preemption provision

The preemption problem above is compounded by the Working Draft's perpetuation of the CSIA's unduly burdensome test for a state seeking an EPA waiver from preemption, by requiring, in subsection 18(f)(1), identification of a compelling "local" interest justifying state-level chemicals laws. As we have previously explained, risk from exposure to a particular toxic chemical is generally likely to be similar from one location to another, particularly with respect to the consumer product (rather than industrial) exposures that are the object of much California state regulation. In this respect, the "local interests" prong of the Clean Air Act waiver provision is largely irrelevant as a model for a TSCA waiver, because, for example, there is no consumer-product analog to a federal nonattainment area for ozone. It is unclear why the existing TSCA waiver provision, which balances state interests against the potential burdens of nonuniformity on commerce, is insufficient to achieve any legitimate objectives with respect to harmonizing state and federal regulation to the maximum extent feasible.

3. Elimination of state authority to co-enforce federal standards

The states have long supplemented EPA's enforcement capacity under numerous environmental and consumer protection statutes – including the Consumer Product Safety Act, multiple titles of the Federal Food, Drug and Cosmetics Act, and the Federal Insecticide, Fungicide and Rodenticide Act – by enacting and enforcing mirror image state laws that embody

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federal substantive standards. Existing TSCA section 18(a)(2)(B)(i) follows this conventional, well-tested enforcement model in providing that states "may . . . establish or continue in effect" any requirement "identical to the requirement prescribed by the Administrator."

To our knowledge, there has never been any problem identified with states' exercise of this form of co-enforcement authority under TSCA. Inexplicably, then, subsection 18(d)(1)(C)(ii)(I) of the Working Draft expressly eliminates states' co-enforcement ability, by precluding states from adopting chemicals regulations that "are already required by the Administrator under section 5 or 6." We believe this provision is ill advised, in that it deprives EPA of significant nationwide enforcement backup just when its TSCA workload is poised to expand – a reduction in resources and partnership capacity that we do not understand EPA to have requested.

* * *

As a final matter, the drafting of subsection 18(e) of the preemption provisions in the Working Draft (titled "Preservation of Certain State Laws") is confounding, and must be clarified to prevent confusion and needless litigation. We understand subsection (1)(B) to grandfather *in toto* actions taken pursuant to California's Clean Drinking Water and Toxics Enforcement Act ("Proposition 65") (among other pre-2003 state laws), which addresses a significant concern that California identified in prior bill iterations. To the extent that subsection (1)(A) purports to contemplate some additional sphere of non-preempted state activity, however, we cannot discern the nature of the state activity intended to be spared. It is unclear what this section accomplishes if it is restricted to "actions" taken prior to January 1, 2015: any meaningful "preservation of state law" would clearly exempt from preemption continued implementation and enforcement of laws enacted prior to passage of the Act. Further, this subsection appears to contradict subsection 18(a)(1)(B), which also governs existing state enactments yet significantly limits their reach. If the intention in subsection 18(e) is to preserve states' ongoing ability to implement laws enacted prior to January 1, 2015, the significant drafting tension between these subsections must be resolved.

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In sum, while our office fully supports the goal of a more robust federal regulatory program, we do not believe this should be accomplished through the unprecedented and unnecessary evisceration of state regulatory authority to fill critical safety and enforcement gaps that is contemplated in the Working Draft. The problems identified in this letter are fixable, but they must be fixed for California to support the present TSCA reform effort.

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
General Counsel

For KAMALA D. HARRIS
Attorney General

cc: The Honorable Diane Feinstein

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