

**LEGISLATIVE HEARING ON THE FRANK R.  
LAUTENBERG CHEMICAL SAFETY FOR  
THE 21ST CENTURY ACT (S. 697)**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON**  
**ENVIRONMENT AND PUBLIC WORKS**  
**UNITED STATES SENATE**  
ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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MARCH 18, 2015

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Printed for the use of the Committee on Environment and Public Works



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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED FOURTEENTH CONGRESS  
FIRST SESSION

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**LEGISLATIVE HEARING ON THE FRANK R.  
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21ST CENTURY ACT (S. 697)**

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**WEDNESDAY, MARCH 18, 2015**

U.S. SENATE,  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:30 a.m. in room 406, Dirksen Senate Building, Hon. James Inhofe (chairman of the committee) presiding.

Present: Senators Inhofe, Boxer, Vitter, Barrasso, Carper, Udall, Whitehouse, Cardin, Sanders, Markey, Boozman, Merkley, Fischer, Capito and Rounds.

**OPENING STATEMENT OF HON. JAMES M. INHOFE,  
U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Senator INHOFE. We will call this hearing to order.

Senator Boxer and I will each have a 5-minute opening statement. Then we will proceed.

I want to use half of my 5-minute statement so I can give the other half to Senator Vitter, who is the co-author of the bill.

I am very pleased today that we will be discussing the Frank R. Lautenberg Chemical Safety for the 21st Century Act. It might be the longest title I can ever remember, but it is worth it. It has strong bipartisan support of nine Democrats and nine Republicans. I am proud to co-sponsor this bill and hope to move it through the committee by way of constructive and orderly process.

For years, Senator Lautenberg worked to update the 1976 law, releasing bill after bill, every Congress. In 2012 he came to me with a clear message. That message was that this law will not be updated without bipartisan support and input from all stakeholders. So Frank and I held a series of stakeholder meetings and through that process, we got a lot of good information on all sides of the issue.

Just about 2 years ago, Senator Lautenberg teamed up with Senator Vitter to introduce a bipartisan bill that created not only the first real momentum for meaningful reform, but a foundation for the legislation we have before the committee today.

It is important to note that today we have a number of witnesses focused on public health and the environment and none from industry. This is certainly not because no one from industry supports the bill. So I, without objection, will place supporting statements

into the record from a number of groups, including the American Alliance for Innovation.  
[The referenced information follows:]

March 31, 2015

The Honorable James Inhofe  
Chairman  
Committee on Environment and Public Works  
United States Senate  
Washington, DC 20510

The Honorable Thomas Udall  
United States Senate  
Washington, DC 20510

The Honorable David Vitter  
United States Senate  
Washington, DC 20510

Dear Chairman Inhofe, Senator Udall, and Senator Vitter:

More than 100 members of the American Alliance for Innovation (AAI) wrote you on March 17, 2015 to thank you for your leadership and offer support for the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (S. 697). That letter is attached. The undersigned members of AAI would also like to express their support for S. 697 as additional signatories to the March 17<sup>th</sup> letter. Therefore, please consider this letter an addendum to the attached March 17<sup>th</sup> letter.

Sincerely,

American Architectural Manufacturers Association  
Council of Producers & Distributors of Agrotechnology  
Flavor and Extract Manufacturers Association  
INDA, Association of the Nonwoven Fabrics Industry  
Interstate Natural Gas Association of America  
Juice Products Association  
National Association of Landscape Professionals  
National Association of Manufacturers  
National Council of Textile Organizations  
National Fisheries Institute  
National Retail Federation  
Portland Cement Association  
RISE (Responsible Industry for a Sound Environment)  
Spray Polyurethane Foam Alliance  
The Vinyl Institute  
The Vision Council  
Vinyl Building Council  
Wallcoverings Association

cc: Members of the Committee on Environment and Public Works

March 17, 2015

The Honorable James Inhofe  
Chairman  
Committee on Environment and Public Works  
United States Senate  
Washington, DC 20510

The Honorable Thomas Udall  
United States Senate  
Washington, DC 20510

The Honorable David Vitter  
United States Senate  
Washington, DC 20510

Dear Chairman Inhofe, Senator Udall, and Senator Vitter:

We are writing as members of the American Alliance for Innovation (AAI) to thank you for your leadership and offer our support for the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (S. 697). The AAI is an alliance of trade associations representing businesses both large and small from across the economy. AAI represents many major sectors of our economy, all along the chemicals value chain, including aerospace, agriculture, apparel, automotive, building and construction materials, chemical and raw material production, consumer and industrial goods, distribution, electronics, energy, equipment manufacturers, food and grocery, footwear, healthcare products and medical technology, information technology, mining and metals, paper products, plastics, retail, storage, and travel goods.

The way chemicals are produced and regulated has an impact on each of our industries, the products that we make and/or the services we provide. A strong, credible federal chemical regulatory program is important to our members, their customers, the millions of workers we represent, the national marketplace and all American consumers.

The Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (S. 697) is a pragmatic compromise that balances the interests of multiple stakeholders while making significant improvements to chemicals management and facilitating a more cohesive federal approach to chemical regulation. We appreciate the thoughtful, bipartisan approach you have taken in crafting the legislation and look forward to working with you and your fellow co-sponsors as the bill is considered by the Committee and the full Senate.

Sincerely,

Adhesive and Sealant Council  
Aerospace Industries Association  
Air-Conditioning, Heating, and Refrigeration Institute

Alkylphenols & Ethoxylates Research Council  
Alliance of Automobile Manufacturers  
Aluminum Association  
American Apparel & Footwear Association  
American Bakers Association  
American Chemistry Council  
American Cleaning Institute  
American Coatings Association  
American Coke and Coal Chemicals Institute  
American Composites Manufacturers Association  
American Farm Bureau Federation  
American Fiber Manufacturers Association  
American Foundry Society  
American Gas Association  
APA – The Engineered Wood Association  
Asphalt Roofing Manufacturers Association  
Association of Global Automakers  
Association of Home Appliance Manufacturers  
Auto Care Association  
Can Manufacturers Institute  
Center for Baby and Adult Hygiene Products  
Chemical Fabrics and Film Association  
Color Pigments Manufacturers Association  
Composite Lumber Manufacturers Association  
Consumer Electronics Association  
Consumer Healthcare Products Association  
Consumer Specialty Products Association  
Corn Refiners Association  
Council of Great Lakes Industries  
CropLife America  
Edison Electric Institute  
EPS Industry Alliance  
ETAD North America  
Extruded Polystyrene Foam Association  
Fashion Accessories Shippers Association  
Fashion Jewelry and Accessories Trade Association  
Flexible Packaging Association  
Global Cold Chain Alliance  
Grocery Manufacturers Association  
Hardwood Plywood & Veneer Association  
Industrial Environmental Association  
Industrial Minerals Association - North America  
Institute of Makers of Explosives  
Institute of Scrap Recycling Industries, Inc.  
Institute of Shortening and Edible Oils  
International Association of Refrigerated Warehouses

International Fragrance Association, North America  
International Institute of Ammonia Refrigeration  
International Institute of Synthetic Rubber Producers  
International Sleep Products Association  
International Warehouse Logistics Association  
International Wood Products Association  
IPC - Association Connecting Electronics Industries  
Juvenile Products Manufacturers Association  
Methanol Institute  
Motor & Equipment Manufacturers Association  
National Association for Surface Finishing  
National Association of Chemical Distributors  
National Association of Printing Ink Manufacturers  
National Black Chamber of Commerce  
National Cleaners Association  
National Confectioners Association  
National Electrical Manufacturers Association  
National Grocers Association  
National Industrial Sand Association  
National Lime Association  
National Lumber and Building Material Dealers Association  
National Marine Manufacturers Association  
National Mining Association  
National Oilseed Processors Association  
National Pest Management Association  
National Restaurant Association  
National Tank Truck Carriers, Inc.  
Nickel Institute  
Oregon Women in Timber  
Outdoor Power Equipment Institute  
Personal Care Products Council  
Personal Watercraft Industry Association  
Petroleum Marketers Association of America  
Pine Chemicals Association, Inc.  
Plastic Pipe and Fittings Association  
Plastics Pipe Institute  
Plumbing Manufacturers International  
Polyisocyanurate Insulation Manufacturers Association  
PVC Pipe Association  
Recreation Vehicle Industry Association  
Resilient Floor Covering Institute  
Reusable Packaging Association  
Roof Coatings Manufacturers Association  
Rubber Manufacturers Association  
Society of Chemical Manufacturers and Affiliates  
Specialty Graphic Imaging Association

SPI: The Plastics Industry Trade Association  
Sports & Fitness Industry Association  
SPRI, Inc. (representing the Single Ply Roofing Industry)  
Structural Insulated Panel Association  
Styrene Information & Research Center  
Textile Rental Services Association  
The Fertilizer Institute  
The Silver Institute  
Thermoset Resin Formulators Association  
Toy Industry Association  
Travel Goods Association  
Treated Wood Council  
United Egg Producers  
U.S. Chamber of Commerce  
Utility Solid Waste Activities Group  
Vinyl Siding Institute, Inc.  
Window & Door Manufacturers Association

cc: Members of the Committee on Environment and Public Works

Senator INHOFE. The reason the majority has chosen these witnesses is to focus on the health and environmental provisions of the bill, and greater regulatory certainty for the regulated community as well as better ensuring protections for all Americans, not just those in a few States with a patchwork of programs. Major environmental laws do not get passed without bipartisan support, and Frank recognized that. The simple fact is that any partisan, partisan, reform effort will fail.

Senator Vitter, you can have the remainder of my time.  
[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR  
FROM THE STATE OF OKLAHOMA

TSCA (Toxic Substances Control Act) is a law that everyone agrees is outdated and in serious need of modernization. I am very pleased that today we have before us a bill with the strong bipartisan support of 9 Democrats and 9 Republicans. I am proud cosponsor of this bill and hope to move it through Committee by way of constructive and orderly process.

For years Senator Lautenberg worked to update the 1976 law, releasing bill after bill every Congress, and in 2012, he came to me with a clear message: this law will not be updated without bipartisan support and input from all stakeholders. Frank and I held a series of stakeholder meetings, and though that process we got a lot of good information on all sides of the issue and I would in particular welcome Ms. Bonnie Lautenberg to the committee this morning.

Just about two years ago, Senator Lautenberg teamed up with Senator Vitter to introduce a bipartisan bill that created not only the first real momentum for meaningful reform, but a foundation for the legislation we have before the Committee today.

We all know that Senator Vitter and myself and our Republican colleagues are not ones to typically offer up bills granting EPA more authority. But in this case I believe it is not only the right thing to do, but the conservative thing to do.

TSCA is not a traditional environmental law that regulates pollutants like the Clean Air or Clean Water Acts instead it regulates products manufactured for commerce. Under the U.S. Constitution, the job of regulating interstate commerce falls to Congress, not the states. We support this legislation not only because it better protects our families and communities, but because it ensures American industry and innovation can continue to thrive and lead without the impediment of 50 different rulebooks.

It is important to note that today that we have a number of witnesses focused on public health and the environment and none from industry. This is certainly not because no one in industry supports this bill I would like unanimous consent to place supportive statements in the record from a number of groups including the American Alliance for Innovation which has sent us a letter signed by XX trade associations. The reason the majority has chosen these witnesses is to focus on the health and environmental provisions of the bill, which have been significantly strengthened as the necessary tradeoff for greater regulatory certainty for the regulated as well as better ensuring protections for all Americans, not just those in the few states with a patchwork of programs. Major environmental laws do not get passed without bipartisan support Frank recognized that and the simple fact is that any partisan TSCA reform effort will ensure that nothing gets done and Americans are stuck with a broken federal system to all our detriment. I hope we get this done to honor Senator Lautenberg's legacy.

**OPENING STATEMENT OF HON. DAVID VITTER,  
U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator VITTER. Thank you so much, Mr. Chairman. Thanks for convening today's important hearing. I too want to thank all of our witnesses, starting with Mrs. Bonnie Lautenberg, for being here today, to discuss this important bipartisan effort to reform an outdated law that affects all of our daily lives and our national economy.

As you suggested, more than 2 years ago, I sat down with Frank Lautenberg in an attempt to find compromise, work together on updating the drastically outdated Toxic Substances Control Act. Updating this law was a long-time goal, it was a passion of Frank's. I am saddened he is not with us today to see and to hear this progress.

But after Frank's unfortunate passing, Senator Tom Udall stepped in to help preserve Frank's legacy and continue working with me to move bipartisan TSCA reform forward. In the long months since, Senator Udall and I have worked tirelessly to ensure the bill substantively addresses the concerns that we heard from fellow Republicans and Democrats, as well as from the environmental and public health communities.

Today, we are here to talk about that work, that successful work, and to answer one key question: are we here to accomplish something that protects the public health and the environment,

while ensuring American industry has the ability to continue to lead and innovate? Or are we willing to just let the status quo remain, the failed status quo, push failed partisan ideas that will not go anywhere?

As members of this committee, I think we have a responsibility to ensure that our constituents are properly served, that we move the ball forward in an important substantive way, and that will only be done clearly with a strong bipartisan approach. And the Udall-Vitter bill we will be discussing today, among other things, is the only bipartisan bill on radar, on the playing field. Our co-sponsors, Republican and Democrat, continue to grow.

It is evident that the Frank R. Lautenberg Chemical Safety for the 21st Century Act is the only realistic shot we have at reforming a very broken and dysfunctional system. So I look forward to all of our witnesses' testimony and the discussion.

Again, Mr. Chairman, thank you very much for this hearing.

Senator INHOFE. Thank you, Senator Vitter.

Senator Boxer.

**OPENING STATEMENT OF HON. BARBARA BOXER,  
U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator BOXER. Thanks so much, Mr. Chairman, and thanks to all of our witnesses who are here.

I am going to ask unanimous consent to place my full statement into the record at this time, and lay out several reasons why I oppose the Udall-Vitter bill.

Senator INHOFE. Without objection.

[The prepared statement of Senator Boxer follows:]

STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR  
FROM THE STATE OF CALIFORNIA

Thank you all for being here today. I ask unanimous consent to place into the record my statement, which lays out several reasons I oppose the Udall-Vitter bill. The bill I introduced with Senator Markey, the Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act, addresses fundamental flaws in the Udall-Vitter bill. Unfortunately, the Republican majority would not permit it to be considered today.

I want to note the presence of Linda Reinstein, Alan's wife, and Trevor Schaefer who are here today, as well as consumer advocate Erin Brockovich, who endorses the Boxer-Markey bill and opposes the Udall-Vitter bill. It is clear that in its present

form, the Udall-Vitter bill fails to provide the public health protections needed and is worse than current law. This bill still does not have the tools necessary to put safeguards in place—even for the most dangerous toxic substances like asbestos.

I would like to enter into the record an analysis by one of the leading legal scholars on environmental law who said: “[T]he Vitter-Udall-Inhofe bill will not make it easier for EPA to regulate harmful toxic substances . . . . When considered in light of its aggressive preemption of state law that would actually remove existing protections in many states, the bill is actually worse than the existing statute from a consumer protection perspective.μ And the changes to the regulatory standard and the failure to change the standard for judicial review will provide job security for chemical industry lawyers for years to come. [Tom McGarity, University of Texas Law Professor, March 17, 2015]

I have never seen such an unprecedented level of opposition to any bill.μ I want you to see what that opposition looks like, and I ask my staff to stand up now and show you the names of more than 450 organizations that oppose the Udall-Vitter bill.μ Some of the groups listed include:

- 8 State Attorneys General (California, Massachusetts, New York, Iowa, Maine, Maryland, Oregon, Washington)
- Breast Cancer Fund
- Asbestos Disease Awareness Organization
- Trevor’s Trek Foundation
- Environmental Working Group
- EarthJustice
- Safer Chemicals, Health Families
- Association of Women’s Health, Obstetric and Neonatal Nurses
- American Nurses Association
- Physicians for Social Responsibility
- United Steelworkers

Let me quote from some of the letters we have received in opposition to the bill. The Breast Cancer Fund said this: “The Frank R. Lautenberg Chemical Safety for the 21st Century Act . . . undermines what few health protections from toxic chemicals now exist . . . .

It advances the interests of the chemical industry and disregards years of work by health care professionals, scientists, public health advocates and state legislators to enact meaningful reform and to prevent diseases linked to chemical exposure.”

According to the Asbestos Disease Awareness Organization, “The fact that the Vitter-Udall bill will not even restrict, much less ban, the deadly substance that claims 30 lives a day is nothing short of a national travesty. Any Senator who supports this industry proposal is in essence supporting the continuation of the toll asbestos has already had on millions of American families.”

EarthJustice had this to say about the Udall-Vitter bill: “[T]he chemical industry got exactly what it wanted—again.”

The Director of Safer Chemicals, Healthy Families, Andy Igrejas, said: “Firefighters, nurses, parents of kids with learning disabilities and cancer survivors all still oppose this legislation.

The Attorneys General from New York, Iowa, Maine, Maryland, Oregon and Washington had this to say: “[W]e believe that, rather than bringing TSCA closer to attaining its goal, the draft legislation’s greatly expanded limitations on state action would move that goal further out of reach.”

Massachusetts’ Attorney General says: “On the crucial issue of preserving our state’s abilities to protect the health and safety of the citizens within our borders the bill strays far from a bill that can adequately protect our citizens from the potential risks that may be posed by certain toxic chemicals in commerce.”

According to California’s Attorney General: “In California’s view, this constitutes poor public policy that undermines the fundamental health and environmental protection purposes of TSCA reform.”

And California EPA says, “Unfortunately, rather than reforming TSCA to ensure that state and federal agencies can efficiently and effectively work together to protect the public, this legislation takes a step backward from what should be the common goal of achieving strong public health and safety protections under a reformed version of TSCA.”

Senator BOXER. I would like to note the presence of two people in the audience today. Erin Brockovich, if she would stand up, please. And Linda Breinstein, and actually Trevor Shaffer. Three people. Senator Markey and I introduced our bill and we named it after Trevor and Linda’s husband, who died of asbestos, and Trevor

is a survivor of environmental brain cancer and Erin Brockovich, well, she is a legend, and I am so proud that they are here to oppose this bill and to support the Boxer-Markey bill.

I have never seen, in all the years I have been here, such opposition to legislation. I have asked my staff to now stand, showing you the organizations that have come out against this bill. I know you can't read them from where you are, but they will be available to you. There are 450 organizations.

And the reason really is summed up by many of them. I will read you a statement by Mr. Tom McGarrity of the University of Texas, a leading legal scholar on environmental law who said that the Vitter-Udall-Inhofe bill will not make it easier for EPA to regulate toxic substances when considered in light of its aggressive preemption of State law that would actually remove existing protections in many States. The bill is actually worse than the existing statute.

I thank my staff, very, very much, for that.

I want to State, some of these that are on this list, eight attorneys general, the Breast Cancer Fund, the Asbestos Disease Awareness Organization, Trevor's Trek Foundation, Environmental Working Group, Earth Justice, Safer Chemicals Healthy Families, Association of Women's Health, Obstetric and Neonatal Nurses. The American Nurses Association has taken a stand against this bill. Physicians for Social Responsibility, even the United Steelworkers.

I am going to quote from a couple of these letters, then I am going to yield the remainder of my time to Senator Markey. The Breast Cancer Fund says, "The Frank Lautenberg Chemical Safety for the 21st Century Act undermines what few health protections from toxic chemicals now exist. It advances the interests of the chemical industry and disregards years of work by health care professionals, public health advocates and State legislators."

I just want to say, I think if the average was asked, who do you believe more, politicians or the Breast Cancer Fund, I think you know the answer.

According to the Asbestos Disease Awareness Organization, "The fact that the Vitter-Udall bill will not even restrict, much less ban on the deadly substance claiming 30 lives a day is a national travesty."

I yield the remainder of my time to Senator Markey.

**OPENING STATEMENT OF HON. EDWARD MARKEY,  
U.S. SENATOR FROM THE STATE OF MASSACHUSETTS**

Senator MARKEY. I thank the Ranking Member.

For decades, in Woburn, Massachusetts, chemical companies and other industries used nearby land as their personal dumping grounds for thousands of tons of toxic materials. Those chemicals leached into the groundwater and contaminated the water supply with deadly chemicals, like TCE.

It was in Woburn that I met a young boy named Jimmy Anderson. He was a regular kid except for the fact that he and other Woburn kids were diagnosed with a rare form of leukemia. Jimmy's mother, Ann Anderson, began a movement where she tied this rare disease cluster to contaminated drinking water.

I held a hearing in Woburn to highlight the harm. Ann's battle began the subject of a book and movie, a civil action. And our fight eventually helped spur the creation of this Country's Superfund laws.

Jimmy died in 1981. Incredibly, it took EPA until 2014 to finish studying the risk of TCE. Jimmy would have been in his mid-40's. And EPA still has not taken any action under TSCA to ban TCE.

There is no question in my mind that there will be more Jimmy Andersons unless EPA is given clear authority, resources and deadlines to take action on chemicals that have already been proven to kill. Unfortunately, the bill we are discussing today does not meet that test. It handcuffs States attorneys general, who are our chemical cops on the beat. It gives known dangers a pass, and it fails in any way to create a strong Federal chemical safety program that will protect public health.

That is why my State's attorney general, Maura Healey, and attorneys general from several other States oppose this bill. Senator Boxer and I have introduced an alternative bill that in my opinion retains the States' ability to clamp down on dangerous chemicals, while ensuring that known chemical threats to public health are acted on quickly.

I thank Senator Boxer for her partnership on this bill, and I look forward to working with all of my colleagues to advance TSCA reform that protects the most vulnerable amongst us from the harm they are exposed to.

I yield back the balance of my time.

Senator INHOFE. Thank you, Senator Markey.

We are going to be hearing, before we start with our witnesses, from two very significant people. One is Senator Udall, the other is Mrs. Lautenberg. I say to my good friend from New Jersey, since you occupy Frank Lautenberg's seat, that you would like to introduce Bonnie, is that correct?

Senator BOOKER. It is, and I really do appreciate, Mr. Chairman, your making allowance for this great privilege.

Everybody in New Jersey knows Senator Frank Lautenberg as an incredible champion of not just issues regarding health and safety, but also of children, seniors and in fact, any cause that was just. You would often hear the leader of that effort being Senator Lautenberg.

He knew the importance of chemical safety, and we know that he fought tirelessly for comprehensive reform. He was a giant of a man, and fought for cleaning up Superfund sites, brownfields and protecting children from unsafe chemicals and toxins.

I know how much his effort on toxic chemicals meant to not only Senator Frank Lautenberg, but indeed, to his entire family. I am extraordinarily excited today to have Bonnie Lautenberg here. I would like to welcome her personally, as the Senator from New Jersey who is sitting in Frank Lautenberg's seat. But more importantly, I think I can say this with confidence, that as much of a giant as Senator Frank Lautenberg was, Bonnie towers just as high. Senator Lautenberg's motto often was, "still fighting." It is clear that Bonnie Lautenberg has not given up the fight herself. She is living that legacy and is still pushing us to reach the sum-

mit, that difficult summit, that Senator Lautenberg worked so hard to climb throughout his life.

I do not have a significant other, but I think all of us who serve in the U.S. Senate know that the men and women who are spouses are often just as equally responsible for the success of the work we do. I know, Senator Udall, your wife is here. I know you and I have esteem for you, sir, but I can say that you married up with confidence.

[Laughter.]

Senator BOOKER. So I just want to let you know that one of the best things Frank Lautenberg did in his career was to marry Bonnie and have a true partner in the incredible work he did for the State of New Jersey, and indeed, for our Country. With that, I would like to welcome Bonnie Lautenberg to testify.

Senator INHOFE. Thank you, Senator Booker.

If it is all right, Senator Udall, we will start with Mrs. Lautenberg. You are recognized for any comments that you would like to make.

#### STATEMENT OF BONNIE LAUTENBERG

Mrs. LAUTENBERG. Good morning, everybody. I just would like to say that my granddaughter and Frank's granddaughter, Mollie Birner, is here with me today. She is working on the Hill and very proud to be here. She is an intern.

Senator INHOFE. Have her stand up. We want to know which one she is.

[Applause.]

Mrs. LAUTENBERG. Chairman Inhofe and Ranking Member Boxer, and all the members of the committee, first I want to say how honored I am to come before you today, not as a scientist, not as a policy expert, but as a mother and grandmother, to speak about a bill that was such a passion to my late husband, Senator Frank Lautenberg, a former distinguished member of this committee. We were part of the Senate family, and Frank loved every day he served here. Frank accomplished a lot in this body, the Domestic Violence Gun Ban, raising the drinking age, the new GI Bill and so many others.

But this bill on chemical safety meant everything to him. He told me it was even more important than his signature accomplishment, banning smoking on airplanes. He wanted chemical safety to be his final, enduring legacy. Frank's guiding principle in his 28 years in the Senate was about saving lives and making our environment better for everyone's children and grandchildren. This is exactly what the effort to reform TSCA is about. TSCA is an outdated, ineffective law that is not protecting families from harm. Frank wanted to change that.

Frank understood that getting this done required the art of compromise. For many years, he could not get Republicans or industry to meaningfully engage on the issue. So we pushed forward a winner take all bill that reflects his wish list on the issue, and pursued an aggressive publicity campaign as well.

Eventually, the pressure worked. Senator Vitter came to the table. He and Frank worked out a compromise that was a major

improvement over the current law. That is what set the stage for the bill we have today. Thank you, Senator Vitter.

I want to especially thank Senator Tom Udall for carrying on Frank's legacy forward after he passed away. Tom is every bit the dedicated environmentalist that Frank was. He took up the issue with the same zeal as Frank. To me, it is like part of Frank is still here in the U.S. Senate, to make this bill a reality. Thank you.

Despite all of this progress, there are still some who are still waiting for Frank's winner take all bill to pass Congress. They are letting the perfect be the enemy of the good. And it is tragic, because if they get their way, then there will be no reform and we will have to live with this completely ineffective TSCA law for many more decades.

We also can't let the interests of a few States undermine the rest of the Country. Frank lamented that it was not fair that New Jersey and the vast majority of States lacked any meaningful measures on this issue but were being held hostage. He worked hard on this compromise to protect the few States with their own laws on this topic, but recognized that the new Federal law will have to become the nationwide standard.

This cause is urgent, because we are living in a toxic world. Chemicals are rampant in the fabrics we and our children sleep in and wear, the rugs and products in our homes and in the larger environment we live in. How many family members and friends have we lost to cancer? We deserve a system that requires screening of all chemicals to see if they cause cancer or other health problems. How many more people must we lose before we realize that having protections in just a few States isn't good enough? We need a Federal program that protects every person in this Country.

The TSCA bill that passed in 1976 has been a shameful failure. It is so bad that even the chemical industry had to admit it. Far too many chemicals are on the market without any sort of testing.

This situation reminds me of the days when I was a kid and we used to run around outside in Long Island, when the fog man came around in his little truck, spraying DDT all over our lawns and trees. Yes, DDT, and we would run through it. That is what we are doing now. If we continue to let the perfect be the enemy of the good, we will continue to run through the fog.

Frank used to say there were 99 huge egos in this body, but he loved you all. Well, almost all.

[Laughter.]

Mrs. LAUTENBERG. You know he had a great sense of humor. But he found nothing funny about the dangers of our current environment and sadly, he did not live long enough to fight to get this done. So now, it is up to all of you to make it happen.

This bill is not only about the legacy of Frank Lautenberg. It is about the legacies of each member of this committee. It is time to take positive action. Please, don't let more time pass without a new law. The American people deserve better.

Please, work out your differences and get it done, for your families and for every family in our Country. Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Mrs. Lautenberg. That was an excellent statement and we appreciate it very much.

Senator Udall.

**OPENING STATEMENT OF HON. TOM UDALL,  
U.S. SENATOR FROM THE STATE OF NEW MEXICO**

Senator UDALL. Chairman Inhofe, Ranking Member Boxer, and thank you, Bonnie, for those very kind and nice words.

It is nice to be back with all of you today. I was proud to serve for many years with you as a member of this committee. We all served for a long time with our former colleague, the late Senator Frank Lautenberg. We all remember Senator Lautenberg's passion for chemical safety reform. He spoke so often about his children and his grandchildren and the need to do something about this broken law.

For the longest time in his career, there was a tremendous standoff. Most of my Democratic colleagues recall voting in favor of his bill, the Safe Chemicals Act, which unfortunately failed to advance past the vote in 2011. I supported that bill enthusiastically, but it received no Republican support in the committee and had no Republican co-sponsors. There was a failure to find agreement between public health and the industry groups, and between Democrats and Republicans.

But in his final days in the Senate, he worked very hard to find compromise with the opposing side. He put his idea of perfection aside. Because his aim was clear, he actually wanted to protect children, to protect the most vulnerable, and to reform a broken law. The original Lautenberg-Vitter bill was introduced quickly. Many of its provisions needed clarification and improvement. Senator Vitter and I have been working to improve this bill. And frankly, these changes have almost all been on the public health side of the equation. We have been open, we have been transparent and we have been inclusive. Everyone was invited to the table to comment on the legislation and provide feedback and suggestions.

Senator Vitter and I are not accustomed to working together on environmental issues. We come to the table with different ideas and we came to this issue with different priorities. There were times when negotiations broke down. But we always came back to the table, because we shared a fundamental, bipartisan goal, to cut through the noise and finally reform this broken law.

I think we all agree: TSCA is fatally flawed. It has failed to ban even asbestos. EPA has lacked the tools to protect our most vulnerable, infants, pregnant women, children and the elderly. Compromise is a great challenge and a tall order. But I am here because in my heart I believe this bill will do the job. I believe we have the opportunity to actually reform a law and improve lives and save lives.

And that is the challenge now for this committee, to ignore the rhetoric and focus on the substance. Work through the legislative process. There are still voices out there with concern. I hear them, I want to engage with them constructively.

But hear my concern as well. New Mexico and many other States have very little protection for our citizens. EPA estimates that the cost of evaluating and regulating a chemical from the start to the finish is at least \$2.5 million. It is a figure that many States cannot afford, especially with 80,000 chemicals in commerce and hun-

dreds of new ones every year. We cannot leave the people of my State and so many others unprotected.

It has been 40 years since we first passed TSCA. There has never been a bipartisan effort with this much potential.

Now today, the New York Times, and I am sure all of you have read the Times today, talked about the examples of how to improve the bill. This is in their editorial, they applauded the bipartisan, the editorial board applauded the bipartisan effort that has gone on here. And they have made several suggestions on how to improve the bill. They are good suggestions. They could help build more bipartisan support. So I hope that we can work on them together.

It has been 40 years since we first passed TSCA, and this bipartisan effort can move forward.

Before I close, I do want to address something up front and in the open. Criticism of the substance of this legislation is legitimate from both sides. It is a compromise product. But I urge, I urge everyone participating in this hearing today to reject attacks on anyone's integrity, character and motivations.

Unfortunately, I fielded a few of those in recent weeks. They did not concern me, because they are absurd and unfounded. But they do a serious disservice to the legislative process.

Instead, I urge this hearing to have a great and spirited discussion on the substance, but at the end of the day, as Bonnie said, let's not wait another 40 years to finally move forward. Thank you, and it is, as I said, wonderful to be back in front of the committee and to be with my colleagues. And it is great to be with Bonnie.

Senator INHOFE. Thank you, Senator Udall. That is an excellent statement. We do miss you on this committee, and without objection, we will make the editorial part of the record.

[The referenced information follows:]

**The New York Times** | <http://nyti.ms/1xdCeVh>

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The Opinion Pages | EDITORIAL

## How Best to Strengthen Chemical Regulations

By THE EDITORIAL BOARD MARCH 18, 2015

Two bills were introduced in the Senate last week to reform the Toxic Substances Control Act, which by most accounts has been a miserable failure at ensuring the safety of chemicals used in consumer products. The bills take vastly different approaches and raise the troubling question of whether to settle for a reasonable compromise or strive instead for a stronger reform.

The problem with the old law, enacted in 1976, is that it allowed thousands of untested chemicals to remain in consumer goods without evidence of safety. The law is so weak that it kept the Environmental Protection Agency from even banning asbestos, a known carcinogen, and other known hazardous materials. The law also forced the E.P.A. to navigate a costly, cumbersome process if it wanted safety tests of a potentially dangerous chemical.

Senator Tom Udall, a Democrat of New Mexico, and Senator David Vitter, a Republican of Louisiana, have introduced a bill that has bipartisan backing from nine Republicans and eight Democrats. A competing bill with stronger health protections was introduced by two Democratic senators, Barbara Boxer of California and Ed Markey of Massachusetts, but it has no Republican support.

The Boxer-Markey bill uses a tougher, more desirable safety standard — chemicals must show “reasonable certainty of no harm” to remain in commerce. The

Udall-Vitter bill uses a lesser standard — chemicals can be regulated only if they pose “unreasonable risk” to health or the environment. Ideally, it would be best to require “reasonable certainty of no harm,” but that language has been repeatedly introduced in reform bills dating back to 2008, without ever attracting a single Republican vote.

Under the Udall-Vitter bill’s “unreasonable risk” approach, the E.P.A. would no longer have to consider costs when deciding whether a substance is unduly risky as it does under current law; that judgment would be based solely on health effects. The agency would have to consider costs when deciding how to regulate a substance, but it would no longer have to prove that it picked the least burdensome approach. Professional organizations concerned with maternal and child health, such as the American Congress of Obstetricians and Gynecologists, have praised the bipartisan efforts to protect vulnerable populations.

Still, the bill has flaws that ought to be corrected. Going forward, it would weaken the ability of states to regulate chemicals under state law. Once the E.P.A. designates a chemical as a “high priority” for assessment of dangers, the bill would block states from taking action even though E.P.A. is years away from actually doing anything about it. That is an invitation for manufacturers to try to stave off regulation indefinitely. Surely, the time to pre-empt state actions is only when the E.P.A. finally acts.

The Udall-Vitter bill is scheduled to be discussed at a hearing of the Senate environment committee on Wednesday. (Senator Boxer is the ranking Democrat on the committee, so her bill is sure to be discussed as well.) Two additional improvements might garner further bipartisan support. The bill does not allow states to enforce restrictions that are identical to federal ones. It should. The more enforcement the better. The bill also requires the E.P.A. to start reviewing a minimum of 25 chemicals within five years. That number surely is too low given thousands of chemicals worth examining.

A version of this editorial appears in print on March 18, 2015, on page A24 of the New York edition with the headline: How Best to Strengthen Chemical Regulations.

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Senator INHOFE. The two of you may be excused, or you may stay. Your call.

Our first panel is going to be the Assistant Administrator of the Office of Chemical Safety and Pollution Prevention of the Environmental Protection Agency, Mr. Jim Jones. He has been here before. He is always welcome. Your professionalism is always welcome as a witness.

**STATEMENT OF HON. JIM JONES, ASSISTANT ADMINISTRATOR, OFFICE OF CHEMICAL SAFETY AND POLLUTION PREVENTION, ENVIRONMENTAL PROTECTION AGENCY**

Mr. JONES. Good morning, Chairman Inhofe, Ranking Member Boxer and members of the committee. I appreciate the opportunity to join you today to discuss much-needed reform of chemicals management in the United States, and the recently introduced bill, the Frank R. Lautenberg Chemical Safety for the 21st Century Act.

There continues to be wide agreement on the importance of ensuring chemical safety and restoring the public's confidence that the chemicals used in the products they and their families use are safe. The Administration also believes it is crucial to modernizing strength in the Toxic Substances Control Act to provide EPA with the tools necessary to achieve these goals and ensure global leadership in chemicals management.

We continue to be encouraged by the interest in TSCA reform, indicated by the introduction of several bills in recent years and months, the hearings on TSCA-related issues that are being held, and the discussions that are taking place. Key stakeholder share common principles on how best to improve our chemicals management programs.

We at the EPA remain committed to working with this committee and others in both the House and the Senate, members of the public, the environmental community, the chemical industry, the States and other stakeholders to improve and update TSCA.

As you know, chemicals are found in almost everything we buy and use. They contribute to our health, our well-being and our prosperity. However, we believe it is essential that chemicals are safe. While we have a better understanding of the environmental impacts, exposure pathways and health effects that some chemicals can have than we did when TSCA was passed in 1976, under the existing law, it is challenging to act on that knowledge.

TSCA gives EPA jurisdiction over chemicals produced, used and imported into the United States. However, unlike laws applicable to pesticides and drugs, TSCA does not have a mandatory program that requires the EPA to conduct a review to determine the safety of existing chemicals. In addition, TSCA places burdensome legal and procedural requirements on the EPA before the agency can request the generation and submission of health and environmental effects data on existing chemicals.

While TSCA was an important step forward when it was passed almost 40 years ago, it has proven to be a challenging tool for providing the protection against chemical risks that the public rightfully expects. For example, as we have all heard, in 1989, after years of study and with strong scientific support, the agency issued a rule phasing out most uses of asbestos in products. Yet in 1991,

a Federal court overturned most of this action because it found that the rule had failed to comply with the requirements of TSCA. As a result, in the more than three and a half decades since the passage of TSCA, the EPA has only been able to require testing on a little more than 200 of the original 60,000 chemicals listed on the TSCA inventory and has regulated or banned only five of these chemicals under TSCA Section 6 authority, the last of which was in 1990. In the 25 years since, EPA has relied on voluntary action to collect data and address risks.

In the absence of additional Federal action, an increasing number of States are taking action on chemicals to protect their residents. And the private sector is making their own decisions about chemicals to protect their interests and to respond to consumers.

The Administration is committed to using the current statute to the fullest extent possible. But the nature of the statute has limited progress. In the last 6 years, the EPA has identified more than 80 priority chemicals for assessment under TSCA. We have completed final assessments on specific uses of four of those chemicals with a fifth to issue soon. Of these five chemicals, two show no significant risks. The remaining three show some risks.

To address these risks that are identified in these three assessments, EPA is considering pursuing action under Section 6 of TSCA. It is clear that even with the best efforts under law and resources, we need to update and strengthen TSCA and provide the EPA with the appropriate tools to protect the American people from exposure to harmful chemicals.

The EPA believes it is critical that any update to TSCA include certain components. In September 2009, the Administration announced a set of six principles to update and strengthen TSCA. While the Administration has not yet developed a formal position on the new bill, we continue to feel strongly that updated legislation should provide EPA with the improved ability to make timely decisions if a chemical poses a risk and the ability to take action as appropriate to address those risks.

We believe that it is vitally important to assuring the American public that the chemicals they find in the products they buy and use are safe.

Mr. Chairman, thank you again for your leadership on TSCA reform. I would be happy to answer any questions you or the other members have. Thank you.

[The prepared statement of Mr. Jones follows:]

**TESTIMONY OF  
JAMES JONES  
ASSISTANT ADMINISTRATOR  
OFFICE OF CHEMICAL SAFETY AND POLLUTION PREVENTION  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS  
UNITED STATES SENATE**

**March 18, 2015**

Good morning Chairman Inhofe, Ranking Member Boxer, and other members of the Committee.

I appreciate the opportunity to join you today to discuss much needed reform of chemicals management in the United States and the recently introduced bill, The Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act.

There continues to be wide agreement on the importance of ensuring chemical safety and restoring the public's confidence that the chemicals used in the products they and their families use are safe. This Administration also believes it is crucial to modernize and strengthen the Toxic Substances Control Act (TSCA) to provide the EPA with the tools necessary to achieve these goals and ensure global leadership in chemicals management.

We continue to be encouraged by the interest in TSCA reform indicated by the introduction of several bills in recent years, the hearings on TSCA related issues that are being held, and the discussions that are taking place. Key stakeholders share common principles on how best to improve our chemicals management programs. We at the EPA remain committed to working with this committee and others in both the House and Senate, members of the public, the

environmental community, the chemical industry, the states, and other stakeholders to improve and update TSCA.

As you know, chemicals are found in almost everything we buy and use. They contribute to our health, our well being, and our prosperity. However, we believe that it is essential that chemicals are safe. While we have a better understanding of the environmental impacts, exposure pathways, and health effects that some chemicals can have than we did when TSCA was passed in 1976, under the existing law it is challenging to act on that knowledge.

TSCA gives the EPA jurisdiction over chemicals produced, used, and imported into the United States. Unlike the laws applicable to pesticides and drugs, TSCA does not have a mandatory program that requires the EPA to conduct a review to determine the safety of existing chemicals. In addition, TSCA places burdensome legal and procedural requirements on the EPA before the agency can request the generation and submission of health and environmental effects data on existing chemicals.

While TSCA was an important step forward when it was passed almost forty years ago, it has proven to be a challenging tool for providing the protection against chemical risks that the public rightfully expects. It is the only major environmental statute that has not been updated or revised since enactment. We believe the time is now to significantly strengthen the effectiveness of this outdated law.

When TSCA was enacted, it grandfathered in, without any evaluation, about 60,000 chemicals that were in commerce at the time. The statute did not provide adequate authority for the EPA to reevaluate these existing chemicals as new concerns arose or science was updated. The law also failed to grant the EPA effective tools to compel companies to generate and provide toxicity data.

It has also proven challenging in some cases to take action to limit or ban chemicals that the EPA has determined pose a significant health concern. For example, in 1989, after years of study and with strong scientific support, the EPA issued a rule phasing out most uses of asbestos in products. Yet, in 1991, a federal court overturned most of this action because it found the rule had failed to comply with the requirements of TSCA.

As a result, in the more than three and a half decades since the passage of TSCA, the EPA has only been able to require testing on a little more than 200 of the original 60,000 chemicals listed on the TSCA Inventory, and has regulated or banned only five of these chemicals under TSCA's section 6 authority, the last of which was in 1990. In the 25 years since, the EPA has relied on voluntary action to collect data and address risks. In the absence of additional Federal action, an increasing number of States are taking actions on chemicals to protect their residents and the private sector is making their own decisions about chemicals to protect their interests and respond to consumers.

This Administration is committed to using the current statute to the fullest extent possible but the nature of the statute has limited progress. In the last six years, the EPA has identified more than

80 priority chemicals for assessment under TSCA. We have completed final risk assessments on specific uses of four of these chemicals with a fifth to issue soon. Of these five chemical uses, two show no significant risk. The remaining three uses show risk. To address the risks identified in these three assessments, the EPA is considering pursuing action under Section 6 of TSCA.

It is clear that even with the best efforts under current law and resources, we need to update and strengthen TSCA and provide the EPA with the appropriate tools to protect the American people from exposure to harmful chemicals. The EPA believes that it is critical that any update to TSCA include certain components.

In September 2009, the Administration announced the attached set of six principles to update and strengthen TSCA. The principles are:

Principle 1: Chemicals Should Be Reviewed Against Safety Standards That Are Based on Sound Science and Reflect Risk-based Criteria Protective of Human Health and the Environment.

Principle 2: Manufacturers Should Provide EPA With the Necessary Information to Conclude That New and Existing Chemicals Are Safe and Do Not Endanger Public Health or the Environment.

Principle 3: Risk Management Decisions Should Take into Account Sensitive Subpopulations, Cost, Availability of Substitutes and Other Relevant Considerations.

Principle 4: Manufacturers and EPA Should Assess and Act on Priority Chemicals, Both Existing and New, in a Timely Manner.

Principle 5: Green Chemistry Should Be Encouraged and Provisions Assuring Transparency and Public Access to Information Should Be Strengthened.

Principle 6: EPA Should Be Given a Sustained Source of Funding for Implementation.

While the Administration has not yet developed a formal position on the new bill, we continue to feel strongly that updated legislation should provide the EPA with the improved ability to make timely decisions if a chemical poses a risk and the ability to take action, as appropriate, to address that risk. We believe that this is vitally important to assuring the American public that the chemicals they find in the products they buy and use are safe.

Mr. Chairman, thank you again for your leadership on TSCA reform. I will be happy to answer any questions you or other members may have.

**APPENDIX: Essential Principles for Reform of Chemicals Management Legislation**

The U.S. Environmental Protection Agency (EPA) is committed to working with the Congress, members of the public, the environmental community, and the chemical industry to reauthorize the Toxic Substances Control Act (TSCA). The Administration believes it is important to work together to quickly modernize and strengthen the tools available in TSCA to increase confidence that chemicals used in commerce, which are vital to our Nation's economy, are safe and do not endanger the public health and welfare of consumers, workers, and especially sensitive sub-populations such as children, or the environment.

The following Essential Principles for Reform of Chemicals Management Legislation (Principles) are provided to help inform efforts underway in this Congress to reauthorize and significantly strengthen the effectiveness of TSCA. These Principles present Administration goals for updated legislation that will give EPA the mechanisms and authorities to expeditiously target chemicals of concern and promptly assess and regulate new and existing chemicals.

**Principle No. 1: Chemicals Should Be Reviewed Against Safety Standards That Are Based on Sound Science and Reflect Risk-based Criteria Protective of Human Health and the Environment.**

EPA should have clear authority to establish safety standards that are based on scientific risk assessments. Sound science should be the basis for the assessment of chemical risks, while recognizing the need to assess and manage risk in the face of uncertainty.

**Principle No. 2: Manufacturers Should Provide EPA With the Necessary Information to Conclude That New and Existing Chemicals Are Safe and Do Not Endanger Public Health or the Environment.**

Manufacturers should be required to provide sufficient hazard, exposure, and use data for a chemical to support a determination by the Agency that the chemical meets the safety standard. Exposure and hazard assessments from manufacturers should be required to include a thorough review of the chemical's risks to sensitive subpopulations.

Where manufacturers do not submit sufficient information, EPA should have the necessary authority and tools, such as data call in, to quickly and efficiently require testing or obtain other information from manufacturers that is relevant to determining the safety of chemicals. EPA should also be provided the necessary authority to efficiently follow up on chemicals which have been previously assessed (e.g., requiring additional data or testing, or taking action to reduce risk) if there is a change which may affect safety, such as increased production volume, new uses or new information on potential hazards or exposures. EPA's authority to require submission of use and exposure information should extend to downstream processors and users of chemicals.

**Principle No. 3: Risk Management Decisions Should Take into Account Sensitive Subpopulations, Cost, Availability of Substitutes and Other Relevant Considerations**

EPA should have clear authority to take risk management actions when chemicals do not meet the safety standard, with flexibility to take into account a range of considerations, including children's health, economic costs, social benefits, and equity concerns.

**Principle No. 4: Manufacturers and EPA Should Assess and Act on Priority Chemicals, Both Existing and New, in a Timely Manner**

EPA should have authority to set priorities for conducting safety reviews on existing chemicals based on relevant risk and exposure considerations. Clear, enforceable and practicable deadlines applicable to the Agency and industry should be set for completion of chemical reviews, in particular those that might impact sensitive sub-populations

**Principle No. 5: Green Chemistry Should Be Encouraged and Provisions Assuring Transparency and Public Access to Information Should Be Strengthened**

The design of safer and more sustainable chemicals, processes, and products should be encouraged and supported through research, education, recognition, and other means. The goal of these efforts should be to increase the design, manufacture, and use of lower risk, more energy efficient and sustainable chemical products and processes.

TSCA reform should include stricter requirements for a manufacturer's claim of Confidential Business Information (CBI). Manufacturers should be required to substantiate their claims of confidentiality. Data relevant to health and safety should not be claimed or otherwise treated as CBI. EPA should be able to negotiate with other governments (local, state, and foreign) on appropriate sharing of CBI with the necessary protections, when necessary to protect public health and safety.

**Principle No. 6: EPA Should Be Given a Sustained Source of Funding for Implementation**

Implementation of the law should be adequately and consistently funded, in order to meet the goal of assuring the safety of chemicals, and to maintain public confidence that EPA is meeting

that goal. To that end, manufacturers of chemicals should support the costs of Agency implementation, including the review of information provided by manufacturers.

Responses by Jim Jones to Additional Questions  
from Senator Inhofe

Inhofe 1. During the March 18 hearing, you stated that EPA would interpret the “likely to meet” standard for low priority chemicals as requiring the Agency be very confident of that determination. Please provide additional information on how the Agency would expect to be confident of that determination. In particular, please contrast current law with the approach required under S.697.

Response: In identifying low-priority substances under the March 10, 2015, version of S.697, the EPA would be required to conclude information is sufficient to establish that the chemical substance is likely to meet the safety standard, as opposed to conducting a full-blown risk assessment and making a determination that the chemical substance does meet the safety standard. Given this, the EPA would want to make the finding based on clear indications of low risk which could be readily determined by reviewing the available data on hazard and exposure, without conducting extensive quantitative assessment; for example, if it were clear that hazard and/or exposure were very low. There is no prioritization process for identifying low priority chemicals under TSCA that is analogous to that in S.697.

Inhofe 2. Several times during the hearing on March 18, you stated that EPA had “no duty” to regulate chemicals under TSCA today. Yet under Section 5, EPA clearly has a duty to review and possibly regulate new chemicals, and under Section 6 EPA clearly has a duty to regulate chemicals that pose an unreasonable risk to health or the environment. Please clarify your statement that “EPA has no duty to regulate chemicals under TSCA today”?

Response: The EPA’s testimony was regarding existing chemicals. TSCA section 6(a) states:

“If the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents, or will present an unreasonable risk of injury to health or the environment, the Administrator shall by rule apply one or more of the following requirements to such substance or mixture to the extent necessary to protect adequately against such risk using the least burdensome requirements.”

So under the circumstance where the EPA makes a finding regarding an existing chemical, it would then have a duty to mitigate those risks by rule. However, there is no mandate under

current law for the EPA to establish a program to prioritize and assess existing chemicals. Without such a mandate, the EPA has found it difficult to maintain action over a sustained period of time.

Inhofe 3. In response to a question posed at the March 18 hearing, you stated there was “ambiguity” with respect to the preemption of State clean air and clean water regulations.

3a. Does TSCA today preempt state actions under the Clean Air Act or any other federal law?

Response: TSCA does not preempt state action adopted under the authority of federal law, including the Clean Air Act.

3b. Is TSCA today “ambiguous” on the preemptive effect of a TSCA action on state clean air and water regulations?

Response: There is some ambiguity about what state requirements would be covered under the heading of requirements “adopted under the authority of federal law.” This is because certain state environmental programs acknowledged under federal law, and apparently intended to be protected from exemption when TSCA was drafted, (e.g., state implementation plans subject to approval under the Clean Air Act) are not literally “adopted under the authority of” federal law. See H.R. Rep. No. 1341, 94th Cong., 2nd Sess. 54 (1976).

3c. Under TSCA today, if a state regulates a chemical substance under a state clean water standard that EPA finds does not pose an unreasonable risk, and that EPA therefore finds does not warrant regulation under Sections 5 or 6, would EPA's decision preempt the state action?

Response: No.

Inhofe 4. You testified in November 2014, that EPA should have clear authority to assess chemicals against a risk-based standard and to take action on chemicals that do not meet the standard.

4a. Does S.697 mandate that EPA base its chemical safety decisions solely on considerations of risk to public health and the environment?

Response: The safety standard, which is the standard used in making a safety determination, as defined in the March 10, 2015, version of S.697, specifically excludes taking into consideration cost and other non-risk factors.

4b. Is S.697 clear that costs and benefits may not factor into a chemical safety evaluation?

Response: The March 10, 2015, version of S.697 is clear that cost and other non-risk factors cannot factor into a chemical safety evaluation.

4c. Does S.697 require that all chemicals in commerce, including those “grandfathered” under existing TSCA, be reviewed?

Response: The prioritization throughput requirements in the March 10, 2015, version of the bill would ultimately result in all chemicals actively in commerce being reviewed.

Inhofe 5. You testified in November 2014 that EPA should have authority to set priorities for conducting safety reviews on existing chemicals based on risk and exposure considerations.

5a. Does S.697 require EPA to establish a risk-based prioritization screening process within a year of enactment?

Response: Yes, section 4A(a)(1) of the March 10, 2015, version of the bill requires that, “not later than 1 year after enactment of this section, the Administrator shall establish, by rule, a risk-based screening process” for prioritizing.

5b. How does EPA's process under the Work Plan Chemical program compare to the requirements of S. 697 for the prioritization, assessment and possible regulation of priority substances?

Response: The March 10, 2015, version of S.697 would require the EPA to develop policies and procedures for carrying out the various requirements in the bill, so the precise details of these processes are not fully specified. That said, the hazard and exposure criteria specified in the bill for the prioritization screening process are similar to what was done to create the EPA's current Work Plan.

Responses by Jim Jones to Additional Questions  
from Senator Vitter

Vitter 1. Can you please explain the impact on an existing state law once a chemical is designated a high priority? The intention is that any and all existing state laws and regulations remain in place after a chemical is designated as a high priority, is that your clear interpretation of the language in the bill?

Response: Yes, it is the EPA's interpretation that regarding the March 10, 2015, version of the bill, the designation of a chemical substance as high priority does not affect the status of existing state laws and regulations.

Vitter 2. EPA adopted Compliance Monitoring Guidance for TSCA in 2011. Does that guidance anticipate a role for state governments in implementing or enforcing EPA's new and existing chemicals program?

Response: The TSCA new and existing chemicals programs are exclusively federal programs.

Vitter 3. Under TSCA's existing preemption provision States can adopt requirements that are “identical” to EPA's decisions without running afoul of TSCA's preemption provision. If a State

adopts a requirement identical to TSCA, the State would have a responsibility to enforce its own law, not federal law, correct? In fact, there is no “co-enforcement” of federal law by the States under TSCA today, or under S. 697, correct?

Response: “Co-enforcement” is not a term that the EPA typically uses. It is correct that, under both TSCA and the March 10, 2015, version of S.697, states do not enforce federal law.

Vitter 4. In your response to a question posed at the March 18, 2015 hearing on co-enforcement, you said you were not aware that co-enforcement by States that has created any problems. Your response appeared to indicate a view that State co-enforcement required the States to adopt the exact same standard or regulation as EPA.

4a. EPA has issued hundreds of Significant New Use Rules over the years. Under TSCA today, those actions preempt state action. How many state actions to restrict or prohibit chemicals has EPA determined are preempted by SNURs?

Response: As the EPA interprets TSCA section 18, significant new use rules do not preempt state law.

4b. How many state actions regarding testing requirements has EPA determined are preempted by test rules or consent agreements under Section 4?

Response: TSCA does not call for the EPA to determine whether state laws are preempted; rather, that determination would typically be made by a court. The EPA is not aware of a case where the agency has been asked about a state testing requirement.

4c. Does EPA regularly assess state restrictions or prohibitions on chemical substances to determine if they adopt the “exact” standard or regulation as EPA?

Response: No.

4d. What criteria does EPA apply to determine if a state action on a chemical substance is identical to the EPA action?

Response: As stated above, TSCA does not call for the EPA to make determinations on whether state laws are preempted. To the best of our knowledge, the EPA has not received any requests to determine whether state actions are identical to the EPA action.

4e. Does EPA believe that state enforcement and penalty provisions associated with a state action on a chemical substance must also be identical to federal law or regulation?

Response: As stated above, TSCA does not call for the EPA to make determinations on these kinds of issues.

4f. Is it possible that State law might be enforced differently from Federal law, and that significant state-to-state differences in enforcement could result in an inconsistent patchwork of state regulation?

Response: It is possible that a state may take a different approach to enforcement of a state requirement than the EPA does to an identical federal requirement.

Responses by Jim Jones to Additional Questions  
from Senator Markey

Markey 1. New York's Attorney General recently sent a letter describing the ways State authority to set strong chemical safety standards and enforce existing laws is preempted in the Udall-Vitter bill. Do you agree that all of the erosions of State authority described in this letter are enabled by the bill text?

Response: In large measure, the letter matches the EPA's analysis of how the March 10, 2015, version of S.697 would preempt state law. However, the EPA does not necessarily agree with all of the analysis in the letter. For example, the EPA believes the bill could be read to provide that preemption under section 18(b) would end as soon as the EPA makes a determination that a chemical substance does not meet the safety standard. The EPA notes that 18(b) preemption only applies to a "chemical substance that is a high-priority substance designated under section 4A." (page 141, lines 24-25), and the bill commands the EPA to "remove the chemical substance from the list of high-priority substances" as soon as a safety determination is complete (section 4A(a)(3)(A)(iii)(I); page 35 line 25 to page 36 lines 1-3).

Markey 2. Vermont's Attorney General recently sent a letter describing the ways State authority to set strong chemical safety standards and enforce existing laws is preempted in the Udall-Vitter bill. Do you agree that all of the erosions of State authority described in this letter are enabled by the bill text?

Response: In large measure, the letter matches the EPA's analysis of how the March 10, 2015, version of S.697 would preempt state law. However, the EPA does not necessarily agree with all of the analysis in the letter. For example, the EPA believes the bill could be read to provide that preemption under section 18(b) would end as soon as the EPA makes a negative safety determination. The EPA notes that 18(b) preemption only applies to a "chemical substance that is a high-priority substance designated under section 4A." (page 141, lines 24-25), and the bill commands the EPA to "remove the chemical substance from the list of high-priority substances" as soon as a safety determination is complete (section 4A(a)(3)(A)(iii)(I); page 35 line 25 to page 36 lines 1-3).

Markey 3. The Attorneys General of New York, Iowa, Maine, Maryland, Oregon and Washington recently sent a letter describing the ways State authority to set strong chemical safety standards and enforce existing laws is preempted in the Udall-Vitter bill. Do you agree that all of the erosions of State authority described in this letter are enabled by the bill text?

Response: In large measure, the letter matches the EPA's analysis of how the March 10, 2015, version of S.697 would preempt state law. However, the EPA does not necessarily agree with all of the analysis in the letter. For example, the EPA believes the bill could be read to provide that preemption under section 18(b) would end as soon as the EPA makes a negative safety determination. The EPA notes that 18(b) preemption only applies to a "chemical substance that is a high-priority substance designated under section 4A." (page 141, lines 24-25), and the bill commands the EPA to "remove the chemical substance from the list of high-priority substances" as soon as a safety determination is complete (section 4A(a)(3)(A)(iii)(I); page 35 line 25 to page 36 lines 1-3).

Markey 4. The Udall-Vitter bill includes language that allows EPA to grant States permission to set stronger chemical safety standards if EPA determines that there is a State or local need to protect health or the environment from that chemical. Do you agree that it would be extremely difficult for EPA to make that determination, since the chemical would pose the same danger in one State as it would in another State?

Response: The March 10, 2015, version of the bill creates two types of preemption and two corresponding types of waivers. For the EPA to waive preemption caused by an EPA determination that a chemical meets the safety standard or EPA regulation of a chemical, the EPA must find that the state requirement is warranted by compelling state or local conditions. For the EPA to waive preemption caused by commencement of an EPA safety assessment, the EPA must find that the state requirement is warranted by a compelling local interest. These provisions – especially the first one, which requires a showing of state or local conditions rather than just a local interest – could be interpreted as requiring a showing of a risk concern that is specific to the state.

Markey 5. The Udall-Vitter bill includes provisions that require EPA to give preference to industry requests to pay for EPA designation of a chemical as "high priority" when regulations on that chemical have been imposed by one or more States. Do you agree that this language could be used to facilitate or accelerate the preemption of planned State chemical safety standards?

Response: The March 10, 2015, version of the bill allows the EPA to identify "additional priorities" for safety assessment and determination pursuant to the request of a manufacturer and processor, subject to payment of fees. These chemicals would not be "high priority" substances under the bill, and the "additional priority" designation would not itself trigger preemption (section 4A(c)(5)).

Markey 6. The Udall-Vitter bill contains a requirement that States notify EPA whenever they take action to regulate a chemical that EPA has not yet designated as a "high priority". EPA then has to determine whether it should deem that chemical as "high priority" if the State's regulation would have significant economic impacts or if two or more States have already regulated it. Do you agree that this language could make it more likely that EPA would act to preempt State regulation of a chemical by classifying it as "high priority"?

Response: Under the March 10, 2015 version of the bill, the criteria for designating a chemical substance as high or low priority are the same whether the EPA evaluates the substance on its own initiative or pursuant to the bill's state notification process. In addition, the bill does not impose a time limit for the EPA to complete prioritization reviews for the chemicals subject to this process (or for any other chemicals under prioritization review). Thus, it is unclear whether that process would make it more likely that the EPA would act to preempt state regulation.

Markey 7. In 1989, EPA tried to ban asbestos under its TSCA authority, but industry successfully overturned the ban in court. The term in the Udall-Vitter bill that is used to define what is meant by "safe" contains the "unreasonable risk" language that was in part the subject of that litigation. Do you believe that the use of this same language that has already been the subject of litigation would increase the likelihood that EPA would be sued using some of the same arguments industry used to overturn the asbestos ban?

Response: The safety standard as defined in the March 10, 2015, version of the bill includes language that alters the meaning of "unreasonable risk" from current TSCA. That being said, it is still possible that the EPA might be sued using similar arguments as in prior cases.

Markey 8. In 2014, a chemical safety case decided in the DC Circuit of the US Court of Appeals reiterated an earlier finding that "This court has acknowledged the difficulties of applying the substantial evidence test 'to regulations which are essentially legislative and rooted in inferences from complex scientific and factual data, and which often necessarily involve highly speculative projections of technological development in areas wholly lacking in scientific and economic certainty.'" The Udall-Vitter bill includes this same "substantial evidence" standard, even though it can be a much harder standard to meet than the one used in other environmental laws. This standard was also part of industry's successful arguments to overturn EPA's asbestos ban. Do you agree that the so-called "substantial evidence" standard is not yet settled law, and that its use in this bill would increase the likelihood that EPA would be sued using some of the same arguments industry used to overturn the asbestos ban?

Response: The EPA may be sued using some of the same arguments used in the asbestos case, in view of the retention of the "substantial evidence" standard. We note, though, that the D.C. Circuit, in the case the question refers to, remarked on "an 'emerging consensus' of the Courts of Appeals, that the difference between the two standards [substantial evidence standard and arbitrary and capricious standard] should not be 'exaggerate[d].'" We also note that whatever benefit might accrue to litigants under the standard would accrue both to industry and environmental litigants challenging the EPA action.

Markey 9. In 1989, EPA tried to ban asbestos under its TSCA authority, but industry successfully overturned the ban in court. Asbestos is already banned in 54 countries, and exposure to it kills 10,000 Americans each year. Would the Udall-Vitter bill allow EPA to immediately propose a ban or restriction on asbestos, or would it have to complete a safety assessment first?

Response: Under the March 10, 2015, version of the bill, the EPA would have the discretion to prioritize asbestos immediately. The safety assessment and determination processes described in the bill would need to be followed before any potential risk management could be promulgated.

Markey 10. Persistent, bio-accumulative and toxic chemicals like mercury and PCBs are known to persist in the environment and accumulate in the body, and can include dangerous chemicals that pass from pregnant women to developing fetuses. Would the Udall-Vitter bill allow EPA to immediately propose a ban or restriction on these known dangers?

Response: PCBs are already banned by TSCA section 6(e). With respect to other PBT chemicals, under the March 10, 2015, version of the bill, the EPA would have the discretion to prioritize these types of chemicals immediately, but would not be required to. The safety assessment and determination processes described in the bill would need to be followed before any potential risk management could be promulgated.

Markey 11. Flame retardant chemicals are used in everything from couches to clothes. If EPA finds that flame-retardant chemicals are unsafe, is it true that under the Udall-Vitter bill, EPA would have to do a separate analysis for EACH type of consumer product that includes them? It is true that under the bill, EPA might even have to study each type of chair or couch and each type of garment as a condition for regulating each one?

Response: It is true that the March 10, 2015, version of the bill requires the EPA, if it intends to regulate an article, to have evidence of significant exposure ‘from such article’, and it is possible that the language in the bill could include multiple analyses along the lines described in the question.

Markey 12. Do you agree that if EPA wishes to ban or restrict the use of a chemical in, for example, plastic, that EPA should be able to analyze exposure from that chemical in ALL plastic products that contain that chemical, instead of having to separately analyze each product that uses that type of plastic?

Response: The EPA agrees that a requirement to separately analyze each product to be regulated could impose significant burden.

Markey 13. Recently, news reports indicated that floorboards that were imported from China contained high levels of formaldehyde, a known carcinogen. Do you agree that the Udall-Vitter bill makes it harder for EPA to intercept products containing dangerous chemicals that are being imported from countries like China?

Response: Yes, the March 10, 2015, version of the bill establishes limitations on EPA’s ability to impose requirements on articles and to require import certification for chemical substances in imported articles.

Markey 14. When EPA designates a chemical as “low priority” that essentially means that EPA thinks it is safe. Do you agree that the Udall-Vitter bill contains no way for a member of the public to challenge the scientific validity of that determination in court?

Response: The only provision in the March 10, 2015, version of the bill that expressly provides for challenging prioritization designations allows for judicial review by a state that had recommended a low-priority designation for a chemical substance. This provision could well imply that Congress did not intend for judicial review of prioritization decisions to be otherwise available.

Markey 15. When EPA designates a chemical as “low priority,” that essentially means that EPA thinks it is safe. The Udall-Vitter bill includes a limited way for some States to challenge the scientific validity of that determination in court even though it would not be possible for an individual or other organization to do so. If a State did successfully make such a challenge and cause EPA to re-classify the chemical as “high priority” instead, wouldn't that also result in the preemption of the State from doing anything to protect against that chemical itself?

Response: Regarding the March 10, 2015, version of the bill, it is unclear to the EPA exactly how this judicial review provision is intended to operate. Under one plausible interpretation, the scenario described above would be precluded. The judicial review provision appears to only apply to a state that has submitted “a recommendation . . . to designate a chemical substance as a low priority.” If so, then this provision would only allow such states to challenge high priority designations (a state would have nothing to challenge if it requested a low priority designation and the EPA followed the state's recommendation).

Responses by Jim Jones to Additional Questions  
from Senator Boxer

Boxer 1. Assistant Administrator Jones, in 1989, EPA tried to ban asbestos under its TSCA authority, but industry successfully overturned the ban in court. The term in the Vitter-Udall bill that is used to define what is meant by “safe” contains the same core language that was the subject of that litigation. Do you believe that the use of this same “unreasonable risk” language that has already been the subject of litigation would increase the likelihood that EPA would be sued using some of the same arguments industry used to overturn the asbestos ban?

Response: The safety standard as defined in the March 10, 2015, version of S.697 includes language that alters the meaning of “unreasonable risk” from current TSCA. That being said, litigants may make similar arguments to those used in prior cases.

Boxer 2. Mr. Jones, flame retardant chemicals are used in everything from couches to clothes. If EPA finds that flame-retardant chemicals are unsafe, is it true that under the Vitter-Udall bill, EPA would have to do a separate analysis for EACH type of consumer product that includes them? Isn't it true that under the bill, EPA might even have to study each type of chair or couch and each type of garment as a condition for regulating each one?

Response: It is true that the March 10, 2015, version of the bill requires the EPA, if it intends to regulate an article, to have evidence of significant exposure “from such article”, and it is possible that the language in the bill could include multiple analyses along the lines described in the question.

**Boxer 3. Mr. Jones, recent news reports indicated that floorboards that were imported from China contained high levels of formaldehyde, a known carcinogen. Do you agree that the Vitter-Udall bill makes it harder for EPA to intercept products containing dangerous chemicals that are being imported from countries like China?**

**Response:** Yes, the March 10, 2015, version of the bill establishes limitations on EPA's ability to impose requirements on articles and to require import certification for chemical substances in imported articles.

Senator INHOFE. Thank you, Administrator Jones. That is an excellent statement.

We are going to have a 5-minute round. I will lead off and I would say this. OK, they are going to be 6-minute rounds. So mine will be eight questions that will really require probably a one-word response.

Mr. Jones, the Administration does not have a formal position on any TSCA legislation at this time, is that correct?

Mr. JONES. That is correct.

Senator INHOFE. So you will not be able to tell us if EPA believes this bill as a whole is better than current law or not?

Mr. JONES. That is correct.

Senator INHOFE. How many chemicals have been regulated under Section 6 of the current TSCA by the Obama administration?

Mr. JONES. Zero.

Senator INHOFE. And how many chemicals have been regulated under Section 6 of the current TSCA since 1990?

Mr. JONES. Zero.

Senator INHOFE. The current TSCA safety standards have been criticized for incorporating cost benefit analysis into safety determinations. Does the bill we are discussing today successfully remove any cost benefit analysis from safety determinations?

Mr. JONES. Yes.

Senator INHOFE. A lot of discussion has gone on over how many chemicals EPA should be required to review at any time, any particular time. If EPA had access to an unlimited amount of resources or user fees, is there a limit to EPA's capacity to review, with your current staffing, to review chemicals?

Mr. JONES. I believe there is. I am sorry, this will take more than one word. But from my experience, even in the pesticides program, where we have about three times as many resources under the Food Quality Protection Act, the most output we are able to do is in the range of about 40 a year. Based on that experience, I would expect that would probably be true in the TSCA sense as well.

Senator INHOFE. Thank you, Mr. Jones. You said previously that EPA has identified around 1,000 chemicals with some concerns. If EPA were to make 20 or even 40 of those chemicals high priorities under the bill, doesn't that leave the States with over 950 chemicals to regulate?

Mr. JONES. That is my understanding of how the bill is written.

Senator INHOFE. I know the EPA is working on Section 6 actions regarding the particular chemical in paint strippers. Can you please explain how that action would preempt States, under current TSCA, the current law, and if you took that action today under current law, would that preempt Proposition 65 labeling in California?

Mr. JONES. Under current law, we don't have a lot of experience because we don't do many Section 6 rules. But if we were successful with a Section 6 rule in the example that you gave, Senator Inhofe, my understanding is that current law would preempt States from doing anything other than exactly what we did, or they could actually ban the entire chemical for all commercial uses.

Senator INHOFE. So there can be some preemption under the current law?

Mr. JONES. There would be current preemption.

Senator INHOFE. I thought that was the case.

Last, as I was listening to you go through the Administration's TSCA principles in your opening statement, one thing I noticed you didn't mention was preemption. Does the Administration have a formal position on preemption?

Mr. JONES. The Administration consciously did not include a principle on preemption, even though we understood how critical it was ultimately to a bill. We do not have a principle on preemption.

Senator INHOFE. Thank you very much, Mr. Jones.

I have used half of my 6 minutes. So at the proper time, we will give an additional 3 minutes to my friend, the author of this bill, Senator Vitter.

Senator Boxer.

Senator BOXER. Thanks so much, MR. Chairman.

I absolutely don't believe in allowing the perfect to be the enemy of the good. That is such an important point. That is why I would be thrilled to support a good bill. I also say you can call something a beautiful name. This bill has a beautiful name, named after a magnificent Senator.

But when the experts look at it, they tell me unequivocally it is not better than current law. As a matter of fact, many say it is worse. Some of them are out in the audience today. They are doctors, they are nurses, they are environmentalists.

I just want to say for the record, because Senator Udall is my friend, we just really disagree on this one, he said don't make attacks personal. And he is right on that. It has nothing to do with personalities. It has to do with children of the United States of America, it has to do with the families of the United States. It has to do with Trevor, who is sitting out there, who, thank God, survived brain cancer that he got when he was exposed to chemicals in an otherwise beautiful, beautiful lake.

So I am not going to stop saying what I think. I am going to escalate saying what I think. Because the information that I have is brought to me by, and these are some of the groups, the Breast Cancer Fund, the Lung Cancer Alliance, the Asbestos Disease Awareness Organization, the Consumers Union. The legacy of our veterans, military exposures, these all oppose this bill strongly. The National Hispanic Medical Association, the Medical Disease Clusters Alliance, the Oregon Public Health Association, the Birth Defects Research for Children Organization, the National Medical Association, which is African-American doctors. The Physicians for Social Responsibility from a number of States, the American Nurses Association, as I said before. The Delaware Nurses Association, the Maryland Nurses Association. Kids v. Cancer, the Autism Society. Clean Water Action, Earth Justice, League of Conservation Voters. NRDC, Sierra Club, Alaska Community Action on Toxics.

And it goes on and on. The New Jersey Environmental Counsel opposes this. The New Jersey Environmental Federation. The New Jersey Environmental Justice Alliance. Environmental Advocates of New York.

So here is why they oppose the bill. It stops States from being able to protect their citizens from chemicals. And many attorneys general are stunned by its preemption.

Now, I was pleased that Senator Udall said, let's look at the New York Times. Absolutely, look at the New York Times. They criticized the preemption in this bill. Let's fix that. Let's fix the preemption. All of our States care about their citizens. Why should we have a bill that is so opposed and dramatically opposed by more than 450 organizations get through here, a weak bill that studies 25 chemicals, that is all you are assured of over 7 years, and no action required?

So I could go on with the list, but we are putting it in the record. I think it is very, very clear. Senator Udall talks about 80,000 chemicals. He is right. Twenty-five chemicals will be studied over 7 years. And guess what? If any one of them is studied, the States can do a thing anymore. They are done. And I am not going to allow that to happen to anybody's people, regardless of State.

So I want a good bill. I don't want a perfect bill. And we don't have it here. That is why Senator Markey and I worked so hard to get a good bill. This isn't about partisanship, or who you can get on your bill. It is about who you protect. And it is shocking to me to see who is behind this bill. It is. It is shocking to me.

Now, Mr. Jones, California's attorney general recently sent a letter describing the ways State authority to set strong chemical safety standards and enforcing existing laws is preempted in the Vitter-Udall bill. Do you agree that all of the erosions of the State authority described in this letter are in fact enabled by the bill text?

Mr. JONES. I think the California State attorney general accurately characterized how preemption would work under the bill, yes.

Senator BOXER. Well, thank you. Because Kamala Harris, she protects kids. That is what she is known for. And this was unusual for her, to write such a letter.

Mr. Jones, even if EPA does propose a ban or other restrictions on a chemical, isn't it true there is no deadline in the Udall bill by which that ban restriction has to be implemented by industry, which could mean that while State action would be completely preempted, it could also be far longer than 7 years before any Federal regulation goes into place?

Mr. JONES. There is no time deadline, that is correct.

Senator BOXER. All right. So here we have a bill that is being sold as protecting everybody and there is not even a deadline to enforce one chemical.

Assistant Administrator Jones, some State attorneys general and California EPA have argued that the way the Udall-Vitter preemption provisions are drafted raises a concern that a State's Clean Air, Clean Water or other environmental laws could also be preempted. Do you agree with that assessment?

Mr. JONES. There is some ambiguity in the way those provisions are drafted, so yes.

Senator BOXER. So yes?

Mr. JONES. It is possible that those kinds of statutes —

Senator BOXER. So it is possible. Let's be clear. That in this bill we are not only talking about preemption of chemicals, but the State's Clean Air, Clean Water or other environmental laws could be preempted and the answer is, oh, yes.

Mr. JONES. As it relates to chemicals, that is correct.

Senator BOXER. Yes. That the Clean Air, Clean Water or other environmental laws could be preempted.

Let's be clear what we are dealing with here. We are dealing with a bill that does harm, when they want to prevent harm. That is why these groups are opposing. Do you think the groups, I am not asking this, this is rhetorical, the groups who oppose this bill want to support, just like I want to support, a bill named after Frank Lautenberg? It would be a happy moment. But not this bill. This bill does not reflect the work I did with him in the past. I am just speaking as one colleague.

Thank you.

Senator INHOFE. Thank you, Senator Boxer. Senator Vitter.

Senator VITTER. Thank you, Mr. Chairman.

Thanks, Mr. Jones, for your testimony. You referred to the Obama administration's essential principles on TSCA reform which were issued several years ago. Sort of your guiding principles. I want to go to those.

The first is that chemicals should be reviewed against a safety standard that is based on sound science and reflects risk-based criteria, protective of human health and the environment.

Is the safety standard in the Udall-Vitter bill we are discussing today consistent with this principle?

Mr. JONES. Yes, I believe so.

Senator VITTER. OK. Second principle. EPA should be given the tools necessary to ensure that manufacturers are providing the agency with the necessary information to conclude that new and existing chemicals are safe and do not endanger public health or the environment, or else action will be taken. Again, are the provisions in this Udall-Vitter bill granting EPA new authorities to collect information as well as removing barriers like EPA having to prove a chemical poses an unreasonable risk prior to collecting information? Are those parts of the bill consistent with this second principle?

Mr. JONES. Yes.

Senator VITTER. OK, third principle. EPA needs clear authority to take risk management actions when chemicals do not meet the safety standards, as well as the flexibility to take into account a range of considerations, including sensitive sub-populations, cost, availability of substitutes and other relevant considerations. I know your staff has flagged one issue in technical assistance with regard to some articles language in the bill, but I am confident we can come to a good agreement with your office and we are working on that. Other than that work in progress, are the changes to the safety standard and Section 6 of this Udall-Vitter bill consistent with this third principle?

Mr. JONES. I appreciate your flagging the articles issue. I think that is a barrier to being consistent with the principles. If that issue were addressed, then I believe the answer would be yes.

Senator VITTER. Great. I appreciate your work on that. We will continue to work and resolve that.

The fourth principle delineates that EPA should have the authority to set priorities for conducting safety reviews as well as clear and practicable deadlines for the completion of chemical reviews. Does the Udall-Vitter bill we are talking about today have clear and practicable deadlines and grant EPA the authority to set priorities for conducting safety reviews consistent with this principle?

Mr. JONES. The principle also reflects a desire that there be timely decisions. I think as Senator Boxer mentioned, there are some questions with respect to the pace. Is the 25 chemicals in 7 years timely; I think there is a good argument that doesn't meet the timely test. Other than not meeting that timely test, yes, I think it is consistent with the other elements of that principle.

Senator VITTER. OK. And then the fifth principle states that TSCA reform should encourage green chemistry, assure transparency, and include stricter requirements, including substantiation for a manufacturer's claim of confidential business information. Are the bill's requirements on confidential information as well as the new green chemistry provision, consistent with this fifth principle?

Mr. JONES. Yes.

Senator VITTER. OK. Then finally, the sixth principle states that TSCA reform should give EPA a sustained source to defray the cost of funding for implementation. Is the user fee section of the bill consistent with this principle?

Mr. JONES. Yes.

Senator VITTER. Thank you very much, Mr. Jones. Your work and EPA's work with us has been very constructive. I know it will continue to be, with the hours of consultation and work. We have adopted many, many elements, including language you have given us. So we will continue that work, particularly in the areas I just flagged. Let me reserve the balance of my time for wrap-up. I may not use it, but let me reserve that.

Senator INHOFE. Thank you, Senator Vitter.

I would like to place into the record a letter supporting the Lautenberg Chemical Safety Act, signed by six attorneys general, and a letter of support signed by a number of TSCA legal experts. Without objection, so ordered.

[The referenced material follows:]

**State Attorneys General**

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

**Alabama \* Georgia \* Louisiana \* Michigan  
North Dakota \* South Carolina \* Utah**

March 17, 2015

The Honorable James Inhofe  
Chair, Committee on Environment  
and Public Works  
410 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member, Committee on  
Environment and Public Works  
456 Dirksen Senate Office Building  
Washington, DC 20510

Re: Support for The Frank R. Lautenberg Chemical Safety for the 21st  
Century Act

Dear Chairman Inhofe, Ranking Member Boxer, and Senate Environment and Public  
Works Committee members:

On March 10, 2015, Senators Tom Udall and David Vitter introduced the Frank R. Lautenberg Chemical Safety for the 21st Century Act (S.697) (the "Act"). This Act, which is co-sponsored by seven Democrats and eight Republicans, will reform the Toxic Substances Control Act ("TSCA") which was passed in 1976 and has not been substantively amended since that time. The TSCA is the primary law overseeing the safety of chemical products and providing EPA with authority to review and regulate chemicals. However, over time, the TSCA has failed to ensure chemical safety, resulting in fractured landscape of chemical regulation in the U.S. In fact, under the TSCA, EPA is unable to place proper health restrictions on even known carcinogens such as asbestos. S. 697 will make significant changes to the TSCA, giving EPA the tools it needs to ensure the safety of chemicals used in U.S. commerce and enhancing the protection of public health and the environment. S. 697 is the result of bi-partisan efforts of the late Senator Frank Lautenberg and Senator David Vitter, along with collaboration from stakeholders, and the Act has strong bi-partisan support. We strongly support and urge the passage of S. 697.

S. 697 updates the current law and creates a national program in an effort to eliminate the piecemeal approach developed under the TSCA. Under the new law, there will be more regulatory certainty and predictability, both to the industry that manufactures chemicals and to those that use and are exposed to chemicals. As the chief legal officers in the States, we are required to take the necessary actions to protect the health, safety, and welfare of the citizens as well as the natural resources and environment. There is real need to address and update the chemical safety in the U.S.

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and to create a balance between State and federal regulation. S. 697 strengthens the TSCA and advances our ability to protect our States.

Under S. 697, EPA will now, for the first time, subject all new and existing chemicals to a systematic review and require all chemicals in commerce, including those grandfathered under TSCA, undergo safety reviews based on hazard, exposure, and risk. This process establishes important milestones and sets aggressive, judicially enforceable deadlines for EPA decisions. EPA will create an initial list of at least 10 high priority and 10 low priority chemicals and designate at least 25 high priorities and 25 low priorities within five years. And once EPA takes final action on a chemical, a uniform federal standard is applied nationwide, creating increased regulatory certainty. Importantly, States will also retain the ability to address and restrict chemicals that have not undergone federal review.

For example, under this new Act, any State actions to prohibit or restrict a chemical substance, taken before January 1, 2015, and any state warning law in effect on August 31, 2003, will never be subject to preemption. Furthermore, S. 697 preserves the ability of States to regulate chemical substances that have not been designated as high priority substances or subjected to a safety assessment or determination. Importantly, it creates an explicit exception from preemption for State actions under authority of any other federal law, or under state law related to air or water quality, waste treatment or disposal, and for reporting and information collection requirements, and it does not limit State authority to regulate chemicals for reasons that do not directly relate to production, manufacturing, distribution, or use. Finally, in the event that a State has reason to regulate a chemical even after EPA has made an assessment or determination, S. 697 allows States to apply for a waiver of the preemptive effect of an EPA decision to address compelling local conditions, or when EPA's decision is unreasonably delayed.

S. 697 strengthens protections for the most vulnerable by placing greater emphasis on the effects of exposure to chemicals on infants, children, pregnant women, workers, and the elderly. For each safety evaluation, EPA must document and explain which susceptible populations were considered, why, and, where needed, how they will be protected. The modernized system that is created by S. 697 results in a chemical management program that incorporates a heightened safety standard and ensures that regulators, public health officials, manufacturers, consumers, and the public get information they need and deserve in a timely fashion.

S. 697 revises the restrictions on public dissemination of information about chemicals by setting reasonable limits on the ability of companies to make confidential business information ("CBI") claims. Currently, under the TSCA, approximately twenty percent of the chemicals on the inventory list are claimed to contain CBI and are shielded from public view. By requiring increased disclosure of the identities of chemicals, EPA will be able to disclose CBI to physicians, first responders, environmental professionals,

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and public health officials during an emergency. The balance between providing the public critically needed information about chemical hazards, exposures and risks, and protecting intellectual property is a crucial aspect of the Act which is of significant importance to the States.

After operating under an outdated law passed nearly 40 years ago that hamstrings EPA's ability to properly regulate dangerous chemicals used in U.S. commerce, S. 697 offers a modern approach to establishing a consistent, national chemical regulatory program that still preserves the States' ability to address unique and pressing State concerns. The comprehensive reforms in S. 697 present an opportunity to improve the programs that protect the health of American families. We encourage Congress to quickly pass these important bi-partisan amendments to our nation's chemical safety laws.

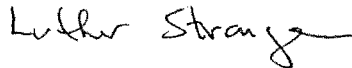
Sincerely,



James D. "Buddy" Caldwell  
 Attorney General of Louisiana



Wayne Stenehjem  
 Attorney General of North Dakota



Luther Strange  
 Attorney General of Alabama



Alan Wilson  
 Attorney General of South Carolina



Sam Olens  
 Attorney General of Georgia



Sean Reyes  
 Attorney General of Utah



Bill Schuette  
 Attorney General of Michigan

March 17, 2015

The Honorable James Inhofe  
Chairman  
Committee on Environment & Public Works  
410 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member  
Committee on Environment & Public Works  
456 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Inhofe and Ranking Member Boxer:

The undersigned are members of the bar with extensive TSCA experience, law professors, and former EPA leadership who were tasked with implementing TSCA. While we recognize the difficulty in reaching agreement on a large and complex piece of legislation, we would offer a few comments on S. 697 -- The Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act. In particular, we are aware of a recent letter from 25 "law professors, legal scholars, and private interest lawyers" (the Ashford letter) who characterize S. 697 as including "essentially ... the same inadequate 'safety standard' used in current law." We would like specifically to address this claim. Simply stated, S. 697 would fundamentally improve the ability of EPA to control chemical exposures found to present significant risks to public health and the environment.

Our point here is to emphasize that S. 697 addresses many of the legal obstacles challenging EPA's ability to regulate chemical exposures. Specifically, the outcome of *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991), has been taken as a fundamental check on EPA's ability to regulate identified chemical risks. S. 697 overcomes this obstacle most clearly in the removal of the provision in TSCA Section 6(a) that required EPA to protect against such risk "using the least burdensome regulatory requirements," a legal formulation that sets into motion an endless analysis of all of the possible regulatory options articulated in this TSCA section. This hurdle has proven impossible for EPA to overcome to date, which is why the language of S. 697 would offer a key improvement by making clear that no such requirement applies in EPA taking actions to protect against risks.

Congress can and will debate many of the particular legislative provisions in this or any bill. Congress may so choose to substitute the suggestions of the Ashford letter as an alternative safety standard. But to claim that the provisions of S. 697 have "essentially the same standard" implying the same outcomes of current law is misleading.

The Honorable James Inhofe  
The Honorable Barbara Boxer  
March 17, 2015  
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In closing, we would also offer several observations about S. 697. This legislation, though perhaps not perfect, represents a significant improvement over the current law, for example, by:

- Strengthening EPA's authority to require testing (S. 697, among other improvements to TSCA, no longer requires legal findings and has been expanded to include order authority);
- Imposing statutory requirements and deadlines to establish and implement procedures for EPA to prioritize chemicals and to conduct and complete safety assessments and safety determinations that must be followed by control actions as needed to ensure that the safety standard is met; and
- Empowering EPA with far greater oversight of chemicals in commerce than TSCA now mandates.

Congress should not delay badly-needed reform by chasing after the "perfect" piece of legislation. We think that the essential framework of S. 697, including the proposed safety standard, is sound. We would be pleased to articulate these views more fully if you or your staff would find more information helpful.

Respectfully submitted,

James V. Aidala  
Bergeson & Campbell, P.C.  
(Former Assistant Administrator, EPA Office of  
Pollution Prevention and Toxic Substances)

Charles M. Auer  
Charles Auer & Associates, LLC  
(Former Director, EPA Office of Pollution  
Prevention and Toxics)

Lynn L. Bergeson  
Bergeson & Campbell, P.C.

Lisa M. Campbell  
Bergeson & Campbell, P.C.

John C. Dernbach  
Distinguished Professor of Law  
Widener University Law School

The Honorable James Inhofe  
The Honorable Barbara Boxer  
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John B. Dubeck  
Keller and Heckman LLP

Herbert Estreicher, Ph.D.  
Keller and Heckman LLP

Charles L. Franklin  
Akin Gump Strauss Hauer & Feld LLP

Warren U. Lehrenbaum  
Crowell & Moring LLP

Martha E. Marrapese  
Keller and Heckman LLP

Irma Russell  
Distinguished Professor of Law  
University of Montana School of Law

Senator INHOFE. I would also like to place into the record a letter of support signed by five former high-ranking EPA and Justice Department officials, including an assistant attorney general and three former EPA general counsels, that not only supports the bill but strongly reviews a previous letter of law professors in their claims.

Without objection, so ordered.

[The referenced material follows:]

March 18, 2015

The Honorable James Inhofe  
Chairman  
Committee on Environment & Public Works  
410 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member  
Committee on Environment & Public Works  
456 Dirksen Senate Office Building  
Washington, DC 20510

Re: Response to Critique by Law Professors of the Frank R. Lautenberg Chemical Safety for the 21st Century Act

In a March 16, 2015, letter addressed to you, a group of 25 law professors and other lawyers expressed “serious reservations” with the “Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act,” S. 697. For the reasons set forth below, we believe that the reservations expressed in the March 15 letter are misplaced.

As former EPA and Justice Department officials who, during our tenures, were tasked with interpreting and implementing the current Toxic Substances Control Act (TSCA), we believe we bring a unique perspective in analyzing and commenting on S. 697 as proposed by Senators Udall and Vitter, and the important need for such legislation. We believe that S. 697 as a whole represents a substantial and necessary improvement over the current Toxic Substances Control Act, and, in particular, that S. 697’s amended safety standard will provide EPA with greater authority to address potentially risky chemical substances in commerce.

**1. The “Unreasonable Risk” Standard for Safety Determinations**

The March 16 letter focuses principally on the safety standard in S. 697 and asserts that S. 697 “essentially preserves the same inadequate ‘safety standard’ used in current law.” To support this claim, the letter references law review articles critical of the current TSCA. The letter, however, misreads S. 697. While S. 697 incorporates the words “unreasonable risk” as the new safety standard, it makes clear that “unreasonable risk” as included in S. 697 is not to be interpreted as it has been under the existing TSCA. S. 697 defines “safety standard” in pertinent part as “a standard that ensures, without taking into consideration cost or other nonrisk factors, that no unreasonable risk of harm to health or the environment will result from exposure to a

chemical substance under the conditions of use.”<sup>1</sup> Thus, the safety standard in S. 697 would require EPA to determine whether risk management measures are needed for a chemical substance solely on the basis of its evaluation of the risks to health and the environment. The language of S. 697 makes clear that its “unreasonable risk” standard has no role for cost-benefit analysis.

Many federal statutes call for regulation of “unreasonable risk.” Language in those statutes has generally been interpreted to combine into one step an assessment of the nature and magnitude of the risk and a risk management decision with respect to reducing that risk, by requiring a balancing of the benefits of regulating against the costs of doing so. For example, the Consumer Product Safety Act directs the Consumer Product Safety Commission to adopt consumer product safety standards, saying that “any requirement of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product.”<sup>2</sup> The Safe Drinking Water Act requires EPA, when proposing a national primary drinking water regulation, to “publish a determination as to whether the benefits of the maximum contaminant level justify, or do not justify, the costs.”<sup>3</sup>

Under TSCA today, in determining that a chemical substance presents an unreasonable risk of injury to health or the environment, EPA must consider the effects of the substance and the magnitude of exposure of human beings, the effects of the substance on the environment and the magnitude of exposure, the benefits of the substance for various uses and the availability of substitutes for those uses, and the reasonably ascertainable economic consequences of a rule regulating the substance.<sup>4</sup>

In contrast, S. 697 would separate a determination of whether or not a chemical substance presents an unreasonable risk from decisions about risk management measures to address a confirmed unreasonable risk. As noted above, in defining “safety standard” S. 697 mandates that there be no consideration of economic costs or benefits:

The term “safety standard” means a standard that ensures, **without taking into consideration cost or other nonrisk factors**, that no unreasonable risk of harm to health or the environment will result from exposure to a chemical substance under the conditions of use ....

<sup>1</sup> S. 697, section 3(4) (also specifying that the “no unreasonable risk of harm” standard shall apply to the general population and “any potentially exposed or susceptible population” identified by EPA).

<sup>2</sup> 15 U.S.C. § 2056(a). See, e.g., *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 511 n.30 (1981) (“In other statutes, Congress has used the phrase ‘unreasonable risk,’ accompanied by explanation in the legislative history, to signify a generalized balancing of costs and benefits. See, e.g., the Consumer Product Safety Act of 1972”).

<sup>3</sup> 42 U.S.C. § 300g-1(b)(4)(C).

<sup>4</sup> TSCA § 6(c), 15 U.S.C. § 2605(c).

(S. 697, section 3(4) (emphasis added)). Explicit language foreclosing the consideration of costs and other nonrisk factors is not found in other “unreasonable risk” statutes, such as the Consumer Product Safety Act or current TSCA. This provision would compel EPA, and any reviewing court, to interpret the S. 697 safety standard very differently from the way unreasonable risk is interpreted under current TSCA.

We note also that the March 16 letter asserts that “courts would be likely to interpret Congress’ intent, as it has been previously construed in case law, as still requiring a cost benefit analysis ([referencing Corrosion Proof Fittings]).” This assertion is incorrect. It is black letter law that statutory language is to be interpreted consistent with the clearly expressed intent of Congress as reflected in the plain language of the statute.<sup>5</sup> Where, as here, the statute would clearly state that the safety standard is to be implemented “without taking into consideration cost or other nonrisk factors,” a reviewing court would certainly not be likely to interpret this definition as requiring a cost-benefit analysis because the statute expressly precludes the consideration of cost or other nonrisk factors.

Moreover, S. 697 defines “safety assessment” as “an assessment of the risk posed by a chemical substance under the conditions of use, integrating hazard, use, and exposure information regarding the chemical substance.” (S. 697, section 3(4)). “Safety determination” is defined as “a determination by the Administrator of whether a chemical substance meets the safety standard under the conditions of use.” (*Id.*) Safety assessments and safety determinations are to be “based on information, procedures, methods, and models employed in a manner consistent with the best available science” and “the weight of the scientific evidence (S. 697, section 4). S. 697 clearly would not allow for consideration of costs and benefits under the safety standard, notwithstanding what may at first blush appear to be similarity in wording to the current “unreasonable risk” standard.

## **2. Consideration of Costs and Benefits for Risk Management**

The March 16 letter also incorrectly describes the provisions of S. 697 as they relate to consideration of costs and benefits in EPA’s rulemaking procedures. Rather than imposing a

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<sup>5</sup> *United States v. Amer. Trucking Assns.*, 310 U.S. 534, 543 (1940) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”); *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (it is a “familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”).

heavy burden on EPA by mandating a formal cost-benefit analysis, the bill simply would require EPA to conduct an alternatives analysis during the risk management rulemaking process, using readily available information, which is a requirement applicable to federal rulemaking that has been in effect through executive orders for over 33 years. We believe that this provision is key to rational decision-making and would not be a fundamental obstacle to rulemaking.

Under S. 697, where EPA determines that a chemical substance does not meet the safety standard, the Agency would be required to adopt a rule establishing risk management measures sufficient for the chemical substance to meet the safety standard. (S. 697, section 8(3)). In selecting those measures, EPA would have to consider costs and benefits:

In deciding which restrictions to impose ... as part of developing a rule . . . , the Administrator shall take into consideration, to the extent practicable based on reasonably available information, the quantifiable and nonquantifiable costs and benefits of the proposed regulatory action and of the 1 or more primary alternative regulatory actions considered by the Administrator.

(*Id.*) A similar provision would apply to consideration of whether to adopt a public interest exemption to a ban or phase-out. (*Id.* p. 74.) S. 697 does not require that EPA select the least costly or least burdensome alternative, but that EPA be aware of and consider the relative costs and benefits of a key regulatory alternative. This provision would simply call on EPA to “consider” costs and benefits so as to develop a rational response to an unreasonable risk.

Consideration of costs and benefits is reasonable and common in regulation of safety and environmental risks. For example, as the Supreme Court concluded in 2009, the Clean Water Act permits EPA to use cost-benefit analysis in determining the content of regulations.<sup>6</sup> There, Justice Breyer noted in his concurrence that consideration of costs and benefits is critical to rational decisionmaking:

[A]n absolute prohibition [on consideration of costs and benefits] would bring about irrational results. As the respondents themselves say, it would make no sense to require plants to “spend billions to save one more fish or plankton.” That is so even if the industry might somehow afford those billions. And it is particularly so in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.<sup>7</sup>

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<sup>6</sup> *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009) (“EPA’s current practice is a reasonable and hence legitimate exercise of its discretion to weigh benefits against costs that the agency has been proceeding in essentially this fashion for over 30 years.”).

<sup>7</sup> 556 U.S. at 232 (citation omitted).

Moreover, EPA and other agencies have been required by executive order to consider costs and benefits, to the extent permitted by law, ever since President Reagan issued Executive Order 12991 in 1981. Executive Order 12991 directed, “Regulatory action shall not be undertaken unless potential benefits to society for the regulation outweigh the potential costs to society.”<sup>8</sup> President Clinton issued Executive Order 12866 in 1993, which provides, “Each agency shall identify and assess available alternatives to direct regulation” and “Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”<sup>9</sup> Most recently, President Obama issued Executive Order 13563 in 2011, which states that the regulatory system “must take into account benefits and costs, both quantitative and qualitative .... In applying these principles, each agency is directed to use the best available techniques to quantify present and future benefits as accurately as possible.”<sup>10</sup> The Office of Management and Budget has issued clarifications to this requirement to consider costs and benefits in Circular A-4, which includes extensive guidance on how to evaluate public health and safety rulemakings.<sup>11</sup>

In other words, S. 697’s requirement for EPA to consider costs and benefits is an obligation shared by all Executive Branch agencies in the interest of good government. It is not intended to be an insuperable or even a heavy burden, but rather is consistent with longstanding Agency practice, can be met within existing Agency capacity, and is necessary to ensure that EPA makes rational decisions.

Thus, we conclude that the views asserted by the March 16 letter, with regard to interpretation of the unreasonable risk standard, the likelihood that the statutory definition of unreasonable risk will be ignored or misinterpreted by a reviewing court, and regarding alternatives analysis in rulemaking, are incorrect.

Sincerely,

*E. Donald Elliott*  
Assistant Administrator and General Counsel,  
Environmental Protection Agency, 1989-1991

<sup>8</sup> 46 Fed. Reg. 13193 (Mar. 8, 1981).

<sup>9</sup> 58 Fed. Reg. 51735 (Oct. 4, 1993).

<sup>10</sup> 76 Fed. Reg. 3821 (Jan. 21, 2011).

<sup>11</sup> Office of Management and Budget, Circular A-4 (2003).

<http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>.

*Scott Fulton*

General Counsel

Environmental Protection Agency, 2009-2013

*Marianne L. Horinko*

Acting Administrator, July-November 2003

Assistant Administrator, Office of Solid Waste and Emergency Response, 2001-2004

Environmental Protection Agency

*Roger Martella*

General Counsel, Acting General Counsel, and Principal Deputy General Counsel,  
Environmental Protection Agency, 2005-08

U.S. Department of Justice, Environment & Natural Resources Division, 1998-2005

*Ronald J. Tenpas*

Assistant Attorney General

U. S. Department of Justice, Environment and Natural Resources Division, 2007-2009

Senator INHOFE. Senator Booker.

Senator BOOKER. Thank you, Chairman Inhofe, and Ranking Member Boxer, for calling this very important hearing.

I want to start, and very importantly, in complimenting Senator Udall and Senator Vitter for coming together across the aisle to work in a bipartisan fashion on this critical issue of fixing our Nation's broken system of evaluating the impact of toxic chemicals on human health. Any efforts at a bipartisan compromise in the U.S. Senate should be hailed and praised in and of itself.

I want to acknowledge the progress that Senators Udall and Vitter have made in working together in good faith on this bill. There has been progress. The version of the bill we are considering today has made improvements over the past year in critical areas, such as the definition of the safety standard and the explicit protections for vulnerable populations.

But I have multiple concerns with the bill as currently drafted, and as yet cannot sign on. My concerns include the following. The timing of preemption, as Senator Udall has already entered into the record, in the New York Times, clearly puts front and center the timing of preemption for high priority chemicals, is a serious problem and defect in this bill. The right of States to co-enforce has been taken away. Why should we be afraid of States' rights to take action, especially when the EPA's budget, as we are seeing right now, continues to get hacked away and away?

There is also limited judicial review for low priority determinations. And there are not sufficient provisions, and I feel very passionately about this, to limit the testing of chemicals on animals where scientifically reliable alternatives exist that would generate equivalent information. I intend to continue working with Senator Vitter and Senator Udall, the bill's co-sponsors, in hopes of addressing these issues and making the bill better.

But I have some specific questions for Hon. Jim Jones. Mr. Jones, I want to thank you for your testimony, for your candidness and for being so forthright. You testified regarding the list of six Administration principles for TSCA to be updated and strengthened. That is where I would like to focus. When the Administration is reviewing this bill in its final form to decide whether to support it or oppose it, will those six principles be the only consideration, or will the Administration look to other elements of the bill?

Mr. JONES. The Administration will absolutely look at the bill in its totality. And there will be elements that are not related to the principles that I am confident will be brought to bear on that evaluation.

Senator BOOKER. Right. So to be clear, holding onto those six principles by this committee is not enough. The Administration will evaluate the totality of the bill and its impacts, is that correct?

Mr. JONES. That is correct.

Senator BOOKER. When deciding whether to ultimately support or oppose the bill, will one issue the Administration considers be preemption and whether or not the bill strikes a right balance between the Federal Government and State government authority on chemical safety regulation?

Mr. JONES. I am confident that preemption will be a critical element of how the Administration ultimately looks at the totality of the bill and whether or not it strikes the correct balance.

Senator BOOKER. I am assuming you are using that word critical very purposefully.

Mr. JONES. I am.

Senator BOOKER. It is a pretty significant element, which draws a large amount of the justifiable criticism of the bill as it stands right now.

Mr. JONES. It is.

Senator BOOKER. To have years of a gap between which States can act appropriately is very problematic. Would you agree?

Mr. JONES. Senator, I don't want to weigh in on the policy elements of exactly how it is drafted, only to say the Administration will be looking very hard ultimately at how preemption plays into the overall bill.

Senator BOOKER. Your courage of weighing in will be noted for the record, sir. I appreciate that.

[Laughter.]

Senator BOOKER. Mr. Jones, under current TSCA States are permitted to co-enforce any restrictions EPA may ultimately put in place. This new bill takes away the rights of States to co-enforce. Is there any reason you are aware of why State co-enforcement would be problematic in any way, and that removing this important provision would be necessary?

Mr. JONES. Co-enforcement exists in most if not all environmental statutes. I am not aware of scenarios whereby it creates a problem. It basically allows, as has been mentioned, States to enforce their own rules as long as their rule exactly the same as the Federal rule. So you have more cops on the beat.

Senator BOOKER. I see my time is waning. Finally, and hopefully we will have another round, another issue I am concerned with is animal testing, unnecessary animal testing, cruel animal testing, inhumane animal testing. I am doing everything I can to make sure the bill minimizes that to the extent possible. Specifically, I believe there are alternative testing methods and strategies that exist that the EPA Administrator has determined are scientifically reliable and would generate equivalent information. I want to know, is this an issue with EPA that you are in agreement with me about there being alternative equally scientifically reliable ways to do it, ways to limit animal suffering, animal cruelty and animal testing?

Mr. JONES. Senator, we are very invested, particularly our colleagues in the Office of Research and Development, in pursuing non-alternative animal testing. My office has been very aggressive in working with those colleagues to see that those tests are deployed when they are scientifically robust and ready to be deployed.

Senator BOOKER. Thank you very much. Thank you, Mr. Chairman.

Senator INHOFE. Thank you very much. Senator Capito.

Senator CAPITO. Thank you, Mr. Chairman. Thank you, Mr. Jones for being here.

I would like to begin by asking to submit into the record several statements in support of the TSCA bill. One from the attorney gen-

eral of West Virginia, one from the president of Building and Construction trades, one from the Smart Transportation Division, which is the former United Transportation Union, one from International Association of Sheet Metal, Air, Rail and Transportation Workers, one from International Association of Machinists and Aerospace, and one from Bridge Structural, Ornamental and Reinforcing Iron Workers.

Senator INHOFE. Without objection, they will be a part of the record.

[The referenced information follows:]



State of West Virginia  
Office of the Attorney General

Patrick Morrissey  
Attorney General

(304) 558-2021  
Fax (304) 558-0140

March 18, 2015

**VIA MAIL**

The Honorable James Inhofe  
Chair  
Committee on Environment & Public Works  
U.S. Senate  
410 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member  
Committee on Environment & Public Works  
U.S. Senate  
456 Dirksen Senate Office Building  
Washington, DC 20510

**Re: S. 697, the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act**

Dear Chairman Inhofe and Ranking Member Boxer,

Last year I wrote to the Committee leadership and expressed my support for the Chemical Safety Improvement Act pending before Committee on Environment & Public Works, which served to amend the Toxic Substances Control Act (TSCA). Today, I write to renew my call for reforms and improvements to the TSCA and to express my support for S. 697, the Frank R. Lautenberg Chemical Safety for the 21st Century Act. I believe this bipartisan bill is a significant step in the right direction toward protecting the American public from unsafe chemicals and I urge you to continue your consideration of it.

One of the flaws in the TSCA is that it allows approximately 62,000 pre-existing chemicals to be "grandfathered" without any tests to indicate what, if any, threat these substances may pose the public. You will recall that last year the State of West Virginia had the misfortune of experiencing the consequences of this regulatory gap firsthand, when 75,000 gallons of 4-methylcyclohexanemethanol (MCHM) contaminated the water supply in nine West Virginia counties. We were alarmed to learn that very little information existed about the health risks of exposure to this chemical. This is unacceptable and must never happen.

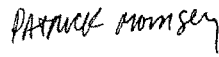
S. 697 takes steps to ensure that no other community will have to experience the same angst that my constituents felt in the aftermath of the chemical spill. This bill establishes a framework for the systematic evaluation of *all* active chemicals and requires additional safety reviews of high-priority substances. It also streamlines the process of gathering the information necessary to determine whether a chemical is safe for its intended use, identifies and acts on

State Capitol Building 1, Room E-26, 1900 Kanawha Boulevard East, Charleston, WV 25305

chemicals that may pose safety concerns, and ensures that necessary information concerning a chemical be shared with public officials and first responders in the event of an emergency.

In short, S. 697 is a needed improvement to the current chemical regulatory framework. I strongly support your continued consideration of this important reform.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Morrissey". The signature is written in a cursive, slightly slanted style.

Patrick Morrissey  
West Virginia Attorney General

# Building and Construction Trades

www.BCTD.org

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13th Vice President

JAMES T. CALLAHAN  
14th Vice President



*Value on Display. Every Day.*

March 10, 2015

United States Senate  
Washington, DC 20510

Dear Senator:

On behalf of the North American Building Trades Unions (NABTU) and nearly three million skilled crafts professionals who comprise the 14 national and international unions we represent, I write in support of the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (CS21), introduced by Senator Tom Udall and Senator David Vitter.

This bill will amend Title I of the Toxic Substances Control Act (TSCA) which regulates the safety of chemicals in commerce. Clearly, the TSCA has not worked as Congress intended. It must be clarified and strengthened. CS21 meets these needs in critical areas. We respectfully request that you co-sponsor and support this needed legislation.

Today, this legislative effort is the result of a thorough, ongoing, bipartisan effort in the Senate. As you know, we have supported this essential work since 2013 – because it will strengthen EPA's authority to protect public and worker health and the environment, and provide needed regulatory certainty to the makers and users of chemical products. Modernizing TSCA takes on additional importance as the U.S. chemical industry undertakes large-scale reinvestment in domestic production facilities that will generate good jobs and growth.

CS21 will authorize EPA to require that chemicals are screened before entering commerce and will establish a workable prioritization system for testing high priority chemicals, which will require additional safety assessments. This effort has added new protections for vulnerable populations, including workers, and makes chemical information more readily available, though more work may be needed to ensure the confidentiality of certain information. The new fee structure will provide EPA with the resources needed to keep high priority chemical testing robust. Finally, while progress has been made in resolving the issue of when federal action may affect state action on chemical regulation, providing states with avenues to continue regulating under certain conditions, additional bipartisan action may be necessary to finally resolve this issue.

We look forward to working with you to resolve any outstanding issues in support of passing CS21.

With kind regards, I am

Sincerely,

Sean McGarvey  
President



March 12, 2015

Richard C. Shelby  
United States Senate  
Washington, DC 20510

Dear Senator Shelby:

On behalf of the SMART Transportation Division (formerly the United Transportation Union), I respectfully request that you cosponsor S. 697, the *Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act*, introduced on March 10, 2015 by Senators Tom Udall and David Vitter.


As the U.S. chemical industry undertakes a wave of domestic investment to construct new facilities, your support for legislation that would significantly improve our nation's chemical safety laws is critical. The chemical industry directly and indirectly supports millions of good-paying American jobs - including a significant number of our members' jobs through the substantial tonnage of chemical shipments on the nation's freight railroads.

Signed into law in 1976, the Toxic Substances Control Act (TSCA) has never been amended and no longer works as Congress intended. S. 697 would amend and strengthen Title I of the TSCA to improve public safety, as well as protect American workers and the environment. This legislation is the result of years of bipartisan negotiation aimed at making the TSCA into an effective and achievable regulatory success.

Specifically, it will accomplish several key goals, such as restoring public confidence in federal chemical safety regulations, recognizing the role of states in the chemical regulatory system, using the best information possible to make chemical safety determinations, achieving greater transparency while protecting confidential business information and promoting job growth in the U.S. chemical industry.

I would like to thank you in advance for your consideration of our request and look forward to continuing to work together as this bill makes its way through the legislative process.

Sincerely,

A handwritten signature in black ink, appearing to read "John Risch". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John Risch  
National Legislative Director  
SMART Transportation Division

**International Association of Sheet Metal, Air, Rail and Transportation Workers**

1750 New York Avenue, N.W.  
Suite 600  
Washington, DC 20006



Phone: (202) 662-0842  
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**Joseph J. Nigro**  
General President

March 13, 2015

To all Senators,

On behalf of the members of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART), we respectfully ask for you to co-sponsor and support the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act – S. 697 – introduced by Senators Tom Udall and David Vitter and a balanced bipartisan group of cosponsors on March 10, 2015.

S. 697 will amend and strengthen the Toxic Substances Control Act of 1976, which is not working as Congress intended and has not been amended since it was passed in 1976. We believe S. 697 represents a clear, politically achievable improvement to America's federal chemical safety regulations.

This legislation has been negotiated in a bipartisan process for over two years. It provides clear, responsible, and politically achievable improvements to America's chemical safety laws to protect public health, worker health and the environment. Some key benefits of S. 697 include greater authority for the EPA to test chemicals, obtain and provide chemical information, protect vulnerable populations, and take action against chemicals determined to harm human health. Safety reviews for all chemicals in commerce are mandated and new chemicals will require a safety finding before they can enter the marketplace. Importantly, S. 697 will replace the failed TSCA cost-benefit safety standard (which prevented action against asbestos using TSCA) with a health-based safety standard. It includes fees on industry to adequately fund safety testing and sets achievable, enforceable timelines for the EPA to make determinations.

Progress has been made since a version of this legislation was first introduced in 2013 on the complex issue of when federal chemical action on a chemical can preempt state action. The EPA will have authority for high priority chemical testing and regulation and states can continue to regulate in the absence of EPA action and retain all regulations enacted before 2015. States can seek waivers to address specific local conditions and can propose substances for EPA prioritization.

Please take this opportunity to end four decades of a failed law. We look forward to working with you to help address any remaining issues and ask for your support of S. 697.

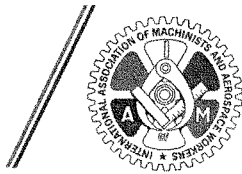
Sincerely,

A handwritten signature in black ink that reads "Joseph J. Nigro". The signature is fluid and cursive, with the first name "Joseph" and last name "Nigro" clearly legible.

JOSEPH J. NIGRO  
General President



**International  
Association of  
Machinists and  
Aerospace Workers**



9000 Machinists Place  
Upper Marlboro, Maryland 20772-2687

Area Code 301  
967-4500



OFFICE OF THE INTERNATIONAL PRESIDENT

March 10, 2015

Dear Senator:

On behalf of the International Association of Machinists and Aerospace Workers, I respectfully ask that you consider co-sponsoring the *Frank R. Lautenberg Chemical Safety for the 21st Century Act*, introduced by Senator Tom Udall (D-NM) and Senator David Vitter (R-LA). This bill is the result of an ongoing bipartisan effort to amend and strengthen Title I of the Toxic Substances Control Act (TSCA) regulating the safety of chemicals in commerce. As you know, we have supported this effort since 2013.

The *Frank R. Lautenberg Chemical Safety for the 21st Century Act* is a workable compromise that is politically achievable and will provide the EPA with greater authority to effectively regulate chemicals in commerce, protect public and worker health, and protect the environment. The *Act* will require EPA to screen chemicals before they enter commerce and provide a list of all chemicals in active commerce. It gives EPA the authority to classify chemicals as high or low priority for safety testing, and to take timely action against chemicals found to be harmful to human health. The *Act* sets achievable schedules for testing and a fee structure to provide EPA with resources for testing, and defines regulatory roles for the federal and state governments. Significant work has been accomplished to clarify the federal-state relationship on regulation. EPA will be responsible for high priority chemical safety evaluations and regulation, and states will have authority to regulate in the absence of EPA action, retain existing regulations made before 2015, and preserve existing labeling requirements like California's Proposition 65.

A strengthened federal chemical regulatory system will protect health and the environment, and allow the U.S. chemical industry to maintain its global leadership, innovate, and provide good jobs. As a representative of workers in both the Chemical and Freight Rail industries, we believe the *Act* will improve federal chemical safety regulation to the benefit of our people and our economy. Again, I respectfully urge you to support this important legislation.

If you have any questions, please contact Legislative Director Hasan Solomon at (301) 967-4575.

Sincerely,

*R. Thomas Buffenbarger*

R. Thomas Buffenbarger  
International President

*International Association of*  
**BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS**

WALTER W. WISE  
 GENERAL PRESIDENT  
 202 393-4810

*Affiliated with AFL-CIO*



SUITE 400  
 1750 NEW YORK AVE., N.W.  
 WASHINGTON, D.C. 20006

March 10, 2015

The Honorable Patrick Leahy  
 United States Senate  
 437 Russell Office Building  
 Washington, D.C. 20510

Dear Senator Leahy:

On behalf of the 120,000 members of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, I respectfully request you to co-sponsor and support the *Frank R. Lautenberg Chemical Safety for the 21st Century Act*, introduced by Senators Tom Udall and David Vitter.

This legislation will successfully modernize Title I of the Toxic Substances Control Act (TSCA), which regulates the safety of chemicals in commerce. We congratulate the bipartisan group of co-sponsors and supporters who have worked together for years to craft and improve this much-needed legislation.

The *Frank R. Lautenberg Chemical Safety for the 21st Century Act* will provide EPA with greater authority and implement a workable system to identify all chemicals in commerce, screen all chemicals entering commerce, identify high-priority chemicals for additional safety evaluation, and take timely action against chemicals found to be harmful to human health. It will improve peoples' confidence in our nation's chemical regulations.

The *Frank R. Lautenberg Chemical Safety for the 21st Century Act* will strengthen TSCA, protect public health and the environment, and provides greater protection for vulnerable populations, including workers. At the same time, it gives responsibility for regulating high priority chemicals nationwide to EPA, while preserving states' ability to regulate in the absence of EPA action, seek waivers, grandfather existing regulations adopted prior to 2015, and preserve labeling requirements (e.g. CA Prop. 65).

This legislation will clearly improve our nation's chemical safety laws, and it will help the U.S. chemical industry expand, innovate, and create good American jobs in construction, manufacturing and associated industries. We look forward to working with you in support of this bipartisan legislation.

Very truly yours,

*Walter W. Wise*

GENERAL PRESIDENT

WWW/jh

Senator CAPITO. Thank you, Mr. Chairman.

Mr. Jones, let me begin, before I get into my questions, ask if you are familiar with the chemical spill that happened in the Kanawha Valley of West Virginia about 15 months ago?

Mr. JONES. Yes, I am, Senator.

Senator CAPITO. I am a supporter of this bill, I will say that from the outset. I do think that TSCA is not the primary law which would govern accidental spill into the water. But I think TSCA can be a useful resource in situations like the Elk River spill. I am pleased to be an original co-sponsor of this.

Under TSCA, can EPA share confidential information it collects with States, under the present law?

Mr. JONES. No.

Senator CAPITO. What about local governments?

Mr. JONES. No.

Senator CAPITO. And then first responders and medical practitioners?

Mr. JONES. No.

Senator CAPITO. No. Does this, the Lautenberg bill, give EPA new authorities to share confidential information with States?

Mr. JONES. Yes.

Senator CAPITO. Local governments? Mr. Jones. Yes.

Senator CAPITO. Medical providers?

Mr. JONES. Yes.

Senator CAPITO. One of the frustrating aspects of the Elk River spill, for those of us who live in the Kanawha Valley, which I do, is that we didn't have any kind of information and actually very little information about MCHM, which was the non-toxic chemical that spilled into our water that caused us to all cease the use of our water for an extended period of time.

Does this bill include new language which would require EPA to share information related to exposures and releases of a chemical substance obtained under this program with other Federal agencies or offices within EPA, to better coordinate and address the failures that we saw at the Elk River spill?

Mr. JONES. Yes.

Senator CAPITO. Thank you. Also on the conditions of use definition in the bill, does it allow EPA flexibility to consider accidental releases and spills in the prioritization of chemicals as well as the safety assessment and determination?

Mr. JONES. It does.

Senator CAPITO. It does. Well, I would tell my colleagues and those in the audience and those listening that this would really go, I think, a long way toward helping what occurred with the non-toxic spill in our community. What happened was it just sort of fell literally between the cracks of any kind of regulatory regime. The State has stepped in on tank regulations and other regulations to try to alleviate, to try to make the information. But the sharing of information I think would be great. The water company didn't even know what was upriver from their water intake and what the toxicity of that was.

With that, I yield back my time.

Senator INHOFE. Thank you, Senator Capito. Senator Carper.

Senator CARPER. Thanks, Mr. Chairman.

Mr. Jones, welcome. It is good to see you. Thanks for your service.

Looking at the audience, seeing Bonnie Lautenberg back here and seeing Jill Udall, I am reminded of a question I often ask people who are married, particularly people who have been married a long time. I ask them, what is the secret? And I get a lot of answers. Some are very funny and some are actually quite poignant. The best answer I have ever gotten to that question is the two Cs. The two Cs. Communicate and compromise. That is not only the secret for a long marriage between two people, it is also the secret for a vibrant democracy. I would add maybe one third C to that, and that would be collaborate.

What we have seen in the legislative process here is an effort for us to communicate better with one another, and with a lot of stakeholders and with EPA. At the same time, to see if we can't develop some consensus and some compromise and collaborate.

I think we are making progress.

It is ironic, when the bill was first introduced by Frank and by Dave Vitter several years ago, it was roundly endorsed by the New York Times, which today finds that the much stronger version of that bill is not yet up to par. There is a real irony there. I hope that is not lost on everyone in the room.

Let me say, about a year ago I sent a letter, with about a dozen of my colleagues, sent a letter to Senator Udall and Senator Vitter, calling for nine fundamental changes to a previous draft of the bill to make it more protective of public health. This new draft addresses each of them, including a risk-based standard, protection of vulnerable populations, new testing authority for EPA and an enforceable schedule for action on chemicals.

I would just ask, Mr. Jones, I understand that in 2009, EPA laid out several key principles for TSCA reform. We talked a little about those already. Can you tell me just very briefly if those requests that I made a year ago are consistent with EPA's TSCA reform principles?

MR. JONES. I was actually preparing for this hearing re-reading that letter. It actually in many ways reads like the Administration's principles, so yes. I would say it does.

Senator CARPER. Thank you.

I believe that despite the important progress on key issues, more could be done to ensure that TSCA reform offers Americans confidence that EPA will be able to protect us from risky chemicals, something that both public health advocates and the chemical industry seek. To that end, in a more recent letter, just a week or so ago, to the bill's sponsors, I have highlighted three areas where I would like to achieve a good deal more progress. I think at least one of our colleagues has already referred to one or more of these.

But first, I think States should have an appropriate role in working with EPA to implement and oversee a new Federal TSCA program. Second, State regulations are halted, I think, too soon in the chemical assessment and regulation process with respect to highly toxic chemicals. And the third point that I would like for us to drill down on and maybe do a better job on is with respect to making sure that the public should have, that we have asked whether EPA has acted appropriately in making chemical prioritization decisions.

My question is, simply, would these additional changes also be consistent with EPA's principles for meaningful TSCA reform?

Mr. JONES. Thanks, Senator Carper. As I mentioned in answer to Senator Booker, the Administration did not take a position on preemption, although we will ultimately view that as an important element in any bill. So I can't speak to the first two issues you raised.

Interestingly, the third issue related to judicial review of low priorities, the concept of a low priority wasn't really on the radar when we developed the principle. So there is nothing that speaks directly to it. I would just say that it is unusual for final agency actions not to be judicially reviewable.

Senator CARPER. OK, thanks. And my third question, I want to just go down a little bit on what might be an appropriate role for the States. My colleagues may remember, those who were here when we debated Dodd-Frank, one of the sticking points was the regulation of nationally chartered banks. Nationally chartered banks did not want to be regulated by States, by State regulators, by State attorneys general, by the State Governors. They wanted to be regulated under the national charter.

It took us a while to figure out how to thread the needle on this one. But in the end, part of what we said is, you know, the Consumer Finance Protection Bureau could issue regulations with respect to nationally chartered banks, the States attorneys general could enforce those. That was the compromise that we struck. And it not a perfect parallel to the issue that is before us here. But it is the kind of thing that we need to do again. If we could find it with respect to nationally chartered banks and the rights of the States to be involved in the regulation, I think we can probably find it here.

I would just ask you, I agree that this bill would fall short of offering States a similar role from enforcing Federal rules under TSCA, which might limit how well TSCA safety rules are able to protect Americans from certain risky chemicals.

Mr. JONES. It does limit States from having that role that is referred to as co-enforcement.

Senator CARPER. All right. I certainly want to say, I want to stop for a minute, Tom Udall has left the room, but you all just tell him I said, bravo. It is Navy talk for good job. I know it has been hard for him, probably hard for you. But I am pleased that he stuck with it and showed the kind of leadership that he has.

I also want to say to David Vitter, David, thank you for your patience in working with me and a lot of other folks. We are not to the finish line, but we are getting closer. I appreciate that.

And to our chairman, thank you for the way you have conducted yourself in this role as our chairman, particularly with respect to this issue. I am encouraged by the words of the ranking member that maybe those three Cs, communicate, collaborate and compromise, maybe we are about ready to seize the day. Thanks so much.

Senator INHOFE. Thank you, Senator Carper.

Now, Senator Fischer.

Senator FISCHER. Thank you, Mr. Chairman.

Mr. Jones, innovation is core to business, and it is key to keeping the United States a leader in technology. We need efficient market access for our innovation to keep America's competitive edge.

As this legislation is currently composed, is it grounded in sound science? Does it facilitate an efficient and transparent product review process? Will it protect confidential business information? And does it provide a single Federal regulatory regime?

Mr. JONES. On the first three questions, I would say the answer is yes. On the single Federal regime, the bill, as does current law, it is not changed at all, requires the agency to ensure that there isn't another Federal agency that could better manage the chemical before we step into the breach to regulate the chemical. But that is a requirement to the existing law, and it is maintained under TSC, under the bill in front of us.

Senator FISCHER. OK. And key for any new regulations to work is confidence from the industry that any confidential business information shared with regulators will be protected. What safeguards are in place with the existing rules, and does this legislation preserve or strengthen those protections that are out there?

Mr. JONES. The general critique that is heard around confidential business information under the current law is that it is allowed to be applied too broadly to things that really are not trade secrets. What the bill before us does is preserve the trade secret confidentiality, but makes more publicly available information that really isn't about trade secrets, things along the line of health and safety data. But the trade secrets are still allowed to be confidentially protected as long as the manufacturer is able to substantiate why it should be.

Senator FISCHER. And do you think safeguards are in place?

Mr. JONES. I believe safeguards are in place, yes.

Senator FISCHER. Thank you. Clear communication of regulatory requirements that may result in approval or denial of new products is crucial, we know, for any regulation to work. So what is the process that EPA will use to establish the new regulatory review timelines laid out in this legislation? Do you have the manpower and the bandwidth so that you can handle any new regulations with this new legislation?

Mr. JONES. The bill before us would require EPA to establish all the kinds of procedures that you are describing, either through rule, or some of them through policy. Both of those would require there to be notice and comments. There would be public participation, how we establish the process that would ultimately govern implementation of the statute.

I believe with the fee provision that is included in the bill that the agency would have the resources to implement the requirements. In the absence of fees, we would not.

Senator FISCHER. But with the fees, you would be able, right now, you feel you would have the manpower then that you could implement the bill?

Mr. JONES. With the fees that are in this bill, yes.

Senator FISCHER. And in addition to petrochemicals, many chemical substances are also manufactured from bio-based chemicals and renewable feedstock like corn. So would S. 697 give EPA the

ability to designate many of those, or even batches of those chemicals, from renewable feed stock as low priority chemicals?

Mr. JONES. It certainly would open that as an avenue. We would obviously have to look at everything on a case by case basis. But that would become a potential avenue for that class of chemistry.

Senator FISCHER. Under current law, is EPA required to assess existing chemicals?

Mr. JONES. No, we are not.

Senator FISCHER. Does the bill that we are discussing today require you to assess those existing chemicals?

Mr. JONES. Yes, it does.

Senator FISCHER. Also, an important part of TSCA that Senator Carper alluded to in his comments, it is in this reform bill, it has been widely discussed, and that is protecting vulnerable populations, such as pregnant women and children. Does the vulnerable populations definition in this bill assure that the agency has the necessary tools and flexibility so that you can identify and protect any potentially vulnerable populations that are considered in this review of the safety of the chemical substance?

Mr. JONES. I believe so, yes.

Senator FISCHER. Thank you very much. Thank you, Mr. Chair. Senator INHOFE. Thank you, Senator Fischer. Senator Markey?

Senator MARKEY. Thank you, Mr. Chairman, very much. We thank you, Bonnie Lautenberg, for being here and bringing Frank Lautenberg's great legacy of fighting for toxic protections to us.

The job that we have on this committee is to make sure that there is a bill that does give protections for the next generation, that we have to put in place learning the lessons of the past.

My first question. The Massachusetts Toxic Use Reduction Act is a multi-faceted pollution reduction law that has been successful at decreasing the amount of toxic waste in Massachusetts by 50 percent and spurring innovation of safer chemical formulations to replace other, more dangerous ones. The Massachusetts Attorney General, Maura Healy, recently sent me a letter describing the way State authority to set strong chemical safety standards and enforce existing laws is preempted in the Udall-Vitter bill. The letter also highlighted the concerns that this bill could preempt actions taken under the Massachusetts Toxic Use Reduction Act and could further be used to interfere with State action related to water quality, air quality, or waste treatment or disposal.

Do you agree that all of the erosions of State authority described in this letter are in fact enabled by the bill's text?

Mr. JONES. I think that the Massachusetts attorney general accurately characterized how preemption would work as it relates to State requirements.

Senator MARKEY. So the answer is yes, it does accurately characterize the impact on State enforcement. Next question on preemption. The Udall-Vitter bill says that as soon as EPA starts to study a chemical it has designated as high priority, States are prohibited, prohibited from taking new actions to regulate that toxic chemical. Since the bill also allows EPA as long as 7 years to finish work on each chemical, do you agree that this could mean that there will be no protections, that chemicals on either the State or Federal level potentially for 7 years or longer would then be in place?

Mr. JONES. Yes.

Senator MARKEY. Next. The Udall-Vitter bill allows, allows the chemical industry pay extra money, pay extra money for EPA to classify a chemical as high priority. Do you agree that this provision could be used by the chemical industry to stop a State from moving forward with plans to regulate a dangerous chemical? Because as soon as EPA starts to study a high priority chemical, that would be paid for by the chemical industry, that States would then be prohibited from regulating it?

Mr. JONES. Yes. I would just say that the bill appears to have a cap on the number of times the EPA could do that. It is 15 percent of the total number of high priorities. But the answer is yes.

Senator MARKEY. The answer is yes. So the chemical industry could pick those chemicals that would not be in fact subject to jurisdiction by the States.

Next, the Udall-Vitter bill requires EPA to begin working on the first 25 high priority chemicals in the first 5 years after enactment. How long would it take under the bill for EPA to have to complete work on those first 25 chemicals? And just to be clear, EPA has to start work on 25 chemicals 5 years after enactment. Each chemical study can take 7 years to be finished. So the study on a chemical that begins in year five after enactment will then not have to be finished for 12 years in total. Is that correct?

Mr. JONES. That is correct.

Senator MARKEY. That is correct.

Next. If it takes 12 years to finish work on the first 25 chemicals, do you agree that given the Udall-Vitter bill's pace and today's methods for assessing chemical risks, it will take more than 100 years to finish studying the 1,000 chemicals that you have previously said were the most in need of assessment?

Mr. JONES. If EPA stuck to the minimum requirement in the statute for that entire period of time, the answer would be yes.

Senator MARKEY. Next. Flame retardants, a widely used in commercial products like couches, clothing and cars, EPA has expressed concern that certain flame retardants which can leach from consumer products are persistent biocumulative and toxic to both humans and the environment. Question: does the Udall-Vitter bill make it more difficult than existing law for EPA to regulate a chemical like flame retardants in a couch or chair even after EPA has found that the chemical is unsafe?

Mr. JONES. This relates to the articles discussion we were having earlier. The draft bill creates a fair amount of analytical burden related to any time we are looking at a chemical in an article. That aspect would make them do it.

Senator MARKEY. It does make them do a separate analysis for every type of product that contains that chemical. You are right. Separate analysis.

And finally, in 1989, EPA tried to ban asbestos under its TSCA authority. But the industry successfully overturned the ban in court in part because the court found that EPA had not met the substantial evidence standard that TSCA required them to meet. The Udall-Vitter bill does not change this standard, even though it can be a much harder standard to meet than the one used in other environmental laws.

Question: do you believe that the use of this same substantial evidence language that has already been the subject of litigation would increase the likelihood that EPA would be sued using some of the very same arguments industry used successfully to overturn the asbestos ban?

Mr. JONES. Our legal team is observing courts who are treating substantial evidence and arbitrary and capricious similarly. That being said, I would expect that a company that opposed the Section 6 rule would try to make the substantial evidence arguments that were made in the asbestos case.

Senator MARKEY. And again, asbestos front and center. We have to be very careful what we do here to make sure that there is true enforcement. I thank you very much.

Senator INHOFE. Thank you, Senator Markey. Senator Barrasso.

Senator BARRASSO. Thank you very much, Mr. Chairman.

Mr. Jones, as a medical doctor, I have long pointed out the important role that chemicals play in our society. This law and its regulations touches so many aspects of our lives, as well as our economy. Therefore, I think it is critical to make sure the law appropriately balances the risks associated with a chemical, the monetary costs of chemical regulation, and the social and societal benefits that may come from the use of that chemical as well.

As I understand it, one of the key flaws of the current law that EPA has identified is the language in the statute called "least burdensome." TSCA states that EPA should apply the least burdensome means of adequately protecting against the unreasonable risk of a chemical. This provision has been blamed by some as the reason why the law has been so ineffective.

Now, this bill removes that reference to least burdensome. So the question is, despite the removal of this language, if EPA were to find a chemical doesn't meet the safety standard under the legislation, would there still be a mandate for the agency to conduct a cost benefit analysis in forming any rules to regulate the chemical substance?

Mr. JONES. The standard is a risk-based standard under this bill. We are required to conduct a cost benefit analysis in choosing the appropriate risk management to apply. But the risk management that we apply needs to meet the safety standard, which is a risk only standard.

Senator BARRASSO. I noticed the Administration's TSCA principles include specific reference to the need for EPA to take into account costs in risk management decisions. Is EPA supportive of some level of cost benefit analysis?

Mr. JONES. The agency and the executive branch in general thinks cost benefit analysis is very important for regulation, which is why for the last 30 years the government, the executive branch has required of itself to do cost benefit analysis. The difficulty that we have had under TSCA is that most of the benefits that we are worried about the health benefits, are not easily monetized. So we end up with a very cost-biased standard. Because it is easy to monetize the costs, but you can't monetize the benefits, which makes it very difficult to show that your benefits outweigh your costs.

Senator BARRASSO. So given that, is the particular cost benefit language in this bill implementable by the agency?

Mr. JONES. I believe so.

Senator BARRASSO. Does the cost benefit language in the bill require a cost benefit analysis at the appropriate time, this is a question of time, rather than, say, during a chemical safety determination which is based solely on science, unlike the current law?

Mr. JONES. That is how the Administration's principles are related. The risk management has some consideration for costs, but the safety determination should be risk only.

Senator BARRASSO. So under S. 697, is EPA directed to consider non-quantifiable costs, such as the social and societal benefits of a chemical in any potential regulations?

Mr. JONES. It believe it would include that.

Senator BARRASSO. Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Barrasso. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Mr. Jones, there are places where the EPA's existing regulatory authority preempts conflicting State regulation, is that correct?

Mr. JONES. That is correct.

Senator WHITEHOUSE. Is there any place in EPA's existing regulatory authority where EPA regulations preempt State regulations before those regulations are promulgated?

Mr. JONES. Not that I am aware of.

Senator WHITEHOUSE. And you probably would be in a position to know?

Mr. JONES. My knowledge is not all-encompassing of all regulations. But the ones that I have worked with —

Senator WHITEHOUSE. Let's stick with the chemical area, then.

Mr. JONES. The chemical area, no.

Senator WHITEHOUSE. This would be a novelty?

Mr. JONES. Yes.

Senator WHITEHOUSE. In which you create what might be called a death zone when a chemical is not regulated by EPA because the process has only begun, and yet no other government, no State government, no one else can regulate that chemical, irrespective of what risk it may present to the public?

Mr. JONES. That is correct.

Senator WHITEHOUSE. In your experience with the rulemaking process, do the industry participants in the administrative process of rulemaking to some degree control the pace of that rulemaking through the actions that they can take in that rulemaking process?

Mr. JONES. In my experience, they participate more vigorously than most other stakeholders. And the timing in which they will submit information has sometimes the potential to make things take longer than one might otherwise expect.

Senator WHITEHOUSE. So it is within the power of an industry participant in the regulatory process to slow down the regulatory process, just through the nature of its procedures.

Mr. JONES. I like to think that the government does maintain that control. But my experience indicates that things can take longer because of the kinds of information that we are presented with and the timing with which the information is sent.

Senator WHITEHOUSE. Understood. I think you have said this before, but you expect that there could be as many as a thousand or more chemicals that will end up on the high risk list?

Mr. JONES. The thousand number comes from when we developed our current work plan chemicals, we scanned the field of data that is out there associated with chemicals and found 1,000 chemicals for which there was some hazard data that to us meant it warranted some evaluation. There are likely to be more than that that ultimately do express hazard data, but it is just not known to us at this point.

Senator WHITEHOUSE. As a Federal official involved in health and safety regulation, is it your view that our sovereign States under our Federal system of government also have an important role in health and safety regulation to protect their own citizens?

Mr. JONES. I do.

Senator WHITEHOUSE. And does EPA work often with State officials and State regulators to assure the health and safety of the American people and the population of their States?

Mr. JONES. Yes, we do.

Senator WHITEHOUSE. In fact, in some cases, you have delegated the authority to State officials to implement Federal law, have you not?

Mr. JONES. That is correct.

Senator WHITEHOUSE. So can you think of any place in EPA's jurisdiction in which a State is forbidden to co-enforce an identical State law to the Federal law?

Mr. JONES. I don't know of an example of that.

Senator WHITEHOUSE. If you were a Senator who was presented with frequent attacks on EPA's budget, annual attacks on EPA's budget, and you were concerned that 1 day those attacks might succeed and EPA's enforcement capability might be drastically limited, would it not be wise to have the prospect of State enforcement of a similar standard just to make sure that the public health and safety was protected by someone?

Mr. JONES. I think our experience with co-enforcement is that is important, even in the absence of declining budgets. Regulations or any law is only effective if there is enforcement of that law.

Senator WHITEHOUSE. The industries' concern is that there not be too many different regimes of regulation that they have to comply with, correct?

Mr. JONES. That is what I have heard.

Senator WHITEHOUSE. So if there is an identical regime, an industry effort to prevent that identical regime from being enforced isn't an effort to deal with the legitimate problem of too much or conflicting regulation by definition, correct?

Mr. JONES. That logic holds true to me.

Senator WHITEHOUSE. It is simply an effort to make sure that there are enough cops on the beat to catch them if they misbehave.

Mr. JONES. I don't know what their motivation is, or anyone's motivation on that is.

Senator WHITEHOUSE. It is the only remaining one, it seems to me, if that first one disappears.

Finally, with respect to the determination of whether a chemical is low priority or high priority, which is roughly, I think, low risk

or high risk, who gets to challenge or review if EPA has made a bad determination among these thousands of chemicals, or if new information comes up that suggests that something is no longer appropriately on the low risk or low priority list?

Mr. JONES. My understanding, in the drafting, it is a little tricky to get one's head around it, is that only a State, if the State originally commented on the original designation, would have the potential for challenging a low determination. That is as I understand it, but I could be mistaken. I am pretty confident, though, it is only limited to States. But I think it is a State that has participated in the process heretofore.

Senator WHITEHOUSE. If new information were developed during the 7-years of review or at any time in the future after a low priority designation, you could end up with a situation in which nobody could challenge that error?

Mr. JONES. That is how I understand the draft.

Senator WHITEHOUSE. Thank you very much.

Senator INHOFE. Thank you, Senator. Senator Boozman?

Senator BOOZMAN. Thank you, Mr. Chairman.

Asbestos, not only asbestos but things in that category that we have had trouble dealing with in the past, it is one of the problems that is being the least burdensome rule. Under this legislation, we would get rid of the least burdensome, is that correct?

Mr. JONES. That is correct.

Senator BOOZMAN. OK, good. Upon enactment, would this bill allow the EPA to make asbestos and similar things and other concerning chemicals a high priority, and therefore the first chemicals through the safety assessment and determination process?

Mr. JONES. It would allow that, yes.

Senator BOOZMAN. So this would be a mechanism to get rid of the things that we have the most concern about?

Mr. JONES. It would allow us to make it a high priority and then require us to do a safety determination and then act if the risk is unacceptable, yes.

Senator BOOZMAN. Good, thank you. Does the bill have a deadline for EPA to promulgate a final rule to regulate a chemical if it is found to not meet the safety standard?

Mr. JONES. Yes, it does. Two years after we have made a safety determination that the chemical does not meet the safety standard.

Senator BOOZMAN. OK, good. Thank you for that clarification.

Senator INHOFE. Thank you, Senator Boozman. Senator Cardin?

Senator CARDIN. Thank you, Mr. Chairman. I thank you for holding this hearing to allow us all to reflect once again on how fortunate we were to serve in the U.S. Senate with Frank Lautenberg. He was an incredible force on this committee and a person who put the health of our children as his highest priority. Bonnie, it is wonderful to see you in our committee, and I thank you for continuing his work.

I also want to thank Senator Udall and Senator Vitter for reaching across party lines to come together and try to move forward an issue that we all know needs to be dealt with. The current TSCA law does not work. We have a responsibility to enact a law that will work.

I want to thank Senator Boxer for her passion on this issue and recognizing that we can do better and continuing to raise those issues. I want to thank Senator Markey for his leadership on this issue as well.

Senator Carper is not here, but I do really want to thank him. He has really been trying to get all of us together at various times to move this issue forward, and spends a great deal of time to get there.

Mr. Chairman, I was listening to my colleagues, and they have raised many of the issues that I intend to raise. Just to underscore. But I have not heard any real response. I hope this means that we may be able to center in some areas that can really bring us together. Senator Booker started with that earlier in his round of questioning. Senator Udall mentioned the fact, let's get together and let's continue to work on this bill. He mentioned the New York Times editorial, and several of us have commented on some features of the New York Times.

But in two respects dealing with preemption, it seems to me that there are clear improvements that we need to incorporate in this bill. The first is that just by making a start of a study on a high priority, it preempts the States from acting. And that process could take as long as 7 years. So we could be 7 years without any action on a chemical that has been determined to be a high priority, preempting the States from taking action that would seem to me, and would seem, I think, to most reasonable people, and Mr. Jones has already responded to this, it would be somewhat unprecedented to have that type of preemption before there is any Federal action at all. So I would just urge us that that seems like a pretty easy area to start moving on the preemption issue.

Quite frankly, preemption has been our most visible area of difficulty. So if we can make some progress on preemption, I think we then start to talk with our attorneys general and figure out a way we can get this done.

The second thing that Senator Whitehouse just talked about, and that is the co-enforcement issue, and Senator Whitehouse raised some good points. Mr. Jones, you responded that under any circumstances, regardless of your budget, it is better to have more cops on the beat as we are trying to enforce the laws.

But let me just challenge you. I looked at the budget that is being recommended in the House of Representatives by the Budget Committee. The information presented to me shows that in 2024 alone, if that budget were enacted, the non-discretionary spending would be 30 percent below the 2014 level, adjusted for inflation. And the House has shown some propensity to not be so generous to the EPA budgets. So if the EPA budget sustained that type of an attack, would that have an impact on your ability to be able to enforce these laws?

Mr. JONES. Absolutely.

Senator CARDIN. We are facing realities here that your budgets could very well be hit. So it is another reason why the co-enforcement issue, to me, should be an easy one for us. To the extent we can get our States helping us enforce our standards, they have to use our standards under the bill, I can't understand why there would be any objection to allowing the States to move forward.

Brian Frosh, the Attorney General of Maryland, will be on the next panel. He is here. He is an independent attorney general that is interested in the public welfare. He is my lawyer, because I am a citizen of Maryland. We certainly will want him enforcing these standards in our State and helping EPA do that. I think you are shaking your head, so I just want the record to show that Mr. Jones is enthusiastically shaking his head, as is Brian Frosh, the Attorney General of Maryland.

[Laughter.]

Senator CARDIN. I want to get to one other issue in the time that remains. Maybe you can help me on this. That is, can you explain the difference between the safety standard of unreasonable risk to health and reasonable certainty of no harm? Do you have good legal doctrine for me to understand the difference between those two standards?

Mr. JONES. Reasonable certainty of no harm is the standard we apply in our pesticides program, which we have through our actions interpreted it to mean that there shouldn't be a cancer risk greater than one in a million, or that we have had adequate margins of exposure for thresholds. Unreasonable risk with the way in which it is characterized in the current bill, without cost consideration or the prohibition against cost considerations, would ultimately be defined by the way in which the agency implemented it. So we would obviously be only able to consider risk in that determination and we would have to make judgments about what level of risk defined an unreasonable risk.

Senator CARDIN. So we don't have a track record on that standard?

Mr. JONES. Not with that standard in the, with the prohibition of giving cost any consideration which is how it is drafted right now.

Senator CARDIN. So that adds some uncertainty to it?

Mr. JONES. Yes.

Senator CARDIN. Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Cardin. Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman.

Mr. Jones, I am brand new, but I understand that in November 2014, you testified before the House on TSCA, and during that hearing you stated that there were several specific improvements that were need in any TSCA legislation to be meaningful for the agency.

Does this particular proposal, S. 697, which would amend TSCA to give the EPA new authorities to obtain information at multiple stages in the process, how would this differ from the current process? And I believe this is an example of a bipartisan approach that clearly has the support of a lot of the members of the committee here. I think this may be very well a stepping stone in terms of how we do business within the committee on other issues as well.

But I would sure like to know what your thoughts are in terms of how this would change the existing process.

Mr. JONES. The biggest change is that right now, there is no duty upon the EPA to look at existing chemicals for safety at all. So we can do nothing in that respect and be in compliance. The Lautenberg bill requires us to look at existing chemicals and creates a

schedule for doing that. That is probably one of the fundamental changes.

The other fundamental change is that it changes the standard upon which we have to evaluate a chemical. And as has been mentioned before, it eliminates one of the hurdles that we experienced, which is this requirement to find the least burdensome way in which to regulate chemicals. Then it also eliminates the cost benefit balancing that was previously required and gives us a risk-based standard that allows us to give cost considerations without having to say the actual benefits literally outweigh the costs.

Senator ROUNDS. Does the definition of conditions of use, which is found within the bill, allow EPA to review not only the uses intended by the manufacturer but also those that go beyond the label, but that are reasonably foreseeable?

Mr. JONES. Reasonably foreseeable is the language, I believe, so yes. There would be things that are beyond how it is labeled but can be foreseen to occur.

Senator ROUNDS. How would these changes help the EPA? Would these give you more tools to do your job better?

Mr. JONES. The principle, one of the tools is a legal one, in that the standard is one that takes away the principal barriers that we are experiencing today. So those are tools.

The other is kind of loosely a tool, requiring us to do something that we are not otherwise required to do. It is not exactly a tool, but a particularly relevant piece to the bill.

Senator ROUNDS. Thank you, Mr. Chairman. I yield back the time.

Senator INHOFE. Thank you, Senator Rounds.

Senator Sanders.

Senator SANDERS. Thank you, Mr. Chairman. Like others, I want to welcome Bonnie Lautenberg here. Jane says hello and thank you for reminding us of all the great work that Frank has done.

I also want to thank Senator Markey and Senator Boxer for their leadership on addressing this very, very important issue. Mr. Chairman, I got involved in this issue soon after I was elected to the U.S. House. I will never forget it. I got a call from a woman in Montpelier, Vermont. And she said something which frankly I initially did not believe. She said that, we installed in our home in Montpelier a brand new carpet. And as the carpet was unrolled, it off-gassed and she and her kids became pretty sick. I thought, this doesn't sound right. I really did. I was disbelieving of that.

Well, we did a little study on it, and it turns out that all over this Country in many States there were attorneys general working on the issue, and I see Mr. Jones is acknowledging it. This has been a problem. A lot of chemicals in new carpets off-gas. And if there is not proper ventilation, people can become sick. That is how I got involved. We have made some progress on that, by the way, I became involved in this.

It seems to me that our goal is not to argue whether or not the current TSCA bill is adequate. I think we have all agreed that it is not. The real issue is, given the fact that we have tens of thousands of chemicals, of which many of them we know very little about, we don't know how they interact with each other, we don't

know how they impact vulnerable populations like kids or people who are ill.

It seems to me that we have the obligation to pass legislation which in fact protects the people of this Country, especially our children. Now, my concerns about the bill that we are discussing today, the Vitter-Udall bill, is that it makes it extremely difficult for the EPA to ban or phaseout toxic chemicals even after determining that they are dangerous. That does not make a lot of sense to me. That the bill prohibits States from enforcing safety standards that are identical to Federal standards, even if EPA enforcement is inadequate, the bill prohibits States from taking actions on chemicals even after determining that a chemical is dangerous if the EPA really identifies a chemical as one deserving of attention, and the bill enables the chemical industry to preemptively place chemicals on the so-called high priority list, preempting States like Vermont from taking action for many years.

Now, I find two aspects of this discussion somewhat interesting. First of all, virtually every hearing that we hold, every markup that we hold, we hear constant attacks against the EPA, as I think Senator Whitehouse and Senator Cardin have indicated. We expect the majority party right now to go forward with massive cuts in the EPA. And now we are led to believe that it should not be States like Vermont and Massachusetts or California who have been vigorous in dealing with this issue, they should not have the responsibility to go forward, but it should be in EPA, which the Republicans want to substantially cut.

Frankly, I don't think that passes the laugh test, if I may say so.

A second point, on a more philosophical basis, I hear many of my Republican friends talking about federalism. I believe in federalism. I think that is a remarkable concept, which says, we have 50 States out there, each doing different things. We learn from each other, Federal Government learns from them, the States learn from the Federal Government. But essentially to tie the hands of States, especially those States who have been most active on this issue, and say, we just want a Federal Government, by the way, we want to cut the funding for that agency which is asked to enforce this legislation, doesn't make a whole lot of sense to me.

So I strongly support what Senator Markey and Senator Boxer are trying to accomplish.

Let me ask, Mr. Jones, a question if I can. Mr. Jones, if we adopted the Udall-Vitter bill as proposed, isn't it true that this would weaken the ability of States like the State of Vermont to take action to limit toxic chemicals?

Mr. JONES. The State of Vermont would not be able to take action on a chemical that EPA designated as a high priority.

Senator SANDERS. Well, that is enough for me.

Senator INHOFE. Thank you, Senator Sanders. Senator Merkley.

Senator MERKLEY. I thank you very much, Mr. Chair. I would also like to welcome Bonnie. It is good to see you again. I know that our colleague, Senator Lautenberg, worked mightily to try to take on these chemicals, for the benefit of everyone's health in this Nation. We are all engaged in that common enterprise. I think we can concur that things that are damaging toxins, cancer-causing

chemicals in everyday products, we should find other ways to make those products. That is what this is all about. The question is whether this bill at this moment gets us there. If it doesn't, what further changes do we need to make.

Under the existing TSCA law, there is State enforcement, is there not, Mr. Jones?

Mr. JONES. Yes, there is.

Senator MERKLEY. But under this law, there would not be State co-enforcement?

Mr. JONES. That is correct.

Senator MERKLEY. So in some ways, that is a step away from a strong enforcement regime?

Mr. JONES. Yes.

Senator MERKLEY. And under the existing TSCA law, preemption occurs only when the regulations are put into place?

Mr. JONES. That is correct.

Senator MERKLEY. But under this law, they are not put into place in that same fashion?

Mr. JONES. When the EPA identifies a chemical as high, a State is preempted.

Senator MERKLEY. So if, for example, the EPA was to identify a chemical as high risk and a State said, oh, it has been identified as high risk, we want to put a label on these products to warn people, they would be preempted from doing so under this law?

Mr. JONES. High priorities determined by the statute, but basically what you said is correct, that once we have identified a chemical as high priority, a State would be preempted from labeling or any other restriction.

Senator MERKLEY. And that preemption might exist for all the years that were being referred to that it might take for EPA to act on that particular chemical? The State would not act, the Federal Government would not yet have acted, and yet we know there is a high risk item out there?

Mr. JONES. That is correct.

Senator MERKLEY. One of the issues we had come up in Oregon was regarding flame retardants. The story on this goes back to the tobacco companies essentially wanted to downplay the role of cigarettes causing house fires, because they had the accelerants in the tobacco and they dropped into the cushions. They said, well, let's focus on the problem really being the furniture, and there should be flame retardants in the furniture.

So there has been a massive requirement for flame retardants and a lot of the foam has 3 to 6 percent by weight flame retardants. And yet we found out later that not only were they cancer-causing but they did nothing to prevent house fires. So here we are, and this is also in, for example, carpets, and my colleague referred to that. Here are babies crawling on carpets full of flame retardants that have toxic chemicals in them and breathing the dust in. That is a big problem.

But here is the situation. There is not just one chemical. There is a family of chemicals. They are called congeners. But 209 chemicals in that family. So imagine essentially when Oregon wanted to regulate one chemical, the chemical industry came out with a different version of the flame retardant. So if there are 209 potential

versions just in this one family and you have to do basically one at a time, doesn't this create an indefinite ability for the industry to keep putting cancer-causing chemicals into our carpets without the ability to kind of catch up, if you will?

Mr. JONES. Flame retardants, for many of the reasons you described, Senator, are very challenging. Even under the existing statute, we are attempting to assess these compounds by doing it in groups as opposed to individually, so that we avoid the scenario you are describing, where the serial evaluation just keeps leading to potentially unproductive substitution. It is a very difficult challenge.

Senator MERKLEY. Will you be saying that the EPA has the resources to evaluate 209 versions of the chemical at the same time?

Mr. JONES. We are looking at about 20 of them right now. We try to pick the 20 that have potentially the greatest hazard and exposure.

Senator MERKLEY. Another concern here is that the designation for low priority can be taken, in fact is taken, according to the flow chart under this bill, before there is a safety analysis. Doesn't that seem a little bit like putting the cart in front of the horse?

Mr. JONES. The way we have read the standard for low determination which is likely to meet the safety standard is that you would have to be so confident in it being low hazard and low exposure that you don't need to do a safety determination. That is how we would read that provision.

Senator MERKLEY. And up to the judgment of the EPA within the resources that it might particularly have under any given Administration or budget regime?

Mr. JONES. The judgment is the key word there, because of a lack of judicial review of that determination.

Senator MERKLEY. That is a significant concern, what you have pointed out, the lack of public being able to challenge that low priority determination, given the flexibility that can occur among different Administrations.

Mr. JONES. I agree. It is kind of interesting when you think of, there is no judicial review, does it really matter what the standard is, because nobody can challenge you.

Senator MERKLEY. Well, there is a section in the bill, and I will wrap up on this note. There is a section in the bill which has a, let me turn back to it here, it has a history that is called a nomenclature section. This bill has been in there since 2013. There is a great deal of uncertainty as to what this section is actually trying to accomplish. Can you fill us in on that?

Mr. JONES. My understanding is that some of the nomenclature around how a chemical was originally placed on the TSCA inventory, which is important in terms of how the statute operates. If you are on the inventory, you can sell a chemical in commerce. But there is a lot of interest by particular manufacturers that that nomenclature be maintained, that we don't start changing the way in which we describe what a new chemical is, for example. The desire is to maintain the longstanding way in which a new chemical in particular was placed on that inventory.

Senator MERKLEY. So this simply is a naming provision with no implications for whether something makes it onto a list of high pri-

ority, low priority or in any other way influences the policies regarding this particular chemical?

Mr. JONES. I would actually like to get back to you on that, Senator. I don't think I have a good answer.

Senator MERKLEY. I would appreciate working with you all.

Senator INHOFE. Thank you, Senator Merkley. We want the next panel to be prepared to come forward, but I retained 4 minutes of my time, which I will allow the author to use, if he so desires.

Senator VITTER. Thanks very much, Mr. Chairman.

And thanks, Mr. Jones. I just have a few wrap-up questions on some key issues we have been discussing. Let's start with preemption. Doesn't the Udall-Vitter bill grandfather in permanently all State chemical specific regulations that were in place January 1st, 2015?

Mr. JONES. That is correct.

Senator VITTER. So if a State has already acted, even if EPA takes on a chemical, even if EPA says, you can drink this and you will have a great life, that State regulation is still in effect?

Mr. JONES. That is saved, that is correct.

Senator VITTER. Doesn't the Udall-Vitter bill grandfather in California's Proposition 65?

Mr. JONES. That is correct.

Senator VITTER. OK. Doesn't it keep in place any State regulation that exists prior to the EPA taking up a chemical until the EPA makes a conclusion in its study?

Mr. JONES. That is correct.

Senator VITTER. So if a State has a regulation on a chemical that EPA takes up, that regulation doesn't go away unless and until EPA essentially blesses the chemical?

Mr. JONES. Or regulates it, yes.

Senator VITTER. Correct. OK. And then there was this discussion of industry priorities and how somehow that is some grand conspiracy to get rid of State regulations, which it isn't. Isn't it true that EPA has complete discretion over accepting or denying those requests, over accepting or denying that money and that request to take up any certain chemical?

Mr. JONES. That is correct, and as I mentioned, we are also limited under the bill to only 15 percent of all priorities can come from that stream. We have complete discretion in how we determine what the priority is.

Senator VITTER. And to go directly to Senator Markey's question, isn't it true that when EPA takes up a chemical through this particular route, that in fact the preemption rules are different? And in fact, States can act while you are studying the chemical, completely contrary to what Senator Markey said, until EPA makes a final decision?

Mr. JONES. That is correct. For chemicals that come in through that venue, the preemption rules are different.

Senator VITTER. So for that particular path, the rules are different and more allowing of the State regulations to continue?

Mr. JONES. Yes.

Senator VITTER. Let me go to this issue of the 25 chemicals over so many years. I want to very clear, so everyone is clear, that is a minimum, that is a floor, correct?

Mr. JONES. What we are statutorily required to do, yes.

Senator VITTER. Yes. And in fact, the Udall-Vitter bill gives EPA more authority, correct?

Mr. JONES. We can do more, yes, it does.

Senator VITTER. And the Vitter-Udall bill gives EPA more resources through user fees, correct?

Mr. JONES. Yes.

Senator VITTER. And it gives EPA more resources through this route of chemical companies being able to supplement your budget, even though you retain all the control, is that correct?

Mr. JONES. That is correct.

Senator VITTER. So obviously, if you zoom past 25, if you get to 40, if you go past 40, there is no ceiling, there is nothing in the law preventing you from doing that?

Mr. JONES. No ceiling.

Senator VITTER. And then a final comment, which is simply that, we are talking about this in the context of environmental regulation, we are the environmental committee. But I would suggest this bill is at least as similar, maybe more similar to product regulation when the Federal Government regulates products in commerce. Because these chemicals go into products in commerce. So I think we need to have the preemption discussion in that context. I think when we do, you see that these sorts of rules are the norm and not the exception.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Mr. Jones. We appreciate your very straightforward way of answering the questions. You are excused.

We would ask the next panel to come forward. Because of the timing, we are going to ask you to try to abbreviate your statements as you see fit. And then we will change and have 5-minute rounds for questions instead of six.

While they are being seated, let me tell everyone who is here. Ken Cook is President and Co-Founder of the Environmental Working Group. Brian Frosh is Attorney General of the State of Maryland, he has been referred to several times. Dr. Lynn Goldman is Dean of Public Health, Milken Institute School of Public Health, George Washington University. Dr. Edward McCabe is Senior Vice President and Chief Medical Officer of the March of Dimes Foundation. And Dr. Richard Denison is the Lead Senior Scientist of the Environmental Defense Fund.

We will have 5-minute opening statements, if they can be abbreviated we would appreciate it. We will start with Mr. Cook and work the other way.

#### **STATEMENT OF KEN COOK, PRESIDENT AND CO-FOUNDER, ENVIRONMENTAL WORKING GROUP**

Mr. COOK. Mr. Chairman, Ranking Member Boxer, thank you very much. I want to thank everyone on the committee for holding this critically important hearing.

Congress has not sent a major Federal environmental protection law to the President's desk for signature in 19 years. It will be 19 years this summer, to be exact, when we saw President Clinton, in the space of a couple of months, sign landmark amendments to the

Safe Drinking Water Act and put into law a new reform system for pesticide policy. Nineteen years ago, and that was it.

We have decades of passing major Federal environmental regulation and law that preceded that. But I think we all know that if it came down to it, not a single one of those landmark laws would pass this Congress today. Not a one. We celebrated 50 years of the Wilderness Act last fall. Now, probably most people in this room have been in a wilderness that was protected under that law. Does anyone remotely believe that we could pass the Wilderness Act today? No.

And the reason is that in the past, we have seen environmental law and regulation come about because of advances in science, public support, engagement of both parties, and both parties acting through bipartisanship in the service of environmental protection and public health, and not the other way around.

Today, much as we salute the advances that have been made and the engagement that has happened, we still look at an end product, the bill before us today, that is severely flawed. I would ask that my testimony in its entirety that goes into detail including on matters such as preemption be entered into the record.

But I want to focus on two particular issues.

Senator INHOFE. Let me interrupt you and say all testimony, written testimony, will be a part of the record. Go ahead.

Mr. COOK. Thank you, Mr. Chairman.

Let me talk about a couple of broad issues in the context of constituents you might encounter as you meet with them in a town hall meeting talking about this bill. Let's talk first about perhaps a cancer survivor, maybe parents like Trevor Shaffer's parents, who are asking you a very simple question: under the proposal, under this safety standard in this proposal, how will you treat known human carcinogens? Known human carcinogens that every agency in the world knows causes cancer?

And the safety standard answer will be as we just heard from Mr. Jones, well, we are going to try something new. We are going to try something that has never been tested. We are going to try unreasonable risk as the standard against which we will determine whether or not carcinogens will be regulated.

Now, we heard Mr. Jones say that it will be up to the agency to determine that. And we read in the New York Times this morning that the tougher, preferable standard, superior standard, would be reasonable certainty of no harm, for which we do have regulatory history. It has regulated thousands and thousands of pesticides that are on the market today. They weren't all banned by that standard. It is just not a standard that the chemical industry wants. Because when it really works is when you have a dangerous chemical, a known human carcinogen. When you have an agent that causes birth defects, when you have an agent that causes serious neural developmental harm, that is when that standard comes in and is most important to have.

The next person in line talking to you about this is perhaps someone who is pregnant, starting a family. I have a 7-year old. I have had people in that line come up to me. And what they are going to ask you is, this little baby is going to be coming into the world here in just a few months. And I am worried about all these

chemicals that studies have shown, including Environmental Working Group studies, have shown. That baby has already been exposed to hundreds and hundreds of toxic chemicals in the womb.

Tell me, what is the pace we can expect of dealing with these toxic chemicals under this particular legislative proposal?

The answer will be, well, we think we will get to it in 100 years or so, get through this first list of 1,000 or maybe more, maybe 100 years. Now, constituents may not be surprised that it will take Washington 100 years to do anything. But when someone who is pregnant is asking you that question, what you are essentially telling them is, when you add up all these issues, you add up the money issues, the notion that there are people in Congress who want to put their "boot on the neck" of the Environmental Protection Agency. There are concerns about goals and deadlines, we have heard them very well expressed here by many of the questions today.

Senator INHOFE. Mr. Cook, you are over your time. Will you conclude, please?

Mr. COOK. I am sorry. I apologize, Mr. Chairman. I will stop right there.

[The prepared statement of Mr. Cook follows:]



**Testimony of Kenneth Cook  
President  
Environmental Working Group**

**On**

**S. 697**

**Before the Senate Committee on Environment and Public Works**

**March 18, 2015**

Thank you for the opportunity to testify. My name is Kenneth Cook and I am the President and co-founder of Environmental Working Group.

Congress hasn't sent a major, comprehensive environmental protection law to the president's desk for signature since 1996 – nineteen years ago this summer, to be exact, when Congress made landmark reforms to the safe drinking water and pesticide laws.

Dozens of bedrock environmental laws were enacted in the preceding 30 years as science revealed more and more ways in which human activity was harming nature and people alike. The development of those laws was driven by scientific advances, overwhelming public support and environmental advocates and organizations determined to clean up America's air and water and safeguard human health from toxic pollution.

It's a good thing for all of us that those laws were enacted when they were. Every one of them began as a "pie in the sky" response to a grave environmental problem – polluted air, rivers, tap water, land. And not a single one of those bedrock laws could be enacted by Congress today.

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The ongoing stalemate in U.S. environmental lawmaking represents a handsome return on investment for a wide range of industries and corporations whose processes and products pollute the environment and threaten human health. They have invested heavily in lobbyists, political contributions and campaign ads to block any new legislation that protects our planet and our health.

Now we may see polluting industries reap the ultimate payoff from their decades of political investments.

It is possible that the first major, comprehensive environmental protection bill to emerge from Congress in almost a generation will be one that originated in the chemical industry – the very industry the bill purports to regulate.

The driving motivation behind this bill is not to protect American workers and families from the thousands of chemicals those companies make, and which scientists find in all of us, including in newborns' umbilical cord blood.<sup>1</sup>

No, this bill has been introduced to protect chemical companies from the backlash and mistrust they themselves have engendered among consumers, responsible companies and legislators in dozens of states. If you want to better understand some of the underlying reasons for this mistrust, I urge you to look at the chemical industry documents EWG has collected and made available to the public.<sup>2</sup> There, you can read in the chemical industry's own words about efforts to hide the truth about harmful chemicals and to derail efforts to raise awareness about, and guard against, harmful exposures. Consider, for example, the devastation chemical pollution has caused in communities such as Anniston, Ala., Parkersburg, W.Va., Bhopal, India, and elsewhere.

<sup>1</sup> EWG, *Body Burden: The Pollution in Newborns* (2005), <http://www.ewg.org/reports/bodyburden2/execsumm.php>; see also App. A (list of chemicals detected in cord blood monitoring studies nationally).

<sup>2</sup> EWG, *Chemical Industry Archives* (2002), <http://www.chemicalindustryarchives.org>; see also App. B (sample of chemical industry documents).

That backlash has been intensified by federal inaction – the combination of a weak law passed in 1976 and the chemical industry’s opposition to every effort to strengthen it to protect human health and the environment.

While it is not true of every member of Congress, it is true that Congress, as an institution, is ultimately responsible for this TSCA stalemate. As a consequence, literally hundreds of thousands of people have died, unnecessarily, from exposure to just one TSCA-regulated substance – asbestos.

Congress after Congress has sat by and watched as this human tragedy unfolded – as companies knowingly exposed workers, their wives, their families and the communities in which they live to that deadly substance. Congress sat by as those same companies lied about the exposure and its dangers and fought every effort to prevent its victims – those struck down and their surviving loved ones – from receiving any meaningful justice or protection.

That alone would be a terrible legacy for Congress to redress. But there are dozens of other chemicals that present elements of that same story that have unfolded over the past 40 years of neglect – and continue to unfold today. The lobbyists for those chemicals are well represented in the room.

Reform of the Toxic Substances Control Act must directly and aggressively take on this tragic health and environmental heritage. That’s what those of us from the environmental wing of the environmental movement resolutely believe. In that spirit, I come here today to strongly oppose S. 697.

Simply put, S. 697 will not ensure that chemicals are safe, will not mandate that EPA quickly review and act to protect human health from the most dangerous chemicals, will not provide EPA the resources needed to conduct badly needed chemical safety reviews, and will not preserve a meaningful role in chemical regulation for the states. By simultaneously and substantially removing the ability of states to regulate “high priority” chemicals and failing to

provide EPA with firm deadlines, adequate resources and a proven, unambiguous safety standard, S. 697 would *actually weaken* the Toxic Substances Control Act – a law so broken that EPA could not even ban asbestos.

In particular, S. 697 would not require that chemicals regulated under TSCA are as safe as the chemicals used in and on food, that is, that chemicals pose a “reasonable certainty of no harm.” Instead, S. 697 continues to allow chemicals to be used so long as they pose “no *unreasonable* risk of harm” to people and the environment.<sup>3</sup> As more than 20 law professors, legal scholars and public interest lawyers noted this week, the standard proposed in S. 697 is deeply problematic because it fails to give EPA clear authority to ban or restrict dangerous substances.<sup>4</sup> By contrast, S. 725 would require chemical manufacturers to demonstrate that their products pose a “reasonable certainty of no harm,” a more robust, proven, health-based safety standard that clearly excludes consideration of cost from the determination of safety.

As they consider the importance of the safety standard, committee members should have one word in the forefront of their thinking: cancer.

The “reasonable certainty of no harm” standard has an established regulatory history at EPA for chemical carcinogens. In the context of pesticides, EPA applies the standard to ensure that a chemical cannot pose more than a 1-in-100,000 to 1-in-1,000,000 risk of developing cancer over a lifetime of exposure. While we do not always agree with EPA’s risk assessments of chemical carcinogens, “reasonable certainty of no harm” remains the strongest health standard to date for cancer regulation in federal environmental law.

It has been suggested that “reasonable certainty of no harm” is appropriate for pesticides, but not for TSCA-regulated chemicals, because “pesticides are designed to kill.” Indeed they are. But

<sup>3</sup> The safety standard purports to exclude consideration of costs when evaluating whether a chemical meets the safety standard and removes from current law the requirement that EPA adopt the “least burdensome” alternative to regulating a chemical. Importantly, however, it retains the term of art “unreasonable risk,” which has been interpreted by courts as requiring a careful balancing of costs and benefits. Therefore, the combination of “unreasonable risk” in the safety standard, along with other provisions in the bill that demand onerous consideration of costs and benefits, see § 8 of S. 697 (amending §§ 6(d)(4)(A)-(B), 6(d)(5)(D) of TSCA), raise serious concerns about the effectiveness of this standard from a public health perspective.

<sup>4</sup> See App. C (copy of letter).

some TSCA chemicals to which your constituents may be unwittingly exposed are every bit as dangerous for many people exposed to them. The known human carcinogens asbestos and formaldehyde come to mind, along with many TSCA chemicals associated with serious non-cancer effects: They are neurotoxic or known to cause birth defects or disruption of the endocrine system that produces hormones in our bodies.

**It is for those most dangerous chemicals that a tough, clear and tested TSCA safety standard is most needed.** We would anticipate that the majority of TSCA-regulated chemicals would not be placed in acute regulatory jeopardy by the “reasonable certainty of no harm” standard, either because those chemicals are not sufficiently toxic, people are not significantly exposed, or some combination of those two risk considerations.

After all, literally thousands of pesticide uses are approved for use right now by EPA under the “reasonable certainty of no harm” standard, despite the fact that, as has been noted, those chemicals are indeed designed to kill. At the same time, dangerous pesticides *have* been banned or restricted under that standard, as were chemicals used in food over decades of previous regulatory application by the FDA. In regulatory interpretation, it is not a perfect standard. Yet “reasonable certainty of no harm” is simply the strongest public health standard in environmental law. It would help us ensure that chemicals that end up in our kids are at least as safe as pesticides.

Still, we can understand why the chemical industry would oppose the adoption of the “reasonable certainty of no harm” safety standard for TSCA regulation. **The most dangerous chemicals – known human carcinogens, highly neurotoxic chemicals, chemicals linked to birth defects – would be much less likely to escape regulation under “reasonable certainty of no harm,” compared to a standard rooted in “unreasonable risk.”**

By contrast, we have strong reason to believe that even the most dangerous industrial chemicals in the world might continue to be loosely regulated or unregulated threats to Americans’ health under the untested, less protective standard in S. 697.

S. 697 would establish a modified version of the famously failed safety standard in TSCA, again rooted in “no unreasonable risk of harm.” How would the standard in S. 697 deal with known human carcinogens regulated by TSCA that end up in Americans, in some cases before they’ve left the womb? We are left to guess.

If the underlying standard turns out to be weak or pliable when applied to truly dangerous chemicals – and we fear that it would – it will hardly matter if the EPA administrator identifies a “potentially exposed or susceptible population” as “relevant to the safety assessment and safety determination” of a TSCA chemical. If the harm done to those “populations” is not an “unreasonable risk,” it will not be unreasonable to risk their continued toxic exposures.

Along those same industry-favoring lines, S. 697 would not mandate accelerated reviews of the most dangerous chemicals already in commerce and, in many cases, already in people. Instead, S. 697 would only require that 25 high priority chemical reviews *be underway* within five years of enactment. It sets no deadline for implementation of any new chemical restriction. Each chemical review could take up to seven years, and S. 697 provides only \$18 million a year in industry revenue to help pay the program’s costs.<sup>5</sup> Under this proposal, EPA could take *a century or more* to review the most dangerous chemicals in commerce.<sup>6</sup>

By contrast, S. 725 would require review of asbestos within three years of enactment, require review of all chemicals that persist in the environment and build up in our bodies within four

<sup>5</sup> Moreover, instead of expediting the review of asbestos or extremely dangerous chemicals that persist in the environment and build up in people, S. 697 would allow manufacturers to obtain fast-tracked reviews of their favored chemicals for a fee. See § 6 of S. 697 (establishing § 4A(c)).

<sup>6</sup> Testifying last year before the U.S. House of Representatives Energy and Commerce Committee Subcommittee on Environment and the Economy, EPA Assistant Administrator Jim Jones said that about 1,000 chemicals had exhibited hazardous properties, were now in use and should receive EPA review. See The Chemicals in Commerce Act: Hearing Before Subcomm. on Env’t & Econ. of H. Comm. on Energy & Commerce, 113th Cong. (2014) (statement of Jim Jones, Assistant Adm’r, U.S. Envtl. Prot. Agency), <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg90983/html/CHRG-113hhrg90983.htm>. Yet S. 697 would require that safety assessments of just 25 chemicals be underway in the first five years after passage. Because each review could take up to seven years, only reviews of these 25 chemicals would have to be completed in the first 12 years after passage. For every review completed, only one chemical would have to be added to the high-priority list for review. At this pace, if S. 697 passes as written, it could take centuries to go through 1,000 chemicals.

years and require that review of 75 high-priority chemicals be underway within five years. In addition, S. 725 provides clear deadlines for review and for implementation of chemical restrictions, and provides sufficient industry revenue to ensure that these reviews and restrictions are quickly and *actually* completed *and* implemented.

S. 697 also creates new obstacles to regulating products made from dangerous chemicals, ignores the impact of chemical spills on fence-line communities,<sup>7</sup> fails to help communities detect cancer clusters<sup>8</sup> and weakens EPA's ability to intercept dangerous imports. Under S. 697, EPA would have to make a separate determination of "significant exposure" before it could, for example, regulate a couch containing flame retardants that harm the endocrine system, or regulate building materials treated with formaldehyde, a known Group 1 carcinogen. By contrast, S. 725 places no restrictions on EPA's ability to regulate both the chemical *and* the couch. What's more, S. 725 explicitly requires EPA consideration of chemical spills, such as the Elk River spill in West Virginia, creates a new program to track cancer clusters and preserves EPA tools to ban dangerous imports.

S. 697 also retains many of the legal obstacles that stymied EPA's efforts to ban asbestos more than two decades ago. In addition to continuing the use of "no unreasonable risk of harm" as the safety standard, S. 697 explicitly requires a cost-benefit analysis for a chemical ban or phase-out and retains the heightened "substantial evidence" standard of judicial review.<sup>9</sup> Simply put, TSCA legislation that fails to clear away all of the major hurdles that prevented EPA from banning asbestos does not deserve the support of Congress.

<sup>7</sup> S. 697 fails to explicitly include unintended chemical spills in the scope of the "conditions of use" to be considered when assessing the safety of a chemical. Furthermore, the bill's definition of "potentially exposed or susceptible population" does not explicitly protect fence-line communities. About 10,000 tons of chemicals are spilled every year in the U.S. The communities that bear the brunt of the harm from these events must be ensured greater protection.

<sup>8</sup> In contrast, S. 725 provides EPA with the authority to work with other federal, state and local agencies, as well as with educational institutions, to investigate and address the causes of disease clusters. §§ 201-07, 301-02 of S. 725.

<sup>9</sup> Although other EPA regulations are subject to the more deferential "arbitrary and capricious" standard of judicial review, actions taken to regulate chemicals pursuant to EPA's authority under TSCA are reviewed under the heightened "substantial evidence" standard. The Fifth Circuit relied on this heightened level of scrutiny when it examined and largely rejected EPA's rule banning asbestos. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1213-14 (5th Cir. 1991).

S. 697 also establishes a troubling new “safe” list of “low priority” chemicals that EPA deems “likely to meet” the safety standard. Similar “safe lists” have been attacked for allowing dangerous chemicals into our food.<sup>10</sup> But unlike similar “safe” lists for food chemicals, the “low priority” list envisioned by S. 697 would not be subject to judicial review.

Finally, S. 697 proposes a radical new version of preemption that restricts state efforts by: 1, preempting state action on any chemical designated as “high priority” by EPA; 2, blocking state co-enforcement of EPA rules; 3, limiting regulation under state environmental and public health statutes; and 4, eviscerating a state’s ability to set more protective standards than EPA’s. Though states could still regulate some chemicals, they would be required to notify EPA of their intention to do so.

States have been the only cops on the beat in recent decades. Since *Corrosion Proof Fittings*, the Fifth Circuit opinion that prevented EPA from banning asbestos, 33 states have acted to protect us from dangerous substances, including lead, cadmium, mercury, formaldehyde and phthalates.<sup>11</sup> Many states have created programs to review and regulate chemicals and many more are currently considering legislation to do so. The expertise, capacity and regulatory commitment of the states should be leveraged to complement EPA, as they have throughout the history of federal environmental law, not stymied or extinguished.

Under S. 697, however, states would be blocked from regulating a chemical once EPA begins to study a “high priority” chemical, not when EPA actually implements a rule restricting a chemical, as current law provides and is typically the case for regulatory action. This radical new version of preemption would not only rob the states of the ability to complement EPA action on

<sup>10</sup> See generally NRDC, *Generally Recognized as Secret: Chemicals Added to Food in the United States* (2014), <http://www.nrdc.org/food/files/safety-loop-hole-for-chemicals-in-food-report.pdf>; The Pew Charitable Trusts, *Fixing the Oversight of Chemicals Added to our Food: Findings and Recommendations of Pew’s Assessment of the U.S. Food Additives Program* (2013), <http://www.pewtrusts.org/en/research-and-analysis/reports/2013/11/07/fixing-the-oversight-of-chemicals-added-to-our-food>.

<sup>11</sup> See Mary Ellen Kustin & Melanie Benesh, *States Lead the Way on Dangerous Chemicals*, EWG enviroblog (Mar. 9, 2015), <http://www.ewg.org/enviroblog/2015/03/states-lead-way-dangerous-chemicals>.

chemicals but would also set a dangerous new precedent that could affect laws related to everything from environmental protection to worker safety. It must be rejected.

Thank you for opportunity to testify. EWG strongly oppose S. 697 and urges this Committee to support real reform of our broken chemical safety laws.

Responses by Ken Cook to Additional Questions  
from Senator Vitter

1. What is the primary Federal law responsible for controlling the release of pollutants into the air?
2. What is the primary Federal law responsible for controlling the release of pollutants to waters of the US?
3. What is the primary Federal law responsible for controlling the release of hazardous materials to the soil?
4. What is the primary Federal law responsible for ensuring safe drinking water supplies?
5. What is the primary Federal law responsible for the safety of consumer goods?
6. What is the primary Federal law responsible for regulating the safety of food and food contact material?
7. Under the laws identified in questions 1 through 6, do states have unrestricted authority to regulate?
8. Can you point to the specific language in S. 697 that prevents EPA from accelerating a chemical review or regulation of any chemical that poses an unreasonable risk?
9. Can you point to the specific language in S. 697 that would restrain the number of high priority chemicals EPA could identify or the restrain the number of safety assessments and determinations EPA can be working on at any given time?
10. Do you agree with EPA that there is a maximum number of chemicals they will be able to consider in a given year or is it your view that the Agency can simply add new high priority chemicals into the system exponentially and in perpetuity unlike current TSCA or any other program administered by either the EPA or any other federal agency?
11. Mr. Cook, the failure of EPA to ban asbestos has been the primary example used by your group and others as to why TSCA reform is so badly needed. In the almost 25 years since EPA's proposed ban of asbestos was struck down in the courts, can you please tell me how many states have completely banned all forms of asbestos? Please name the states and share with the committee a detailed analysis of the complete bans and how they keep citizens safe from asbestos exposures in the absence of federal action.

**Answer to Questions 1 – 7 and 11 from Senator Vitter:**

Under federal environmental, safety and public laws, states possess varying degrees of authority to protect consumers and the environment, including the authority to set standards that exceed federal standards. Any steps taken to modernize TSCA should preserve a role for the states. In the absence of federal leadership, states have led efforts to protect consumers from dangerous chemicals. Although states have not yet banned asbestos, state action has not only protected citizens in these states from many harmful chemicals – including mercury, cadmium, lead and formaldehyde – it has also driven product reformulations that benefit consumers nationally. I have attached an EWG report on state efforts.



## STATES LEAD THE WAY

Feds Should Use – Not Lose – Help From States To Protect People

by Mary Ellen Kustin, Senior Policy Analyst and Melanie Benesh, Stable Law Fellow

States are leading the way when it comes to protecting people from dangerous chemicals. And it's a good thing, because the federal Toxic Substances Control Act, on the books since President Ford signed it into law, is broken.

This statute is so dysfunctional that only five of the tens of thousands of chemicals in commerce have been restricted under its authority.

To fill the regulatory gap, 33 state governments have taken action to protect their citizens from well-known hazardous chemicals such as **BPA**, **formaldehyde**, **lead**, **mercury** and **flame retardants**. Many of the state laws take children's health into special consideration when banning toxic chemicals from consumer goods like toys, baby bottles, sippy cups and children's jewelry.

But a chemical **industry-backed bill** being offered by Sens. David Vitter (R-La.) and Tom Udall (D-N.M.) would block states from taking new actions to regulate chemicals that the U.S. Environmental Protection Agency has designated high priority.

**Maine**, **Vermont** and **California** grant their state agencies authority to give priority to chemicals of concern and to regulate those chemicals in products. Both Maine and Vermont focus on children's products. Lawmakers in **New York**, **Oregon** and **Washington** are considering legislation to grant their state agencies similar authorities. The California Attorney General's office recently sent a **letter** to Washington asserting that the industry bill might undermine the state's ability to protect Californians from toxic chemicals.

Of greatest concern, the letter said, was that the industry bill would prevent state authorities in California (and elsewhere) from regulating "high priority chemicals" years before federal regulations could take effect. The industry bill would also prevent states from passing laws to supplement and co-enforce federal regulations once they're on the books, even though states commonly do so under other environmental and consumer protection statutes.

In some instances, the industry bill would undercut states' abilities to protect people through other environmental laws, such as those meant to protect air and water.

True TSCA reform should give priority to human health over industry interests. Because states have played a pivotal role in recent years in taking actions to protect public health, TSCA reform must maintain a role for states to regulate dangerous chemicals and must preserve states' capacity to supplement the work of the federal government.



## At Stake in the Senate TSCA Fight: The Fate of Asbestos

By Tina Sigurdson, Staff Attorney and Alex Formuzis, VP for Strategic Campaigns, EWG Action Fund

Many Americans probably believe asbestos was banned years ago, consigned to the trash bin of history, never to be seen again. Not so. This notorious human carcinogen is still legal for use in the U.S.

In 1989, during the administration of President George H.W. Bush, the federal Environmental Protection Agency attempted to ban asbestos, but its efforts were thwarted. EPA's attempted ban grew out of a 10-year, \$10 million study that generated 100,000 pages of evidence.

The industry went to court and succeeded in blocking the ban. In 1991 the U.S. Court of Appeals for the Fifth Circuit threw out most parts of EPA's regulation, on grounds that the federal Toxic Substances Control Act of 1976 says EPA must prove that a ban is the "least burdensome alternative" for controlling the public's exposure to the "unreasonable risks" posed by asbestos.

Today, the nation faces two alternatives for reforming the broken federal chemicals law—a chemical industry-backed bill proposed by Sens. Tom Udall (D-N.M.) and David Vitter (R-La.), or a bill proposed by Sens. Barbara Boxer (D-Calif.) and Ed Markey (D-Mass.) backed by the majority of the environmental and public health groups.

As the U.S. Senate considers these two measures, the key question is, would this bill ensure that EPA could ban asbestos, even in the face of legal challenges from industry? Any proposal that does not lay the groundwork for a ban is wholly inadequate. If a "chemical safety" bill leaves any uncertainty as to whether EPA can protect Americans from a known killer like asbestos that has devastated tens of thousands of families for decades, what will it do to keep any other chemicals of concern out of our bodies and the bodies of our children?

The fate of any new effort to ban asbestos depends on how courts apply a combination of three parts of TSCA: the safety standard, a weighing of the costs and benefits of protecting public health, and the judicial standard of review.

Here are the scenarios we anticipate under each bill:

### 1. Safety Standard:

**Industry bill:** This bill uses a modified version of the "unreasonable risk" safety standard in current law. This term has already been interpreted in the courts to mean that some risks are *reasonable* and not worth preventing. But the industry bill also says regulators should not consider any question other than the health hazards of asbestos. How would courts interpret these conflicting instructions? We don't know.

**Boxer-Markey Bill:** The Boxer-Markey bill says the safety standard should be "reasonable certainty of no harm." This is the same standard EPA applies to pesticides on fruits and vegetables. Unlike the industry-backed bill, which proposes an untested and unpredictable new safety standard, the "reasonable certainty of no harm" standard would ensure that EPA's focus is where it belongs, squarely on the health risks of asbestos.



## 2. Costs and Benefits:

**Industry bill:** This bill sets up a series of hurdles in the form of calculations EPA would have to make before banning asbestos or anything else. The agency would have to weigh the costs and benefits of a ban, including the costs and benefits of alternatives to asbestos. Then it would have to calculate the costs and benefits of at least one alternative regulatory scheme. Because the industry bill's "unreasonable risk" standard could be interpreted to mean that some risks are acceptable, a court could end up forcing EPA to issue a regulation restricting asbestos but not banning it entirely, even though that option wouldn't save as many lives.

The requirement in current law, which was applied in the case that struck down the 1989 asbestos ban, is that EPA must use the "least burdensome" means of addressing risk. This is a very onerous type of cost-benefit analysis. Although the industry bill improves upon this requirement by removing the "least burdensome" language, the bill does not resolve the problem of factoring in costs instead of focusing on human health. It is the bill's untested safety standard and the required cost-benefit analysis of addressing that "unreasonable risk" to different degrees, operating together, that are problematic for public health.

**Boxer-Markey bill:** This proposal would require a cost-benefit analysis only for rules that would cost industry \$100 million or more. The EPA would need to consider alternatives less sweeping than a ban only if other regulatory actions would also meet the safety standard of "reasonable certainty of no harm." Since scientists have concluded that any exposure to asbestos, no matter how small or brief, can cause cancer, a court would most likely find that nothing short of a ban can solve the nation's asbestos problem.

## 3. Standard of Review:

**Industry bill:** In 1991, when the chemical industry won the court fight and overturned EPA's ban of asbestos, it had an unusually strict standard of judicial review on its side. The "standard of review" is a federal statute's instruction to the court on how closely to scrutinize an agency's decision-making process. It tells the court how much evidence the agency must provide to back up its decision and how much to defer to the agency's reasoning as the expert on the subject at hand. The TSCA law says that courts must throw out any EPA rule "not supported by substantial evidence in the rulemaking record." The court that struck down EPA's asbestos ban said in its decision that this "substantial evidence" standard "imposes a considerable burden on the agency." *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1214 (5th Cir. 1991). This burden made it harder for EPA to defend its asbestos ban in court and ultimately contributed to its failure.

**Boxer-Markey bill:** The Boxer-Markey bill would replace the "substantial evidence" standard with a more common standard, called "arbitrary and capricious" review, which means a court can reject only those decisions that the agency did not make rationally or that resulted from an abuse in the agency's discretion. In effect, this standard tells the court to apply less intense scrutiny to EPA's decision-making process and defer to the agency's expertise when it comes to chemicals and public health.

### The bottom line:

The Udall-Vitter bill, blessed by the chemical industry, fails to fully eliminate the legal obstacles that prevented EPA from banning asbestos. It could generate wasteful, expensive and time-consuming litigation that would distract EPA from its real work to protect public health.

In contrast, the Boxer-Markey proposal would make it possible for the EPA to make an asbestos ban stick. It would do much to bring the decades-long American asbestos epidemic to an end.

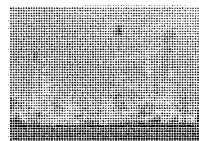


## Toxic Ambiguity: The Dangerous Mixed Messages of the Udall-Vitter Bill to Reform TSCA

April 15, 2015

by **Lisa Heinzerling**, Justice William J. Brennan, Jr., Professor of Law, Georgetown University Law Center

Most would agree that the Toxic Substances Control Act (TSCA) is one of our least effective federal environmental laws. It is a welcome development, then, that Congress has begun seriously to consider legislation to reform this statute. However, a prominent TSCA reform bill now circulating in Congress – the **Frank R. Lautenberg Chemical Safety for the 21st Century Act**, sponsored by Tom Udall and David Vitter – may stymie meaningful federal regulation of chemicals while preempting the state laws that have stepped into the breach opened by the failure of TSCA. This would leave us even worse off than we are today.



It is common ground among experts in the law of toxic substances control that a major reason for the failure of TSCA is the paralyzing effect of a 1991 federal court decision – ***Corrosion Proof Fittings v. EPA*** – invalidating the Environmental Protection Agency's ban on asbestos. There, the court piled on stifling analytical requirements as prerequisites for regulatory action on toxic chemicals and applied strikingly strict scrutiny to EPA's evaluation of the costs and benefits of banning asbestos. So large does this decision loom in the failed history of TSCA that any law aiming to reform TSCA will almost certainly be viewed with close attention to how the law purports to change the features of TSCA that spelled doom for EPA's ban on asbestos in ***Corrosion Proof Fittings***.

Here is the rub: In two significant respects, the Udall-Vitter bill does not change the features of TSCA that undid EPA's asbestos ban. The bill retains the same overall formulation of the safety standard to be achieved (protection against "unreasonable risks") and the same standard for judicial review ("substantial evidence") that together brought down the ban on asbestos. To retain these features of TSCA even though they proved so damaging in the litigation over asbestos is to signal that the Udall-Vitter formula for TSCA reform is not so reformative after all.

For the safety standard, the Udall-Vitter bill pairs a standard of "no unreasonable risk of harm to health or the environment" with an instruction to EPA not to consider "cost or other nonrisk factors" in determining whether a risk is "unreasonable." For many years, **courts have interpreted "unreasonable," when used in health, safety and environmental statutes, to permit a balancing of costs and benefits.** It is thus confusing to pair the term "unreasonable risk" with an injunction not to consider costs and other factors besides risk. Yet the Udall-Vitter bill does not provide further clarity; it nowhere defines "unreasonable risk."

Legal confusion has consequences. When a statute is ambiguous, courts will defer to an agency's reasonable interpretation of that statute. The juxtaposition of language signaling a desire for cost-benefit balancing and language signaling a hostility to such balancing may be unclear enough to allow the EPA ultimately to exercise its discretion to choose which approach – cost-benefit balancing or no cost-benefit balancing – to adopt. Whatever EPA's present inclinations in this regard might be, there is no guarantee they will remain fixed in future administrations.

What is guaranteed, however, is that ambiguity will encourage time- and resource-consuming litigation, and the outcome of such litigation is not assured. In ***Corrosion Proof Fittings***, the court struck down EPA's ban on asbestos largely in reliance on a difference of opinion between the EPA and the court about the "unreasonableness" of the risks posed by asbestos. If, in the face of this infamous precedent, Congress again chooses to describe the safety standard in terms of "unreasonable risk," a court may well conclude that Congress must not have meant wholly to reject the standard that helped scotch the ban on asbestos.

The reason why it is important not to inject cost-benefit analysis into chemical safety determinations is that this analysis **skews systematically against protective chemical regulation.** The benefits of chemical safety – in better health, longer lives and a cleaner environment – are especially difficult to quantify and monetize. The benefits of chemical safety, moreover, tend to

surface years into the future when the long-latency diseases – such as cancer – that are toxic chemicals' calling cards begin to appear. As cost-benefit analysis is commonly conducted, however, regulatory benefits occurring in the future are discounted back to the date on which regulation producing those benefits is put in place. Such discounting drastically shrinks future benefits, often to the point of triviality. In failing clearly to rule out the restrictive cost-benefit metric, even in the initial determination of whether a chemical is unacceptably risky, the Udall-Vitter bill threatens to continue the federal government's long incapacity on chemical safety.

Beyond cost-benefit analysis, there are many other ways to understand "unreasonableness" that would severely limit the regulation of chemical risks. One could specify a high numerical level of risk (1 in 1,000, say) as the threshold for unreasonableness. One could, alternatively, stipulate that a risk is unreasonable only if consumers already indicate a willingness to take steps to avoid the risk. Or one could hold that a risk is not unreasonable if it is no greater than risks citizens often take in their daily lives, such as driving automobiles. Even short of a cost-benefit standard, the language of "unreasonable risk," without further elaboration from Congress, could unduly hamper protective safety standards for toxic chemicals.

A second feature of the Udall-Vitter bill that bodes poorly for its effectiveness is the standard of review the courts would be directed to use in reviewing EPA's rules under the law. The standard of review is basically an instruction to courts about how forgiving or grudging they should be in evaluating agencies' regulatory work. The two predominant standards applied to contemporary agency rules are "arbitrary and capricious" and "substantial evidence." Mystifyingly, the Udall-Vitter bill opts to retain the latter standard – present in TSCA now – in the reform bill. It was this very standard that helped to embolden the court of appeals to overturn EPA's ban on asbestos. Retention of the standard of review that was used to overturn the asbestos ban could easily be viewed as an endorsement of the heady-eyed scrutiny the court applied in *Corrosion Proof Fittings*.

In overturning the asbestos ban, the court explicitly called out the difference between the "arbitrary and capricious" and "substantial evidence" standards in supporting its ruling. In the intervening years, the Supreme Court has done nothing to clear up confusion generated by differing approaches among the federal courts of appeal to the relationship between these standards of review. In its one reference to the differing signals from the lower courts, in *Dickinson v. Zurko*, the Supreme Court pointedly declined to take a stand in the debate.

To the extent these standards of review are different, it is widely understood that the substantial evidence standard gives courts a freer hand in challenging an agency's judgments. The license to second guess an agency's judgments is especially threatening to rules on chemical safety, which almost inevitably take place in settings rife with scientific uncertainty. In fact, the D.C. Circuit recently highlighted the challenges of applying the substantial evidence standard of review to regulations "rooted in inferences from complex scientific and factual data." For these reasons, the choice of a standard of review for a reformed TSCA, no matter how abstruse it might sound, is a policy choice of great significance.

The Udall-Vitter bill's idiosyncratic use of the terminology of "unreasonable risk" (to indicate something other than cost-benefit balancing) and "substantial evidence" (to indicate, perhaps, arbitrary-and-capricious review) will sow needless confusion. And the inevitable companions of confusion in the law are enlarged agency discretion, regulatory uncertainty and unpredictable litigation. Combining an unpredictable safety standard and a strict standard of review with the preemption of state laws on chemical safety may well produce the worst of all possible worlds: "reform" that undoes the only meaningful chemical safety regimes now in place in this country and replaces them with a program that may well produce no progress at all.

**Answer to Questions 8-10 from Senator Vitter:**

While S. 697 would not prohibit EPA from accelerating or increasing the number of reviews, S. 697 fails to provide EPA with adequate resources to quickly review the chemicals EPA has identified as needing urgent attention. As currently drafted, EPA would not complete review of these chemicals for *more than a century*. We urge the Committee to ensure that EPA has the mandate and the resources to quickly review and regulate the most dangerous chemicals in commerce.

Responses by Ken Cook to Additional Questions  
from Senator Boxer

1. Mr. Cook, in 1989, EPA tried to ban asbestos under its TSCA authority, but industry successfully overturned the ban in court. The term in the Vitter-Udall bill that is used to define what is meant by “safe” contains the same core language that was the subject of that litigation. Do you believe that the use of this same core language that has already been the subject of litigation would increase the likelihood that EPA would be sued in the future? Do you agree that special effort should be made to avoid using terms that are likely to increase the risk of litigation?

**Answer to Question 1 from Senator Boxer:**

As Mr. Jones testified, S. 697 creates an ambiguous and untested safety standard that would invite judicial gap filling. I have attached two recent analyses that underscore the failure of S. 697 to address the challenges facing EPA regulation of asbestos and other dangerous chemical in the wake of *Corrosion Proof Fittings*.

2. Mr. Cook, in 1989, EPA tried to ban asbestos under its TSCA authority, but industry successfully overturned the ban in court. Asbestos is already banned in 54 countries, and exposure to it kills 10,000 Americans each year. But under this bill, EPA would have to spend years studying this known danger again before it could propose a ban or other restriction on its use. Mr. Cook, do you think the bill should be modified to allow EPA to move directly to propose a safety regulation for asbestos?

**Answer to Question 2 from Senator Boxer**

Congress must create an expedited path to ban asbestos. Unlike S. 697, S. 725 would require quick consideration of asbestos and would remove all of the key legal hurdles that frustrated earlier EPA efforts to ban asbestos. In particular, S. 725 would allow EPA to forgo the “balancing” of costs and benefits required by the “no reasonable risk of injury” standard, eliminate the requirement to adopt the “least burdensome” alternatives, and would no longer subject EPA rules to the heightened “substantial evidence” standard of judicial review.

Senator INHOFE. You will have ample opportunity in response to questions.

Mr. COOK. Thank you, Mr. Chairman.

Senator INHOFE. General Frosh

**STATEMENT OF HON. BRIAN E. FROSH, ATTORNEY  
GENERAL, STATE OF MARYLAND**

Mr. FROSH. Thank you very much, Chairman Inhofe and Ranking Member Boxer, members of the committee. It is an honor for me to be here with you. It is a special honor to be here with my Senator, Senator Ben Cardin. It is always a pleasure to work with you.

I want to thank all the members of the committee for your commitment to updating the Toxic Substances Control Act. There is widespread agreement that this Act needs an overhaul. It is not protecting our constituents, it is not protecting them from exposure to toxic chemicals as it should. Reform is needed. But that reform must be built on a platform of meaningful protections for the public. And I am here today to ask you not to interfere with States' rights, the rights of States specifically to protect their citizens from toxic substances, from poison.

As a State attorney general, and Senator Markey referred to me and my colleagues as the cops on the beat, I am deeply concerned that S. 697 would abandon the model of cooperative federalism that characterizes other Federal environmental laws and has characterized the relationship between States and the Federal Government for four decades under TSCA. It essentially puts the States out of business of protecting their people from poison.

The preemption provisions that are built into this legislation tie the hands of States at nearly every turn. Among these, there is a prohibition on new State chemical restrictions from the moment EPA begins the process of considering regulation of high priority chemicals. It is a plain fact that the bill itself allows this EPA review period to last as long as 7 years. That doesn't account for procrastination, sloth or litigation.

Let's say it is only 7 years. Let's say we are talking about a toxic chemical that is 7 years with no Federal regulation, 7 years during which no State can take action regardless of how dangerous, how toxic, how poisonous a chemical is, regardless of its impact on men, women or children.

Seems to me the legislation has got the priorities upside down. If a chemical is dangerous, we should be acting as quickly as we can to protect our people. If the Federal Government cannot act swiftly and it may have come to your attention that it usually does not, States ought to be able to fill the void. States have done a good job of identifying threats to their citizens, and some, including Maryland, have passed laws that shield their people from toxic chemicals.

The laboratories of democracy, as Justice Brandeis called the States, have been out in front of Congress, out front of the EPA and I think to the great benefit of our entire Nation. In Maryland, we passed laws to protect infants and children from ingesting bisphenol A, BPA. So have many other States. If you looked at EPA's website this morning, you will see the EPA acknowledges

that it is a reproductive, developmental and systemic toxic in animal studies. EPA is studying it.

Washington and Oregon restrict flame retardants like DECA BDE. Iowa restricts packaging containing lead, cadmium, mercury, hexavalent chromium. You don't want your kids chewing on this stuff. Maine, New York, California, many other States have enacted laws that protect their citizens from toxics. We are talking about chemicals that cause chronic diseases, respiratory ailments, cancer, birth defects and death.

Usually, when the Federal Government preempts the States, it is because you say to us, we got this. We are regulating this. You don't need to worry about it. This legislation preempts the States before the Federal Government takes action. It is not, we got your back, it is, we are going to think about it. You sit back.

I think we share the same objective. No one wants people to get poisoned. We all want an economy that is robust and healthy as well. State governments do a pretty good job. I ask that you respect their judgment. Respect the rights of States to protect their citizens. Let us continue to work cooperatively to prevent harm to people we serve. Fix TSCA. But do no harm. Don't preempt the States. Allow us to continue to guard the health and safety of our citizens and protect them from toxic chemicals.

Thank you very much.

[The prepared statement of Mr. Frosh follows:]

BRIAN E. FROSH  
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Testimony of Brian Frosh  
Attorney General, State of Maryland

Before the  
United States Senate  
Committee on Environment and Public Works

March 18, 2015

Chairman Inhofe, Ranking Member Boxer and members of the Committee, I appreciate the opportunity to testify today on efforts to reform the Toxic Substances Control Act (TSCA). Few disagree that TSCA has done an inadequate job protecting the public from exposure to untested and damaging toxic chemicals. TSCA reform is needed, but the changes must ensure that any reform includes meaningful protections. Unfortunately, S. 697 includes the near evisceration of state authority to regulate toxic chemicals and fails to achieve TSCA's intended goals.

As a state attorney general, I am deeply concerned that the bill would diverge from the model of cooperative federalism – where the role of states, including state attorneys general, in protecting the health and welfare of their residents, is respected even as the federal government sets a floor for action. We employ this model in many other contexts of environmental protection, and it works. I do not understand how this legislation brings us closer to the health and safety protections that the public deserves.

I served as a state legislator for 28 years. I have sponsored and supported many laws that protect the health and safety of Maryland residents, including laws that protect the public from toxic substances. I have also served on a variety of federal and state commissions, committees, and taskforces charged with protecting the environment and restoring the Chesapeake Bay to health. In Maryland, we have passed laws to protect babies from ingesting BPA and to guard our residents from brominated flame retardants. We have banned the manufacture and sale of lead-containing children's products, and we restrict the cadmium content in children's jewelry.

I understand the tensions that are inevitable in any federal-state partnership. But the legislation before you is at odds with the effective, cooperative federalism that characterizes every other federal environmental law, and with the cooperation that has persisted for four decades with respect to TSCA. Currently, TSCA states unequivocally that in the absence of a rule or order promulgated by the EPA

nothing in this chapter shall affect the authority of any State or political subdivision of a State to establish or continue in effect regulation of any chemical substance, mixture, or article containing a chemical substance or mixture.

15 U.S.C. §2917(a)

Second, it provides that even if EPA manages to adopt control requirements as to a chemical substance or mixture under TSCA, states may still (i) enact identical requirements, to assume the role of co-enforcers, (ii) adopt requirements under the authority of other federal laws, or (iii) ban the use of such substance or mixture – other than its use in the manufacture or processing of other substances. 15 U.S.C. §2917(a)(2)(B). And, where the states wish to provide their residents with a “significantly higher degree of protection” from the risks *for any reason*, they may apply for an exemption so long as the state’s requirement would not cause the manufacturer to violate a federal requirement and would not unduly burden interstate commerce. 15 U.S.C. § 2617(b).

As members of this Committee know well, many major environmental statutes provide that states may apply for delegation to implement permitting and other regulatory programs. Once they receive such delegations, states must maintain programs that comply with federal guidance, except that they may also choose to go further to provide more stringent protections for their residents.<sup>1</sup>

S. 697 imposes a tangled web of preemption that ties states' hands at nearly every turn. This also provides fodder for litigation challenges where states dare to navigate that web. Perhaps the most obvious example of this expansion of preemption is the prohibition on new state chemicals restrictions from the moment EPA "commences" the long and arduous process of considering whether to regulate a "high priority" chemical.<sup>2</sup> During this process, likely to last 7 years or more, for a chemical that EPA's screening has identified as a "high priority," S. 697 imposes a regulatory freeze in any state not fortunate enough to have enacted restrictions previously. Equally vexing, anytime a state even "proposes" a new statute or administrative action, it must report its proposal to EPA, setting in motion a screening process that could very well lead to preemption before the state has time to see its proposal through to fruition. S. 697, § 4A(b)(9). Such a restriction does not enhance the protection of the public health or serve the goals of TSCA.

Another pernicious expansion of preemption is the removal of the ability of states to enact restrictions on high priority chemicals that are *identical* to any of those eventually adopted by EPA. Why is this important? Because such "mirror image" statutes can empower the states to fill the

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<sup>1</sup> See, e.g., the provisions authorizing delegation of federal authority to regulate hazardous air pollution: "A program submitted by a State under this subsection may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emissions standards and prevention requirements but shall not include authority to set standards less stringent than those promulgated by the Administrator under this chapter." 42 U.S.C. §7412(l).

<sup>2</sup> "No State or political subdivision of a State may establish (after the date of enactment of the Frank R. Lautenberg Chemical Safety for the 21st Century Act) a statute or administrative action prohibiting or restricting the manufacture, processing, distribution in commerce or use of a chemical substance that is a high-priority substance designated under section 4A, as of the date on which the Administrator commences a safety assessment." S. 697, § 18(b).

role of co-enforcers of EPA's standards. Allowing for the enactment of identical state statutes treats states as partners and enables the civil servants and prosecutors in states to do their part to protect the health and environment of their residents. Across the spectrum of federal environmental statutes, the preemption provisions routinely preserve this authority for states – without question and without any requirement for the federal agency to grant a waiver or engage in a rulemaking exercise. The divergence from the longstanding policy enshrined in existing TSCA would set a dangerous precedent in federal environmental law.

Within this web of preemption, some will point to openings for state authority which they will claim answer the concerns of states like mine. But, as several attorneys general have written, we have grave concerns that those openings will prove illusory. Thus, for example, one provision of the bill preserves “any action taken before January 1, 2015, under the authority of a State law...” S. 697, § 18(e)(1)(A). Even assuming that “action” includes the adoption of regulations, will the state be able to enforce those pre-Act regulations after EPA has established its own rule with respect to high priority chemicals? Section 18(a)(1)(B)'s preemption of continued enforcement of state statutes or administrative actions would seem to imply not. This raises the question whether section 18(e)(1)(A) is just an illusion. Another “opening” for states that some have pointed to are the waiver provisions in section 18(f). Here, the cited provisions come with a curious twist, a requirement that the state requesting the waiver show that “compelling state or local conditions warrant the waiver to protect health or the environment.” S. 697, § 18(f)(1)(A)(i) and (B)(i). This additional requirement is unduly burdensome. Moreover, it places the EPA administrator, who has already concluded her safety determination and come to a different conclusion, in a position of having to say she “got it wrong” at least as to the state or locality seeking the waiver. This

hardly seems like the “opening” that most environmental waiver provisions provide, where it suffices for a state to show that it is being more protective and not unduly burdening commerce.

Quite apart from the impact these changes will have on the federal-state partnership, the legislative record thus far lacks any concrete example of unjustifiable harm suffered by chemical manufacturers as a result of state activity under this law. For the most part, the states have given EPA ample room to implement the law, acting only when their residents are able to convince state legislators that one or a handful of admittedly toxic chemicals are causing potential threats to public health, especially the health of vulnerable groups like children and the elderly. No innocent chemical has been condemned, much less outlawed. In fact, the manufacturers’ real complaint appears to be that consumer pressure in the marketplace has forced changes in the use of chemicals like bisphenol-A (BPA), a plasticizer thought to cause harmful disruption of the endocrine systems of fetuses, babies, and small children.

I am a pragmatist, and I understand the desire to cut a deal with the chemical industry that will allow this 40-year-old law to be updated. What I do not understand is how the evisceration of state authority is a fair deal.

In conclusion, my state shares the goal of this Committee in reforming the Toxic Substances Control Act. The federal government should set standards for the safety of chemicals. However, whatever action you take should also recognize the long-standing role of states in working cooperatively with the federal government. I hope you will let states continue to protect the health and safety of their residents. I thank you for the opportunity to testify before this Committee.

Responses by Brian E. Frosh to Additional Questions  
from Senator Boxer

1. **Your testimony said that the Vitter-Udall bill imposes a tangled web of preemption that ties states' hands at nearly every turn. In particular, you highlight your concern that states are preempted at the moment EPA "commences the long and arduous process of considering whether to regulate a chemical." What will the impact be on the citizens of Maryland and the country if states if are prohibited from acting on dangerous chemicals while EPA studies the chemical for seven years or more?**

The short answer is that the public will be exposed to dangerous toxins for years while awaiting EPA action. Under S. 697, states would be preempted from imposing any new restrictions on a high-priority chemical once EPA starts its safety assessment. S. 697 allows up to seven years between a chemical's high-priority designation and its federal restriction – a period during which states are denied the ability to restrict the chemical in order to protect the health of their citizens and the environment. And history suggests that additional, unauthorized delays will indeed occur.

Thus, even though EPA would have designated a chemical as high-priority under proposed § 4A(b)(3) because it has the "potential for high hazard or widespread exposure," states would not be able to protect their citizens and environment from that chemical even though any federal restrictions on it are likely years away.

For example, Congress amended TSCA in July 2010 to add specific formaldehyde standards for composite wood products. Congress directed EPA, "[n]ot later than January 1, 2013," to promulgate regulations to implement the standards. 15 U.S.C § 2697(d)(1). Presently, EPA anticipates promulgating the regulations by December 2015. *See Formaldehyde Emission Standards for Composite Wood Products*, Env'tl. Prot. Agency, <http://www2.epa.gov/formaldehyde/formaldehyde-emission-standards-composite-wood-products/#proposedrule> (last visited April 15, 2015).

2. **The Vitter-Udall bill prohibits States from enacting and enforcing chemical safety standards that are identical to the ones set by EPA. Your testimony says that this "would set a dangerous precedent in federal environmental law." Can you explain the consequences of not allowing States to uncover and stop violations of standards designed to protect Americans against toxic chemicals? If there is no co-enforcement, there are fewer cops on the beat, who stands to gain from less enforcement of environmental protections? Could you please describe how the states supplement and complement federal efforts to regulate the safety of chemicals? Could you please provide examples of enforcement actions that have been taken by states' attorneys general to address violations of state or federal laws concerning toxic chemicals? Please also describe how state co enforcement can**

**complement federal enforcement efforts.**

The consequence of not allowing states to uncover and stop violations of toxic chemical standards is simply that more Americans, including children, and more of our environment will suffer the health or other harmful consequences of toxic chemical exposure.

I do not believe anyone would gain from a statutory prohibition on state co-enforcement. On first blush, it might appear that companies that use or sell toxic chemicals might benefit from a bar on state action that would lead to fewer TSCA enforcement actions. But in the long run I think that those companies would not benefit, for at least two reasons. First, failure to enforce would lead to additional toxic ingestion or contamination incidents, and when those incidents come to light, they would lead to distrust of the companies and industries involved, to renewed efforts to make TSCA restrictions more stringent, and to additional civil lawsuits. Second, the families of people working in those companies suffer the same health and environmental consequences of toxic chemical misuse as other Americans, so any benefit in reduced compliance expenditures or increased profit would come at a human cost.

States have a broad toolbox that they can use to supplement and complement federal efforts to address chemical safety. Those tools include state statutes, state regulations, state administrative orders, state consent orders, state policy guidance, and state purchasing policies. In the absence of preemption, each of these tools can be used to address toxics problems that EPA has not, for whatever reason, addressed.

Due to the short time allotted for responding to these questions, I have not done a comprehensive search for actions by state attorneys general or other state agencies to enforce state toxic chemical laws, but I do provide the following examples:

Toxic Jewelry

California's Metal-Containing Jewelry Law prohibits the manufacture and sale of any jewelry in California containing excess levels of lead, and also, in the case of children's jewelry, cadmium. The California Attorney General and state Department of Toxic Substances Control have over the last three years sued and obtained judgments against nearly 20 jewelry importers and wholesalers over unlawful sales of noncompliant jewelry. These actions resulted in the immediate removal of at least 350 tainted styles of jewelry from the market, and injunctions that require companies to take additional steps to prevent the sale of noncompliant jewelry.

In 2007, the New York Attorney General, acting pursuant to a variety of state statutes that protect children from dangerous products, entered into an assurance of discontinuance with Michaels Stores regarding its sale of children's jewelry containing lead. (The state did not file an action in court, because Michaels agreed to take various

steps to stop the sales of such products.) New York entered into similar assurances of discontinuance with another chain, Big Lot Stores, a regional chain, and a number of local retailers. These case resolutions resulted in merchandise changes not only in New York, but also in Arizona, California, Georgia and New Jersey because of the location of the companies targeted.

#### Toxic Toys

In 2008, the Massachusetts, New York, and other Attorneys General brought an action against Mattel for alleged sale of toys with lead paint in excess of applicable state standards and obtained a consent judgment barring this sales practice.

#### Toxic Packaging

Under the California Toxics in Packaging Prevention Act, major clothing retailer Forever 21, Inc. entered a settlement in which it agreed to pay substantial penalties and costs to resolve allegations that the retailer had acquired and used plastic bags that failed to meet the Act's restrictions on certain metals, including lead. According to the Toxics in Packaging Clearinghouse, California is one of nineteen states with statutes that restrict the use of heavy metals in product packaging.

#### Mercury in Discarded Consumer Products

California's Mercury Thermostat Collection Act of 2008 requires manufacturers to establish a collection and recycling program for out-of-service mercury-added thermostats. The state's Department of Toxic Substances Control is currently in administrative enforcement negotiations with 31 manufacturers who failed to meet the state's collection goals by April 2014. Such actions protect the environment from pollution associated with improper disposal of mercury-containing devices.

#### Protection from Lead in Plumbing

In 2006-2008, California enacted laws that increase public protection from exposure to lead in drinking water by limiting the amount of lead allowed in certain plumbing components. The state's recent reports, sampling and analysis provide a roadmap for future enforcement by state and local health authorities against products identified as noncompliant.

I am at present unaware of efforts by state attorneys general to enforce federal toxic chemical laws, even as duplicated in state law, but that is likely because TSCA as currently in effect has provided little protection against toxic chemical harms to enforce. Even so, as the examples above show, state enforcement action under state law has been an effective supplement and complement to federal action.

3. **States often plan an important role in reducing the risk of toxic chemicals. Could you please provide examples where actions taken by one or more states to reduce the risks of toxic chemicals have been followed by similar action by the federal government? Could you please provide examples where actions taken by one or more states to reduce the risks of toxic chemicals have resulted in companies taking action to remove such chemicals from their products, to the benefit of residents of the state(s) taking action and other states?**

There is a long history of state action on toxic chemicals serving as a spur to federal action. 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. 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.

As for situations where state action has led companies to remove toxic chemicals from their products, I have identified some examples in my response to the previous question, and add the following two examples:

- Because of California's action, manufacturers of children's bounce houses have started using low-lead vinyl, which had previously used lead-containing vinyl that through touch and breathing of dust, exposed children to lead.
- Because of California's action manufacturers of wood used in children's outdoor play structures have ceased using inorganic arsenic – a carcinogen and potent poison – that leached out of the wood and exposed children who touched it or breathed dust from the aging wood.

4. **What examples from federal environmental or product laws would you recommend the Committee consider in deciding whether to change the current balance between preservation and preemption of state authority in the Toxic Substances Control Act?**

Several key principles of federal/state power-sharing are embodied in existing federal environmental and product laws. Each is worthy of inclusion in any revised TSCA, as follows:

- States should be authorized to exceed federal substantive standards to create more health- and environmentally protective laws within their jurisdictions (as under the Clean Water Act and FIFRA). If states are to be at all constrained in this regard, the most they should be required to show is that state regulations (1) will confer a higher degree of protection, and (2) will not unduly burden interstate commerce as under the Consumer Product Safety Act and existing TSCA.

- States should be allowed to wholly ban particular chemicals and uses within their borders as under FIFRA and existing TSCA.
- States should be allowed to exceed federal substantive standards with respect to any chemical substance for any products purchased *for a state's own use* (i.e., as a market-participant), as under the Consumer Product Safety Act (*see* 15 U.S.C. § 2075(b)).
- States should be able to enforce all federal standards in federal court (as under the Consumer Product Safety Act and existing TSCA), and should also be able to adopt laws enforceable in state court that mirror federal standards (as under existing TSCA, and the nonprescription drug portion of the Food, Drug and Cosmetics Act (*see* 21 U.S.C. § 379(r)(f)).
- To the extent any federal preemption of state authority is contemplated, it should never occur prior to the effective date of a corresponding federal regulation, as under the Consumer Product Safety Act (*see* 15 U.S.C. § 2075(a)).

**5. Could you please provide examples where U.S. EPA has not met a statutory deadline for final agency action?**

EPA has a well-documented history of not meeting statutory deadlines. In a recent study, the Government Accountability Office noted that of 32 major rules EPA promulgated between May 31, 2008 and June 1, 2013, nine – or approximately 28 percent – were promulgated after the relevant deadline. GAO, *Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking Is Limited* 9, 11 (Dec. 2014), available at <http://www.gao.gov/assets/670/667533.pdf>.

I have not performed exhaustive research, but here are a number of specific, mostly recent, examples of EPA failures to meet statutory deadlines, including one under TSCA:

- EPA failure to meet deadline to promulgate regulations regarding formaldehyde standards under TSCA. *See* 15 U.S.C. § 2697(d)(1) (January 1, 2013 deadline). *See Formaldehyde Emission Standards for Composite Wood Products*, Env'tl. Prot. Agency, <http://www2.epa.gov/formaldehyde/formaldehyde-emission-standards-composite-wood-products#proposedrule> (last visited April 15, 2015) (EPA currently anticipating promulgation by December 2015).
- EPA failure to meet deadline for review of new source performance standards. Partial Consent Decree, *New York v. McCarthy*, No. 13-1555 (GK) (D.D.C. July 7, 2014).
- EPA failure to meet deadline to complete five-year review of National Ambient Air Quality Standards. Consent Decree, *American Lung Ass'n v. EPA*, No. 1:12-cv-00243-RLW (D.D.C. June 15, 2012).

- EPA failure to meet deadline to designate areas as attainment or nonattainment. *NRDC v. EPA*, 777 F.3d 456, 461-62 (D.C. Cir. 2014).
- EPA failure to meet deadline to grant or deny permit application. *Sierra Club v. EPA*, 762 F.3d 971, 973 (9th Cir. 2014).
- Repeated EPA failures to meet deadline to promulgate renewable fuel standards. *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 911 (D.C. Cir. 2014); *National Petrochemical & Refiners' Ass'n v. EPA*, 630 F.3d 145, 152 (D.C. Cir. 2010); see also Erin Voegelé, API, *AFPM Sue EPA over RFS delays*, Biomass Magazine (Mar. 20, 2015) available at <http://biomassmagazine.com/articles/11695/api-afpm-sue-epa-over-rfs-delays> (describing complaint filed by industry groups alleging “multi-year trend of ‘disregarding statutory deadlines’”).
- EPA failure to meet deadline to promulgate standards for hazardous air pollutants. *Sierra Club v. EPA*, 699 F.3d 530, 532 (D.C. Cir. 2012).
- EPA failure to meet deadline to approve or disapprove revision to state implementation plan. *Texas v. EPA*, 690 F.3d 670, 676 (5th Cir. 2012).
- EPA failure to meet deadline to promulgate federal implementation plan. *Montana Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174, 1182, 1190 (9th Cir. 2012).
- Repeated EPA failures to meet deadlines to promulgate procurement guidance documents. *National Recycling Coalition, Inc. v. Browner*, 984 F.2d 1243, 1245 (D.C. Cir. 1993).
- EPA failure to meet deadline to promulgate radionuclide emissions standards. *NRDC v. Reilly*, 976 F.2d 36, 37-38 (D.C. Cir. 1992).

There are no doubt additional examples, recent as well as older. While not excusing EPA for these delays, my belief is that one of the causes of EPA’s frequent inability to meet statutory deadlines is inadequate funding, and I am unaware of any provision of S. 697 that would permanently and comprehensively address that issue as regards EPA’s TSCA responsibilities.

## Statewide chemical-related restrictions in Maryland

Statewide restrictions on products containing specific chemicals have been enacted by legislation. The following table lists statutory restrictions currently in effect in Maryland. The table does not include all lead-specific restrictions.

Chemical ban or restriction	Authority	Effective Date of Restriction	Responsible agency (Where specified)
<b>Toxics in packaging</b> Prohibition of packaging to which lead, cadmium, mercury, or hexavalent chromium has been added	Md. Code Ann., Environment §§9-1901-1907	1993	MDE
<b>Mercuric oxide batteries</b> Disposal of mercuric oxide batteries prohibited unless as part of a Department-approved plan for recycling and/or disposal	Md. Code Ann., Environment §§6-901-903	1994	MDE
<b>Sale of methyl methacrylate liquid monomer</b> Prohibition of sale of methyl methacrylate liquid monomer to beauty salons	Md. Code Ann., Health-General §24-303	2000	DHMH
<b>Mercury in schools</b> Prohibition of use or purchase of elemental or chemical mercury in primary or secondary classrooms	Md. Code Ann., Environment §6-906	2003	
<b>Mercury thermometers</b> Prohibition of sale of mercury fever thermometers to consumers	Md. Code Ann., Environment §6-905.1	2004	
<b>Mercury-containing thermostats and mercury-added products</b> Prohibition of sale of thermostats containing mercury to consumers; prohibition of sale of mercury-added products (dyes or pigments, electric switches, fluorescent lamps) to retailers unless labeled	Md. Code Ann., Environment §§6-905.2 & 905.3	2006 (mercury-added products)  2007 (mercury-containing thermostats)	

## Statewide chemical-related restrictions in Maryland

<b>Brominated flame retardants</b> Prohibition of new products or flame-retardant parts of new products that contain more than one-tenth of 1% of pentabrominated diphenyl ether or octabrominated diphenyl ether by mass	Md. Code Ann., Environment §6-1202	2008	MDE
<b>Lead-containing children's products</b> Prohibition of manufacture, sale, or distribution of lead-containing children's products (as defined in the statute)	Md. Code Ann., Environment §§6-1301-1311	2008	MDE
<b>Mercury vehicle switches</b> Mercury minimization plan; collection and handling of mercury vehicle switches	Md. Code Ann., Environment §§6-905.4 & 905.5	2009	MDE
<b>Brominated flame retardants</b> Prohibition of certain products that contain more than one-tenth of 1% of decabrominated diphenyl ether by mass (effective December 2010: mattresses, residential upholstered furniture, and electrical/electronic equipment; effective December 2012: all products except transportation equipment, military equipment, or their components; effective December 2013: all products)	Md. Code Ann., Environment §6-1202.1	2010, 2012	MDE
<b>Cadmium in children's jewelry</b> Prohibition of manufacture, sale, or distribution of children's jewelry that contains cadmium at more than 0.0075% by weight	Md. Code Ann., Environment §§6-1401-1404	2012	
<b>TCEP in child care products</b> Prohibition of import or sale of child care products containing more than one-tenth of 1% of tris (2-chloroethyl) phosphate (TCEP) by mass; statute contains option for suspension of implementation if certain findings are made	Md. Code Ann., Health-General §24-306	2013	DHMH
<b>Child care articles and formula containing bisphenol-A</b> Prohibition of State purchase of infant formula in containers containing more	Md. Code Ann., Health-General §24-304	2012 (child care articles)	DHMH

## Statewide chemical-related restrictions in Maryland

than 0.5 parts per billion of bisphenol-A; prohibition of manufacture, sale, or distribution of: containers of infant formula containing more than 0.5 parts per billion of bisphenol-A; requirement for use of a safe and legal alternative when replacing bisphenol-A; statute contains option for suspension of implementation if a certain finding(s) is made		2014 (formula)	
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may petition for judicial review of a low-priority designation contrary to the state's recommendation.

- c. **Does S. 697 impose any barrier to a state regulating a chemical substance designated by EPA as a low priority?**

Yes. Insofar as even proposed state regulation of a low priority chemical triggers both a requirement for states to notify EPA, and a requirement for EPA to conduct a prioritization screening, there is substantial risk that EPA might upon notification redesignate such a chemical as high priority, commence a risk assessment, and thereby immediately preempt state regulation. This notification-and-screening mechanism may itself have a chilling effect on state agencies and legislatures.

- d. **Can you explain what legal theory a state might seek to protect in seeking judicial review of a low priority designation?**

I cannot predict what legal theories other states might choose in future litigation, and any theories contemplated by my office would be protected Work Product prior to initiation of litigation.

- e. **As Attorney General, would you recommend Maryland take EPA to court over a low priority designation or advise the State to take action on their own?**

I cannot speculate about potential future legal actions, or theorize about privileged legal advice I might give to state agency clients in the future.

19. **TSCA today contains a preemption provision as well as a waiver process. Under that provision, actions by EPA, such as Significant New Use Rules, have preemptive effect.**

- a. **In the years since TSCA was enacted in 1976, how many states have availed themselves of the waiver provision?**

This question is better suited for EPA, as Maryland is not the recipient of waiver applications from all 50 states nationwide. However, the historic dearth of EPA Section 6 chemical restrictions in the wake of the *Corrosion Proof Fittings* decisions has meant that the question of state waivers under present TSCA has been largely academic. There have been very few federal restrictions on chemical substances, so there is correspondingly little that states would need a waiver from.

- b. **Has MD ever applied for a TSCA waiver?**

The response for #15 and #19b are effectively the same. I am not aware of Maryland applying for such a waiver.

I note, however, that proposed section 4A(a)(2)(B) anticipates that EPA would make initial designations of high- or low-priority status for at least 20 chemicals within 180 days of the date of enactment. In addition, proposed section 4A(a)(3)(B)(ii) requires that EPA complete a priority determination within 90 days after the receipt of certain information regarding a chemical substance. Accordingly, it appears that the bill contemplates a fairly quick priority determination process, particularly once relevant information has been provided to EPA, as would likely be the case when EPA was considering redesignation under proposed section 4A(b)(8) after state notification pursuant to proposed section 4A(b)(9).

- b. Would that amount of time really preclude a state from taking the fast, urgent action that you posit is needed?**

If indeed the statute contemplates redesignation within 90 or 180 days, and EPA in fact completes redesignation in that time, then states in some cases might be able to take administrative action before the redesignation occurs. But in some cases, state administrative action could take longer than the redesignation process, for example, issuance of a new regulation may require a public comment period that makes it impossible to finalize the regulation that quickly.

- c. Can states fully participate in the notice and comment opportunities provided under S. 697?**

My analysis of S. 697 has not disclosed any apparent obstacle to the states participating in notice and comment procedures under the bill.

- 18. Under S. 697, a prioritization determination by EPA is discretionary and EPA need not re-designate just because a state is taking action. If EPA finds a chemical to be low priority, S. 697 requires that EPA have had sufficient information to make that affirmative determination.**

- a. Under S. 697, can states recommend that EPA prioritize a substance as a high priority?**

Yes.

- b. Does S. 697 provide a state an opportunity to seek judicial review of an EPA decision contrary to the state's recommendation?**

Proposed section 18(f)(7) authorizes judicial review of an EPA decision "on a recommendation made under section 4A(b)(4) to designate a chemical as low priority" but proposed section 4A(b)(4) does not refer to state recommendations. It may be that this reference should be changed to section 4A(a)(4)(A). In that case, S. 697 appears to provide that a state

may obtain a waiver for an existing statute or administrative action upon a showing of "compelling State or local conditions," among other things. Under subsection 18(f)(1)(B)(i), a state may obtain a waiver for a new statute or administrative action upon a showing of "compelling local interest," among other things.

It is not clear what difference is intended between "compelling State and local conditions" and a "compelling local interest." In either case, the risks to human health or the environment are generally likely to be similar from one state to another, particularly for consumer products. A toddler nibbling on a lead-laden toy in Maryland suffers the same harm as a toddler nibbling on the same toy in Oklahoma. Nor do I see any reason for such a prerequisite for waivers. I note that federal statutes such as the Clean Air Act and the Clean Water Act allow the states to impose more stringent requirements than under federal law without any need to obtain a waiver.

In addition, states would not be able to obtain a waiver under any circumstances after EPA had determined a chemical to satisfy the safety standard, even if there were particular state or local conditions that warranted regulation in a particular state or region.

While from the perspective of the states the existing TSCA waiver provision may not be ideal, I do not understand why there is any need to impose more stringent limitations on the availability of waivers, as S. 697 would do, given the important role states play in toxic chemical regulation.

17. **Some have alleged that the S. 697 requirement that states simply notify EPA if they take action to regulate a low- (or no-) priority chemical will force EPA to automatically re-designate the chemical as high priority subjecting it to a safety assessment and the accompanying regulatory "pause."**

- a. **Based on your review of S. 697 and the federal administrative process, how long would it take EPA to re-designate a chemical and then commence the safety assessment process?**

It is my understanding that some have expressed concern that EPA might redesignate some chemicals from low priority to high priority upon state notification, but I do not know whether anyone has contended that EPA will automatically redesignate such chemicals upon state notification.

In any event, I am unable to estimate how long EPA's redesignation process would take, especially given that the designation and redesignation procedures in S. 697 are new and at present untested. I would respectfully suggest that the Committee address this question to EPA Assistant Administrator Jim Jones, who would have more knowledge of and experience with EPA rulemaking processes.

alterations to foods, drugs, and cosmetics:

- Chemical identity and composition;
- Conditions of its proposed use;
- Physical or other technical effect of the substance or additive and the quantity of the substance or additive that is required to produce the effect;
- Probable composition of substances that might be formed in the product as a result of the substance or additive;
- Probable amount that would be consumed in the average human diet;
- Safety factors that, in the opinion of qualified experts, are appropriate for use of animal experiment information;
- Availability of analytic methods; and
- Other relevant factors.

**13. How many of the State's prohibitions or restrictions are currently preempted, or arguably preempted, by EPA action under current TSCA?**

Given the short time allotted to respond, exhaustive analysis of the issues raised by this question was not possible. That said, I can point to only one chemical restriction in Maryland that has any overlap with a chemical currently restricted under TSCA §§ 5 or 6, which is for hexavalent chromium (Md. Code Ann., Envir., §§ 9-1902). MD's ban relates to its use in packaging, while EPA's ban relates to its use in commercial cooling towers. The significant difference between the regulatory targets of U.S. EPA and State of Maryland restrictions on hexavalent chromium suggest that, under existing Section 18(a)(2)(B) of TSCA, the Maryland restriction would not be preempted. That said, the language in this section of TSCA is sufficiently untested that I cannot rule out the possibility that a person might argue that the Maryland restriction is preempted.

**14. Has any prohibition or restriction on chemical substances adopted by the State of Maryland been the subject of enforcement action in which preemption by a federal decision was raised as a defense?**

Notwithstanding the short time allotted to fully research this question, I am not aware of any.

**15. Has the State of Maryland ever applied for a waiver of preemption under current TSCA or any other federal law?**

I am not aware of Maryland ever applying for a waiver of preemption under TSCA.

**16. Does S. 697 permit states to apply for waiver from the preemptive effect of TSCA decisions?**

Proposed section 18(f) of S. 697 permits states to apply for waiver of preemption but it could be difficult to satisfy. Under proposed section 18(f)(1)(A)(i), a state

regulation under Section 4, 5 or 6, and the Administrator has not commenced a safety assessment of that chemical substance. This latter provision of S. 697 would preempt states from establishing regulations as to chemical substances that are wholly unregulated by TSCA. This preemption of states during the multi-year period between commencement of a safety assessment and the effective date of a federal rule creates a harmful regulatory void.

8. **Does S. 697 allow a state to regulate uses of a chemical substance not within the scope of a safety assessment or determination after a chemical substance has been labeled a high priority? What about after a safety determination has been made?**

Yes.

9. **Assume that under S. 697 EPA has 20 chemical substances in the safety assessment and determination process. How many other chemical substances are potentially the subject of assessment and possible regulation by the State of Maryland?**

This question is unanswerable, particularly because it is wholly unbounded as to time frame, and therefore asks about intended Maryland actions into the infinite future.

10. **Your Facebook entry (<https://www.facebook.com/BrianFrosh>) indicates a belief that Maryland is on "the leading edge" of chemical regulation. How many prohibitions or restrictions on chemical substances has the State of Maryland enacted in the last 10 years? Please describe the prohibitions or restrictions and in particular, note if they have been broad regulations covering many different uses of the chemical substances or narrow dealing with specific uses?**

Please see the attached table.

11. **Does the State of Maryland apply a risk-based approach to chemical regulation?**

Maryland applies a risk based approach to cleanup of chemicals released or spilled into the environment. However, the Maryland Department of the Environment typically defers to EPA (Office of Pollution Prevention and Toxics) and FDA to evaluate the toxicological properties, pharmacokinetic properties, and fate and transport of chemicals produced/manufactured, imported, and utilized within the State.

12. **What scientific standard does the State of Maryland apply in chemical regulation?**

The Maryland Department of the Environment defers to TSCA scientific standards with regard to chemical regulation.

The Maryland Department of Health and Mental Hygiene does not have a formal process to evaluate chemical safety. In general, DHMH would use a risk-based approach to decisions regarding chemicals in consumer products. For example, in the [Md. Code Ann., Health-General 21-239(e),] the Secretary uses the following criteria to evaluate proposed

(vi) any food, food additive, drug, cosmetic, or device (as such terms are defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. § 321)) when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic, or device.

The term "food" as used in clause (vi) of this subparagraph includes poultry and poultry products (as defined in sections 4(e) and 4(f) of the Poultry Products Inspection Act [21 U.S.C. 453 (e), (f)]), meat and meat food products (as defined in section 1(j) of the Federal Meat Inspection Act [21 U.S.C. § 601 (j)]), and eggs and egg products (as defined in section 4 of the Egg Products Inspection Act [21 U.S.C. § 1033]).

15 U.S.C.A. § 2602 (West 2012)

**c. Is "poison" a term defined under TSCA?**

No.

**d. Are you familiar with the federal Poison Prevention Packaging Act and State laws on Poison Control Centers?**

Yes.

**4. How many chemicals are currently on the TSCA Inventory?**

The number of chemicals on the TSCA inventory is constantly in flux; this is a question that EPA would be better suited to answer.

**5. How many chemicals are periodically reported to EPA under the Chemical Data Reporting Rule?**

This is likewise a question that EPA would be better suited to answer.

**6. Does S. 697 impose a limit on the number of chemicals EPA can review in any given year?**

S. 697 does not impose an upper limit on the number of chemicals that EPA can review in any given year, which will presumably be driven by agency priorities and resource capacity. Rather, the bill mandates that EPA evaluate a modest number of chemicals in the three years after enactment (20 high-priority substances, and enough substances to designate an additional 20 as low priority).

**7. Does S. 697 allow a state to regulate any chemical substance not subject to a safety assessment, or not regulated under Sections 4, 5 or 6?**

Yes. S. 697 would allow states to establish regulations only if there is an absence of federal

products, among others – permits states substantial room to regulate pesticides used in interstate commerce. Additional federal statutes, such as the Consumer Product Safety Act (as amended by the Consumer Product Safety Improvement Act), also permit states to regulate products used in interstate commerce, although not in an entirely “unrestricted” manner. In marked contrast to the structure of S. 697, however, any limitations on state regulation are imposed only where a federal agency has *already controlled* the hazard that motivated the regulation in the first place. *See, e.g.*, Consumer Product Safety Improvement Act, 15 U.S.C. § 2075(a)(2012) (stating that state regulations may only be preempted once “a consumer product safety standards under this Act *is in effect*.” (emphasis added).

**3. In response to questions at the March 18, 2015 hearing regarding the preemption provisions of S.B. 697, you stated that “States should be able to regulate poisons.”**

**a. Are chemical substances under TSCA the equivalent of “poisons”?**

The Merriam Webster Dictionary defines toxic as follows: “containing or being poisonous material especially when capable of causing death or serious debilitation <toxic waste> <a toxic radioactive gas> <an insecticide highly toxic to birds>.”

*Toxic Definition*, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/toxic> (last visited Apr. 15, 2015).

**b. What is the definition of “chemical substance” under TSCA today?**

The definition is as follows:

- (2)(A) Except as provided in subparagraph (B), the term “chemical substance” means any organic or inorganic substance of a particular molecular identity, including--
  - (i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature and
  - (ii) any element or uncombined radical.
- (B) Such term does not include--
  - (i) any mixture,
  - (ii) any pesticide (as defined in the Federal Insecticide, Fungicide, and Rodenticide Act) [7 U.S.C.A. §§ 136 et seq.] when manufactured, processed, or distributed in commerce for use as a pesticide,
  - (iii) tobacco or any tobacco product,
  - (iv) any source material, special nuclear material, or byproduct material (as such terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. §§ 2011 et seq.] and regulations issued under such Act),
  - (v) any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986 [26 U.S.C.A. § 4181] (determined without regard to any exemptions from such tax provided by section 4182 or 4221 or any other provision of such code), and

Responses by Brian E. Frosh to Additional Questions  
from Senator Vitter

1. **Prior to your appearance at the March 18, 2015 hearing, have you had any experience in assessing or evaluating the preemptive effect of a federal law on an action by the State of Maryland?**

Yes.

2. **Your Facebook entry regarding the March 18, 2015 hearing (<https://www.facebook.com/BrianFrosh>) indicates you believe S. 697 "abandons the model of cooperative federalism that is the foundation of our environmental regulations."**

- a. **Please describe your understanding of "cooperative federalism," and how that view is supported in federal law.**

Cooperative federalism is the principle that the federal government cooperates and shares power with states and their political subdivisions to solve common problems, rather than having the federal government dominate. As the U.S. Supreme Court has explained, this relationship among sovereigns fortifies our democracy: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." (*Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Whereas cooperative federalism would permit states to take action to protect their citizens when the federal government fails to act, S.B. 697 prevents states from protecting public safety during the long period in which the federal government merely "considers" regulating a toxic chemical.

- b. **Under any other federal environmental law, do states have unrestricted authority to regulate?**

Numerous federal environmental laws give states expansive power to regulate, and to exceed federal substantive standards. Among these are the Resource Conservation and Recovery Act (RCRA), Subtitle C of which allows states to adopt regulations more stringent or broader in scope than the federal hazardous waste regulatory program; the Clean Water Act (allowing states to adopt more restrictive water quality standards than the U.S. EPA); and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (allowing states to adopt more restrictive standards than U.S. EPA, and to establish their own pesticide registration programs).

- c. **Under any other federal laws regulating products manufactured for use in interstate commerce, do states have unrestricted authority to regulate?**

As described above, FIFRA -- which governs household, lawn, and garden pesticide

Senator INHOFE. Thank you, General Frosh. Dr. Goldman.

**STATEMENT OF LYNN R. GOLDMAN, M.D., MICHAEL AND LORI MILKEN DEAN OF PUBLIC HEALTH, MILKEN INSTITUTE SCHOOL OF PUBLIC HEALTH, THE GEORGE WASHINGTON UNIVERSITY**

Dr. GOLDMAN. Mr. Chairman, and members of the committee, it my honor to testify today about the Frank R. Lautenberg Chemical Safety for the 21st Century Act, a bill to reform the Toxic Substances Control Act. And I do dedicate my testimony to the memory of Frank Lautenberg and his commitment to making chemicals safer.

I am a pediatrician, and as you know, between 1993 through 1998, I served as Assistant Administrator for the USEPA office that is now called the Office of Chemical Safety and Pollution Prevention. I first testified before this committee about the need for TSCA overhaul 21 years ago, in May 1994. Since that time, Congress did overhaul the pesticide law under the Food Quality Protection act in 1996. But TSCA unfortunately is frozen in time.

The most important amendment in the Lautenberg Act is to replace the risk benefit balancing requirement in the current version of TSCA with a firm public health standard requiring that EPA make decisions solely on the basis of risk to human health and the environment. The provision requiring protection of infants, children, the elderly, pregnant women and other populations also is an immense improvement over current law.

The Lautenberg Act also provides EPA with the strong authority it needs to order chemical testing, much as it currently has for pesticides.

The 1989 Asbestos Ban and Phase-Out Rule, as you know, was overturned by the Fifth Circuit Court, which interpreted the least burdensome clause of Section 6 to imply a preference for end of the pipe solutions over more effective solutions, like replacing asbestos. The Lautenberg Act deletes that clause. Importantly, the Act will require that EPA actually affirm the safety of new chemicals and manage them to meet the new public health standard, something people haven't been talking about today.

Provisions in the Lautenberg Act would open up vast quantities of chemical information, much of which never should have been declared confidential in the first place, or information for which that claim is now outdated. As a former California State regulator, I strongly support the provision allowing EPA to share this data with States, something we were not allowed to do when I was at the EPA.

In 1994, I called for a clear agenda and deadlines for the EPA and TSCA. The proposed legislation includes deadlines for prioritization, safety assessment and regulation, as well as a reasonable transition plan. I thank you for having undertaken the hard work of negotiating a provision enabling EPA to not only collect fees but also to actually use eh fees they collect. Bravo for that. I appreciate your hands-ff approach to how EPA uses regulatory science in the context of the program and ask that you do not freeze the science by injecting 2015 standards into a law that needs to work for us for a number of years.

I appreciate that the actions States have taken to date and actions taken under Proposition 65 now and in the future would not be preempted by the Act. Also, the Act does not preempt State right to know efforts, something we haven't talked about, but a very important component of State activities.

But we do have to recognize the chemical industry as a multinational enterprise and the need to take actions to protect people in all of our States, not just State by State, as well as the need to have actions that recognize what the downsides of those actions might be, such as replacement of bisphenol A with bisphenol S, a chemical about which we know very little but probably has similar toxicity.

Listening to the discussion here today, there is probably more work that is needed to do to strike the right balance in terms of preemption. I certainly am sympathetic to arguments that States can be strong co-enforcers with the EPA. I think that is an issue that will need further discussion.

Other areas that I would note is that I think Congress could set more aggressive but realistic expectations for EPA's productivity, as well as taking advantage of this reauthorization to participate in the global Stockholm and Rotterdam Chemical Conventions. Twenty-one years ago, there were TSCA hearings. Everyone declared it was too complicated and everyone walked away for nearly a generation. You have heard many statistics describing this pace of chemical regulation under TSCA. But there is a human cost to inaction. Since 1976, 149 million babies were born in this Country. Three percent of them had birth defects and more than 10 percent were born pre-term. Eighty-six million people have died in the U.S. since that time, more than 25 percent from cancer.

Each of us has our own ideas about what a perfect TSCA would look like. But I don't want to be facing another Senate committee 20 years from now giving the same testimony about this 60-year old law. Nor do I want to have to tell my daughter that she and her future children would not have a greater level of protection because we failed to pass a good, even if not a perfect, law.

I thank you all for our willingness to work together and I wish you the best in finding a path forward.

[The prepared statement of Dr. Goldman follows:]

Written Testimony  
Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act

Senate Environment and Public Works Committee  
Lynn R. Goldman, M.D., M.P.H., M.S.

Michael and Lori Milken Dean  
Professor, Environmental and Occupational Health  
Milken Institute School of Public Health, George Washington University  
March 18, 2015

Testimony of Lynn R. Goldman

Mr. Chairman and members of the Committee on Environment and Public Works, it is my honor to testify today about the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act, a bill to reform the Toxic Substances Control Act. I dedicate this testimony to the memory of Frank Lautenberg and his commitment to making chemicals safer for this generation, and future generations.

I am Dean of the Milken Institute School of Public Health at the George Washington University. I am a pediatrician and an epidemiologist and from 1993 through 1998 I served as Assistant Administrator for Prevention, Pesticides and Toxic Substances at the US Environmental Protection Agency (EPA). (This is now known as the Office of Chemical Safety and Pollution Prevention. While serving in that position I was responsible for the implementation of the Toxic Substances Control Act. Prior to joining the EPA I worked for eight years in public health with the California Department of Health Services. However, my testimony represents my own views and not the views of these or any other organizations.

When TSCA was passed in 1976, there were great expectations that it would improve our understanding of chemical risks and address these risks in a comprehensive multi-media framework. But, for a variety of reasons, TSCA has not been able to fully live up to these expectations. The people in the Toxics program at the EPA do an excellent job with the tools that they have but they have neither the legislative tools nor the resources that are needed.

There are several symptoms that all is not well with TSCA. First is the rising tide of chemicals being regulated on a state-by-state basis. While I support the right of states to take action to protect their citizenry, only federal actions protect all US citizens. Moreover, state actions too often leave us with replacement of a risky chemical by another chemical about which we know little or nothing. Second is the enormous gap that is forming between TSCA and the new chemicals legislation (REACH) in the European Union. And third is the dwindling away of personnel and resources in the EPA devoted to core TSCA efforts.

Today, I will discuss a number of concerns, most of which I have been trying to bring to your attention for the 21 years since the first time I testified about the pressing need for TSCA reform in May 1994. I will address these issues in the context of the Frank R. Lautenberg Chemical Safety for the 21st Century Act, or Lautenberg Act. These include: risk evaluation, protection of vulnerable populations, risk management, precaution, new chemicals, right to know, pollution prevention, international management of chemicals and priority-setting.

#### *Precaution*

The current safety standard in TSCA, “unreasonable risk”, has been interpreted by the courts to mean that any decision to protect public health and the environment must be

Testimony of Lynn R. Goldman

balanced by the costs to industry. One reason that I was supportive of the Chemical Safety Improvement Act, or CSIA, in 2013, is that it explicitly required that decisions be based “solely on considerations of risks to human health and the environment.” The Lautenberg Act goes even further in precluding EPA from using non-risk factors in making safety determinations.

#### *Protection of Vulnerable Populations*

TSCA does not require the protection of sensitive populations, including children. Several other statutes, the Clean Air Act, the Safe Drinking Water Act and the Food Quality Protection Act all contain provisions making it clear that such populations should be protected.

Children are often more highly exposed to chemicals in the environment, via diet, inhalation, crawling on the floor, mouthing hands and objects in the environment, and route such as transfer from mother to baby in utero or in breast milk. Children are often more susceptible. “Windows of exposure” during development cause susceptibility to irreversible effects like birth defects, neurobehavioral outcomes, and other developmental alterations, and cancer.

Because the fetus and child are often more exposed and can be more susceptible to adverse effects of chemicals during critical life stages, this is a particularly important vulnerable group. Other groups include people who have genetic differences in response or metabolism of chemicals; the elderly, and people with preexisting conditions.

I am pleased that the Lautenberg Act explicitly requires that infants, children, pregnant women and the elderly be protected and clearly requires that both heightened susceptibility and unique exposure patterns be considered.

#### *Risk Evaluation*

To evaluate risk requires the availability of data on hazards and exposures. The Chemical Testing Program at EPA was established to carry out the policy expressed in TSCA that adequate data should be developed with respect to the health and environmental effects of chemical substances and that the development of these data should be the responsibility of chemical manufacturers and processors. Unfortunately, the analytic burden required of EPA to write TSCA 4 Test Rules and to defend them from litigation is substantial. As a result, over the past three decades, the Government Accountability Office (GAO), the Congress, and others have noted a lack of productivity and the absence of a clear agenda for testing.

EPA has tried to overcome this problem in a number of ways, including: use of Enforceable Consent Agreements rather than test rules; development of a Master

Testimony of Lynn R. Goldman

Testing List and voluntary approaches for screening high volume chemicals in cooperation with the chemicals industry and the OECD (Organization for Economic Cooperation and Development). These voluntary programs are good programs but it is not at all clear how and when EPA will move from screening to more extensive testing of chemicals for adverse endpoints.

Another important information gathering provision is TSCA Section 8(e), a critically important information-gathering tool that serves as an "early warning" mechanism for keeping the Agency apprised of significant new chemical hazards and exposures, and for satisfying the public's right to know about these hazards. EPA's longstanding policy has been, appropriately, that if certain serious health effects are discovered, that information should be considered for immediate reporting to EPA without further evaluation. Over and over again, across the decades, it comes to pass that companies may misinterpret TSCA Section 8(e) and EPA's corresponding policy.

EPA has tried to remedy this situation in several ways including by providing guidance documents and via the voluntary Compliance Audit Program (CAP) which, in 1992, allowed participating companies to submit delinquent Section 8(e) information and pay stipulated penalties up to a \$1 million ceiling. Yet, this problem has recurred again and again. Some recent examples of significant information being withheld from EPA include: chromium, diacetyl and PFOA.

EPA collects little to no information about chemical exposures yet such information is essential to the evaluation of risk. TSCA needs to be reformed to give EPA clear expectation for testing of risks of existing chemicals. Both the CSIA and the Lautenberg Act would give the EPA very important authority to use orders to require testing and eliminate the current risk finding requirement. Significantly, the Lautenberg Act has enhanced EPA authority in this area (compared to the CSIA) by ensuring EPA can require testing of new chemicals and to inform prioritization.

The Lautenberg Act in my view unnecessarily requires that the EPA first request voluntary information prior to issuing an order. I think that this is an unnecessary step that could delay provision of information when different companies make different decisions about how and when to respond to voluntary requests. I would suggest that this provision be reconsidered.

#### *Risk Management*

In terms of managing the risks of toxic chemicals, the EPA never has recovered from the Fifth Circuit Court of Appeals decision to remand the 1989 Asbestos Ban and Phaseout Rule to EPA. In this case, the court's decision imposed a burden of proof on EPA that significantly increased the level of analysis on potential substitutes and on identifying the least burdensome approach for any future Section 6 action. The court's

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interpretation of least burdensome alternative under Section 6 appears to define end-of-pipe solutions, where toxic substances are controlled after they are distributed into the environment, as less burdensome than pollution prevention solutions, where toxic substances are reduced or eliminated at their source. End-of-pipe solutions are in conflict with the pollution prevention approach and are more costly over time.

Importantly, the Lautenberg Act (like the CSIA) requires that EPA restrict any chemical that does not meet the safety standard. Going further, the Lautenberg Act would assure the public that the restrictions imposed are sufficient to assure that the chemical meets the safety standard. The Act would also strike the “least burdensome” requirement and make clear that costs and benefits are to be considered only “to the extent practicable based on available information”. It would replace the requirement for identification of the “least burdensome” approach with a process in which EPA would evaluate only alternatives that are deemed relevant and feasible. I support this. Too often today decisions are made about phasing out, or banning, a use of a chemical with complete ignorance of the risks of possible substitutes. An example is the phase-out of BPA in food containers and the concern today about a substitute, BPS. Under this law the EPA could have assessed a cluster of chemicals that are available for this use and the result would have more clearly benefited public health.

#### *New Chemicals*

Section 5 of TSCA requires that anyone who intends to manufacture or import a new chemical substance in the United States notify EPA 90 days before commencing that activity. The EPA’s new chemicals program has over the years reviewed thousands of new chemical substances. In many cases EPA has made decisions to prevent risk before a harmful substance enters commerce. The U.S.’s new chemicals program is unique in that it requires review of chemicals prior to manufacture rather than prior to marketing as in most other countries with such systems. In contrast the EU REACH system requires registration of substances manufactured or imported in EU above 1 tonne per year. Because many chemicals that initially are manufactured for research and development never come to market, the US gives the bulk of attention to new chemicals that will never appear in commerce.

The new chemicals program in the United States does not require any testing prior to submission of a “pre-manufacturing notification” (PMN) and over half of all PMNs are submitted without any test data. The Agency has developed tools to use Structure Activity Relationships (SAR) to predict and assess the fate and effects of new chemicals. SAR is limited so it is important that EPA can obtain test data on new chemicals.

When EPA determines that there is a risk associated with a PMN it has tools that can be used to manage those risks. TSCA Section 5 gives EPA the ability to require additional tests or other measures such as disposal controls and worker protection. These

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provisions have caused the industry to screen out “bad actors” before presenting them to the EPA in the first instance.

The Lautenberg Act is a great improvement over TSCA in requiring an affirmation of safety by the EPA rather than triggering manufacture of the chemical by default if EPA is silent during the 90-day review. It establishes a clear expectation that new chemicals will be managed to provide reasonable assurance they will meet the new public health standard. Importantly it authorizes the EPA to suspend review and/or take intermediate action in the face of inadequate information to make a final decision. Additionally I suggest that Congress consider focusing EPA’s efforts on premarket rather than premanufacture approvals so that EPA would be able to give more attention to chemicals that actually are entering commerce.

#### *Right to Know*

Empowering the public with information is a powerful tool for environmental progress. The creation of the Toxics Release Inventory (TRI), established in Section 313 of the Emergency Planning and Community Right-to-Know (EPCRA), led the way to a new era of public disclosure and a more constructive dialogue between citizens and industry on emissions reduction and pollution prevention. Likewise, in California, the right-to-know aspect of Proposition 65 has been a powerful tool for changing the formulation of chemical products on the market. Public release of environmental data gives everyone the ability to participate in the broader national effort to set an agenda for toxics and to address chemical issues based on the extent of risk posed. States, local governments, industry, labor unions, public interest groups and grass roots communities have important roles to play; all problems of chemical management cannot be solved through direct EPA action. Importantly, the Lautenberg Act would not preempt State actions requiring reporting, monitoring or other forms of information collection or disclosure.

As a former state regulator, I know the value of site-specific information in risk assessment and priority setting. Currently, TSCA does not allow EPA to share “confidential business information” or CBI with state officials. A large amount of information reported to the EPA under TSCA information is claimed as CBI; EPA’s studies have found that much of this is either outdated or never deserved this protection in the first place. For example, in 1998 EPA found:

- More than 65 % of the information filings directed to the Agency through TSCA were claimed as confidential.
- About 20 % of facility identities in the inventory update were claimed as confidential.
- About 40 % of Section 8(e) substantial risk notices had chemical identity claimed as confidential.

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As you might guess, if the EPA can't tell governors or state agencies what the chemical is, or where it is, the chemical with "substantial risk" cannot be addressed in any form or fashion.

The Lautenberg Act places stricter limits on the ability of companies to hide the identities of chemicals, and would review the CBI claims for all existing substances on the inventory in five years, so that these claims will not exist in perpetuity. It retains the provision in current law making health and safety information off-limits for CBI claims. It requires all chemical identity claims to be approved by EPA and claims automatically expired, unless renewed, after ten years. Further the law specifically provides for disclosure of information to states and others for need the information to protect health and the environment.

*Priority Setting and Deadlines*

Because there are so many chemicals on the market that have yet to be evaluated, what is needed is for Congress to set a clear agenda for priorities in evaluation and management of chemicals, as well as clear expectations for action. Along these lines, there are many chemicals that are strongly suspected to have potential risks, several of which have already been identified by the EPA. It would be a mistake to hamstring the agency with requirements to do comprehensive assessments and reassessments of all chemicals before any action is taken; it makes much more sense to establish an orderly process that is driven by prioritization.

The current bill does establish clear expectations and deadlines for the major components of a logical process involving prioritization, safety assessment, and regulation. It appropriately establishes a two-year transition period during which the EPA is to promulgate all new requirements and procedures, and allows the EPA to continue to do its work using existing procedures until these new procedures are in place. It requires EPA to place at least 10 chemicals on its high-priority list and 10 on a low-priority list and to have listed 20 of each within three years and 25 of each within five years.

I applaud the general approach in terms of requiring prioritization and agenda setting for safety assessment and regulation. However I think that Congress could set a faster pace for EPA to prioritize chemicals, to complete assessments and to manage chemical risks.

A more aggressive process would more quickly identify the several hundred chemicals that are in most need of control, as well as many more that would be determined to be low priority. In this regard, it is of critical importance that Congress make it clear that these assessments are not intended to be academic exercises but instead that they will prioritize the hazards and exposure scenarios that are most relevant to risk to human

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health and the environment. Moreover, and obviously, too much focus on low priority chemicals would not be the best use of EPA's limited resources.

#### *Fees*

EPA's Toxics program has limited organizational capacity. Any new legislation will need to address this problem. It will be important to have a reasonable phase-in period, provision for fee-supports and clear and reasonable schedules. Current TSCA user fees apply only to new chemical notifications, are negligibly small (\$2500, or \$100 for a small business), and are retained by the general treasury rather than being made available to EPA to defray the costs of the program. The Act provides for much more generous fee collection for new and existing chemicals as well as those assessed as high priority. Fees would go to EPA and would be set at a level sufficient to cover 25% of program costs; Congress and EPA would not be allowed to use the fees to replace general revenues that currently support the TSCA program. I think that this is a good start to putting the program on a stronger footing and also, appropriately, to transfer some of the costs to the industry. I would like to see stronger consideration in factoring in inflationary increases so that the fees would not effectively decline over time.

#### *International Management of Chemicals*

Chemicals are increasingly managed internationally. TSCA needs provisions that allow the US to fully participate in international chemical management schemes. We, along with Iraq, Israel, Italy and Malaysia, have not ratified the Stockholm Convention on Persistent Organic Pollutants, signed by President George W. Bush in 2001. We, along with Angola, Iraq, Tunisia and Turkey, also have not ratified the Rotterdam Convention on Prior Informed Consent, signed by President Clinton in 1998. Yet the US was very much involved in negotiating these agreements.

Any legislative changes that would be required to allow us to join these conventions should be included. We need a provision that would trigger regulatory action when a chemical is added to the Stockholm Convention list of POPs identified for elimination or reduction, or to "opt out" of any such listing. We need an additional provision that triggers export notification for chemicals that are on the Rotterdam Convention mandatory PIC list. While similar amendments would be required in FIFRA, amending TSCA in these areas would be a good first step.

#### *Regulatory Science*

I caution against efforts to prescribe how the regulatory science is conducted or evaluated under TSCA. No matter how well driven by current scientific approaches, any specific approaches are likely to soon be outmoded. Rather, EPA needs to evolve its approaches over time, in recognition of the inevitable changing science behind chemical

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evaluation and assessment as well as the regulatory options that might be available in the future.

I support the provisions of the Lautenberg Act that would allow this process to unfold in a context of scientific advances that are likely to improve our ability to assess chemicals over the next few years.

In that regard, I would not be supportive of amendments that attempt to enshrine in the law any current practices or even practices recently recommended by expert bodies. Current TSCA has been in place for nearly 40 years. This overhaul effort should not attempt to freeze the science in procedures that are recommended in 2015, but are almost certain to be outdated in just a few years time.

#### *Preemption of State Authority*

Under current TSCA, actions by EPA do preempt state and local actions, but states have the ability to obtain a waiver from Federal preemption to increase levels of protection in a state, if such an action does not unduly burden interstate commerce. The CSIA as introduced included strong preemption language that, as a former state public health official, concerned me. Specifically I was concerned that an EPA prioritization of a chemical, whether or not action was taken or even if the review were completed, would have a preemptive effect.

The Lautenberg Act is more reasonable. It saves all actions that states have taken prior to January 1, 2015 and it saves California's Proposition 65. It asks states to hold back on imposing new restrictions on chemicals while EPA is reviewing the chemicals. I don't think this is an onerous requirement. Most states do not have the capacity to review chemicals and those that do are not able to accomplish this quickly. Importantly this provision allows states to take action to control chemicals that EPA has determined to be low priority but for which a state may have concern for any reason. At any point in the process states will be able to request waivers from EPA and EPA's low-priority decisions are judicially reviewable by states. As noted earlier, the Lautenberg Act would not preempt State actions requiring reporting, monitoring or other forms of information collection or disclosure.

#### *Conclusion*

In summary, overhaul of TSCA is long overdue. Absent congressional action on TSCA we will continue to see the erosion of federal management of chemicals on many levels. This is a complicated area but at the end of the day there is one simple principle that should be kept foremost: assuring the American public that the products on the market, the air they breathe, the food and the water, are safe. Fortunately, at this time there is a major opportunity for reform.

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I applaud the efforts by members of the Senate, the technical assistance from EPA, and the input that has been received from a number of stakeholder groups, including public health and industry groups. I understand that the Lautenberg Act is a work in progress. While many have been involved in shaping it, we are still in a process of producing a bill that can be enacted by both houses of congress.

Twenty-one years ago I didn't dream of a day when we would be this close to reform. Twenty-one years ago there were hearings, but everyone decided it was too complicated and everyone walked away for nearly a generation. At that time, the industry testified that TSCA was a model statute and that there was no need for reform. Most of the public health and environmental advocates who are here today were disengaged; they did not believe that anything could be done to reform TSCA.

I want to remind you of the human cost of inaction. Since TSCA passed in 1976, 149 million babies were born in this country. An estimated 3% of these babies had birth defects and more than 10% were born preterm. Since 1976, 86 million people in the US died; around 25% of these deaths were caused by cancer. Each of us has our own ideas about what a perfect TSCA would look like. But I don't want to be facing another Senate committee 20 years from now, testifying about a 60-year old law. Nor do I want have to tell my daughter that she and her future children will not have a greater level of protection because we failed to pass a good, even if not perfect, law.

The need for change is clear. We should not and cannot wait another generation before taking action. Thanks to you all for your efforts to bring the parties together to craft a reasonable, science-based and health protective overhaul of TSCA that will move us forward.

Responses by Lynn R. Goldman to Additional Questions  
from Senator Boxer

1. Dr. Goldman, I know you are not a legal expert, but I see that you have expressed support for the Vitter-Udall bill based on some of the legal standards in the bill. I have been provided an expert legal opinion by Professor McGarity at the University of Texas on whether the legal standards included in the Vitter-Udall would ensure that protections or bans could be put in place to address the threat posed by dangerous chemicals. He says that the bill's cost-benefit analysis requirements and the standards retained from the original TSCA law make it virtually impossible for EPA to finalize a restriction on a chemical. He further states that the litigation that would ensue would go on for many years, and even decades. Do you agree that any TSCA reform bill must ensure that EPA has the tools to put safeguards in place and that decades of litigation must be avoided?
  
1. Dr. Goldman, do you believe that if only a tiny fraction of chemicals are assessed, as provided for in the Vitter-Udall bill, that children and families will be subject the health impacts of the hundreds of chemicals that remain unaddressed?
  
2. Dr. Goldman, a number of stakeholders have written to me in opposition to the Vitter-Udall bill. These letters are listed below and attached. Can you please confirm that you have read these letters? After reading those letters, can you please let me know if you agree with anything stated in these letters? Also, please explain why you oppose these experts?
  - Office of the California Attorney General
  - California EPA
  - Attorney General of Massachusetts
  - Attorneys General of NEW YORK, IOWA, MAINE, MARYLAND, OREGON AND WASHINGTON
  - Attorney General of Vermont
  - Minnesota Pollution Control Board
  - The Environmental Working Group
  - Safer Chemical, Healthy Families Coalition – 450 organizations dedicated to reforming toxics laws
  - Breast Cancer Fund

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WASHINGTON, DC

Office of the Dean

April 24, 2015

The Honorable James Inhofe  
Chairman  
Committee on Environment & Public Works  
410 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member  
Committee on Environment & Public Works  
456 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Inhofe and Ranking Member Boxer,

Thank you once again for the opportunity to have testified before your committee about ongoing efforts to reform the Toxic Substances Control Act of 1976, namely the Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act, which I will call the Lautenberg Act. I am responding to your letter of April 6, 2015, requesting that I respond to the written questions that were submitted by your committee members. Your request includes questions from Senator Barbara Boxer and I will address these questions one by one.

First, you have provided me with a copy of written testimony of Mr. Tom McGarity, a law professor at the University of Texas. You have asked: "Do you agree that any TSCA reform bill must ensure that EPA has the tools to put safeguards in place and that decades of litigation must be avoided?" In response, I agree that any legislation to reform TSCA should provide the EPA with tools to put safeguards in place that operate much more effectively than the tools that are provided in existing law. As Senator Boxer notes, I am not an attorney. In fact, I am a public health physician and scientist, as well as a former EPA Assistant Administrator for Toxic Substances. And, therefore, I certainly would hope that Congress would carefully craft any legislation to reform TSCA to assure that the implementation of the legislation is not unnecessarily mired in litigation. However, I am not aware of any environmental legislation that has not been followed by decades of litigation, including the very successful Clean Air Act, which has effectively saved millions of lives, and is currently being litigated in the US Supreme Court two decades after its enactment.

Second, you have asked if I "believe, that if only tiny fraction of chemicals are assessed, as provided for in the Vitter-Udall bill, that children and families will be subject to the health impacts of the hundreds of chemicals that remain unaddressed." It is my sense that the status quo is a law that allows for EPA to assess only a tiny fraction of chemicals. I think that the Lautenberg Act would allow for assessment of a much larger universe of chemicals for the following reasons:

- The Lautenberg Act mandates that EPA reset the chemical inventory. This will enable EPA and others to identify which chemicals, and how many chemicals, are in commerce

today. We only know how many were on the original inventory and how many have been added as new chemicals each year. We would learn which among these tens of thousands of chemicals are actually in manufactured, imported or otherwise used in the US today. Today EPA cannot do this at all. Yet this information is key to any chemical assessment effort.

- The Lautenberg Act would at long last grant the EPA the authority to systematically and comprehensively collect information about chemicals in commerce periodically not only to update the inventory over time, but also to obtain important data on the quantity of use, and where and how these chemicals are being used. Current law restricts EPA's ability to require complete reporting of chemical use in the US. This kind of information would allow the EPA (and others) to further assess thousands of chemicals in use today about which it has no or very little information.
- The EPA has in its possession a vast amount of information about thousands of the chemicals that are on the market today that it cannot share with others because of obsolete Confidential Business Information claims, and claims that should never have been made in the first place. The information in EPA's CBI Vault includes the names of the chemicals, locations where they are manufactured, basic physical and chemical properties and information about potential health and environmental impacts. The Lautenberg Act would open up most of this information on tens of thousands of chemicals to public scrutiny and accelerate the process of chemical assessment by making the information available to other federal and state agencies, academic scientists, NGOs and members of the public. Moreover it would allow the EPA to disclose any remaining legitimate CBI claims, for thousands of chemicals, to states, for the first time ever.
- The Lautenberg Act would provide the EPA with authority to call in data on any chemical on the market in the US, thus providing the EPA with the ability to respond to needs for assessment of any of tens of thousands of existing chemicals. Nothing would preclude EPA from taking targeted action to manage any risk that is revealed by this testing, via its rule making authority, via referring information to other regulatory agencies, via pollution prevention efforts like "design for environment" or via issuing advisories to the public.
- The Lautenberg Act would authorize the EPA to require additional data on any new chemical so that it can assess the risks of those chemicals and would for the first time require that the EPA make an affirmative finding of safety rather than under the status quo, where silence implies approval. Between 1,000-2,000 new chemicals are reviewed every year; this would be a major impact on EPA's ability to assess chemicals new chemicals.
- It is true that the Lautenberg Act envisions that, initially, only a small number of chemicals be selected for a comprehensive review and assessment as "high priority" chemicals. What seems to be envisioned is that EPA would conduct an "IRIS-type" process that would put these chemicals through a very extensive top to bottom safety assessment and risk management process. As I said in my testimony, I think that Congress could ask more of EPA in this area. That being said, most public health and environmental risk from chemicals can be mitigated with smaller actions that target the worst exposures in the most vulnerable settings. For example, some chemicals that are safe for most uses are toxic in aquatic environments and should not be used in settings that result in water discharge. While such a chemical would likely not be selected as a

"high priority" chemical, the Lautenberg Act would provide EPA with other tools for managing this risk. This is yet another reason why I do not agree that the Lautenberg Act would only allow for assessment of a tiny fraction of chemicals.

Finally, you have requested that I read the letters that were sent to you by a number of stakeholders "in opposition to the Vitter-Udall bill". You ask me to confirm whether I have read those letters. Yes, I have read those letters. You ask if I can "please let me know if you agree with anything stated in those letters? Also please explain why you oppose these experts?" I should start by pointing out that none of the experts submitting the letters have the experience that I have with actually having been responsible for administering the TSCA program for more than five years, nor are they necessarily aware of the array of approaches that are used for managing the risks of chemicals. Many of these are people whom I know, and respect. I agree with them in some areas, and disagree in others.

First I will reflect on the letters that you have sent to me that were forwarded to you by State regulators, namely the Minnesota Pollution Control Agency and CalEPA. I think that the Minnesota Pollution Control Agency (MN PCA) raises a number of points that should be considered by Congress. At last month's hearing I think that I voiced my agreement with the idea that states should be able to incorporate federal chemicals regulations into state law and to engage in enforcement actions. I had not anticipated this concern because of the fact that, when I was at EPA, the members of our state affiliated group the Forum on State and Tribal Toxics Action, (FOSSTTA) was not interested in coenforcement of TSCA. The MN PCA also points out that some of the statutory language appears to be vague and inappropriately to intrude on the regulation of toxics as pollutants in air, water and waste. I did not read the statute that way nor do I think that was the intent of the statute. However, since MN and several others have stated this is a plausible interpretation, I would recommend that the language be clarified.

MN and others object to the preemption language in the Lautenberg Act. Many of the positions you sent me are in complete opposition to any preemption of state actions. I think that this is unrealistic and undesirable. However, the states need to serve as a backstop and, as I said when I testified, it is important that the language provide a means for states to protect their citizens if, for some reason, the EPA is unable to act.

CalEPA's letter raises some additional points. I disagree with much of their analyses in that I do not agree that the Lautenberg Act "eliminates state authority", or would preempt current state laws. I also do not agree that California's regulatory regime for chemicals has, or can, effectively protect the public from toxic chemicals. Certainly their efforts have been heroic, creative and even, at times successful on a limited scale. Unfortunately, even with the best of intentions and using the best risk assessment models, California (and all other states) is hamstrung by the inability to require testing and a lack of systematic evidence not only on chemicals of interest, but also their substitutes. They talk about the ability to collaborate with EPA on on-the-ground investigations but they don't mention the fact that under current law EPA can't share much of the information about chemicals, even the names of chemicals and where they are manufactured and processed. How, then, can they join with the EPA in investigations?

Numerous examples given by California and in some of the other letters illustrate the problem with our current state-by-state approach in that chemical uses are banned by states only to be replaced by substitutes that are of unknown toxicity. Why? Because states lack information on chemicals uses and states lack authority to require data generation. Here are two examples of this phenomenon: Bisphenol A uses were replaced by Bisphenol S and PBDE flame retardants were replaced by Tris flame retardants. Many actions that have been taken by states as illustrated by their letter are scattershot (lead comes out of children's imported jewelry but not children's imported toys for example); ineffective (a regulation in Vermont does nothing to protect consumers in the other 49 states); and not fully informed (states do not have information about substitutes nor do they have access to information that EPA has that has been claimed as CBI).

Another point with which I disagree in CalEPA's letter is its assertion that the EPA asbestos ban was overturned because EPA did not meet the "substantial evidence" test applied to informal rulemakings under the statute. This language was not the central issue; rather, it was the "least burdensome" language, which is struck in the Lautenberg Act. I think that many would disagree with CalEPA's interpretation of the "substantial evidence" language and how it compares with the "arbitrary and capricious" standard in the APA.

CalEPA opposes the use of cost benefit analysis in decision making. I don't agree. Whereas I think that the regulatory standard (where you want to end up) should be based on public health and environmental considerations alone, cost benefit analyses are helpful in deciding among options about how to get there. CalEPA is concerned that EPA will be underfunded to meet the provisions of the Act; however, the Act, for the first time, would establish user fees that would directly support EPA's efforts under TSCA (unlike the fees in current law which are too small and go directly to the Treasury rather than to EPA).

You sent me a number of letters from various groups of attorneys general and individual state attorneys general. First and foremost I am heartened to see that so many of the state attorneys general are tuned into this issue and wish to become partners with EPA in enforcing chemical control statutes. As I note above I support the idea of state co-enforcement, which I think was raised by all the letters. CA Attorney General Brian E. Nelson makes another point that I think is valid, namely, that the waiver-from-preemption provision is unduly burdensome. Please note that this is in contrast to some of the letters you received that concluded there was no waiver provision. Reading his comments carefully, and rereading the statute, I think he has a point that states should not have to prove a "local" interest to justify state action. His letter, and others, point to the very long time line that the statute gives the EPA to take action. As I said in my testimony, I think that Congress could and should raise its sights in terms of the minimum number of "high priority" chemicals that EPA can handle as well as the deadlines that Congress is setting for action for EPA. That would be my recommendation for how to address this concern. However, I do not agree with the statement by Attorney General Nelson that "it is 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". Letters from the New York Attorney General; the Attorneys General from New York, Iowa, Maine, Maryland, Oregon and Washington; the Massachusetts Attorney General; and the Vermont Attorney General do not contribute many additional points.

You sent me two letters from nongovernmental organizations. First there is a letter from the Breast Cancer Fund. They feel that the Lautenberg Act undermines health protections in current law that now exist under TSCA. In contrast, I think that the Lautenberg Act would strengthen every single provision of TSCA. In particular they are concerned about EPA's ability to regulate imports. Today, EPA does very little in that regard. However, I would agree that it is important that not only EPA but also Customs and Border Enforcement are able to restrict the import of illegal chemicals and chemical uses into the US. They also assert that the Lautenberg Act would not allow EPA to regulate the worst chemicals; I do not agree with that conclusion. Finally, they share the concerns about state preemption and state co-enforcement.

The Environmental Working Group asserts that the risk standard in the Lautenberg Act is weaker than the standard in food law of "a reasonable certainty of no harm". I do not agree. However, the interpretation of the latter standard, for pesticides, was established through report language. That could be an appropriate way for Congress to clarify its intention in this statute as well. Another unique point that EWG made is that this bill does not cover chemical spills. However, these are covered by another statute (EPCRA). I disagree with EWG's position on user fees. I think that my response to the remainder of EWG's points is covered among my responses to the letters from states and attorneys general.

Lastly, you have provided for my comment a letter from the coalition "Safer Chemicals Healthy Families". I understand their point about the chemicals that would be denoted "low priority"; I don't think it is a big issue in the context of the fact that today, all chemicals are, in essence "low priority", thanks to our 1976 law. They raise an important issue about chemicals in products, which is alluded to in many of the above letters. I would agree that the EPA should not have to regulate a chemical product-by-product. EPA should be able to use its expert judgment on the most effective way to regulate chemicals, whether in all products simultaneously (a complete ban), groups of products, or one product at a time.

Senator INHOFE. Thank you, Dr. Goldman. Dr. McCabe.

**STATEMENT OF EDWARD McCABE, M.D., SENIOR VICE PRESIDENT AND CHIEF MEDICAL OFFICER, MARCH OF DIMES FOUNDATION**

Dr. McCABE. Chairman Inhofe, Ranking Member Boxer and members of the committee, thank you for the invitation to testify at this critical hearing. My name is Ed McCabe, and I am a pediatrician and geneticist serving as Senior Vice President and Chief Medical Officer of the March of Dimes Foundation. We appreciate this opportunity to testify today on the critical issue of protecting Americans and specifically vulnerable populations like pregnant women, children and infants from toxic chemicals.

Unfortunately, the current Federal framework for the regulation of toxic substances is badly antiquated. As others have said, TSCA represents the last meaningful and comprehensive action taken in the field. The now outdated rules constructed in 1976 still govern the introduction and use of chemicals today, even though science has advanced in ways almost unimaginable at its passage.

The safe management of toxic substances is especially important to pregnant women and children because they are more vulnerable to the potential dangers. Ample reason exists for concern that the developing fetus, newborn and young child are at increased risk of health consequences from chemical exposure. Given their increased vulnerabilities, pregnant women and children must be given an additional margin of protection beyond other populations.

The legislation before the committee today, developed by Senators Tom Udall and David Vitter, and co-sponsored by numerous other Senators, including the Chairman, represents a critical step forward toward establishing a system of chemical regulation that will be protective of maternal and child health. This bipartisan effort is commendable, and the March of Dimes would like to extend our appreciation to each of you for your roles in this work.

As this committee considers chemical reform legislation, the March of Dimes would like to share with you four principles that we believe are essential to the successful reform of America's system of regulating toxic chemicals. Legislation that meets these principles would represent a vast improvement in chemical safety for children and families everywhere.

Legislation should specifically protect the health of pregnant women, infants and children. As I noted, these populations are especially vulnerable to toxic substances, and a meaningful chemicals reform legislation must recognize the elevated risks posed by some chemicals for maternal and child health and incorporate special protection for these groups.

No. 2, legislation should establish an efficient and effective system and timetable for prioritizing and assessing chemicals. Given that over 80,000 chemicals are currently in commerce across our Nation, reform legislation must establish a sensible, practical framework for the appropriate prioritization and assessment of chemicals in a timely fashion. A system that allows for indefinite timeframes and evaluation of only small numbers of chemicals will fail to protect the health of pregnant women and children.

No. 3, legislation should include a mechanism for requiring the generation of scientific data if existing data are insufficient to determine the safety of a substance. Under the current failed system, chemical manufacturers have a disincentive to study the impact of their products, which is antithetical both to transparency and to the public's health. In order to conduct appropriate safety assessments, the government must have the ability to require studies be conducted to produce data on safety especially related to maternal and child health.

And finally, No. 4, legislation should provide timely access to chemical information for health care providers and first responders in critical circumstances. Health care providers and first responders must have immediate access to vital chemical information when they respond to known or suspected exposures, both to treat their patients and to protect themselves. Reform legislation must ensure that those who may be risking their own health to assist others must have the information necessary to make informed decisions.

In conclusion, reforming the framework under which the U.S. regulates chemicals and potentially toxic substances is critical and long overdue. Today, a real solution appears to be within reach. On behalf of the March of Dimes, I thank you, Mr. Chairman, as well as Senators Udall and Vitter, for our hard work, reaching across the aisle and working to address the needs and concerns of many stakeholders. The March of Dimes stands ready to be a partner and resource as Congress works to produce a successful reform bill that protects the health of all Americans, including our vulnerable women, infants and children.

Thank you for the opportunity to testify.

[The prepared statement of Dr. McCabe follows:]

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**Statement of Edward R.B. McCabe, M.D., Ph.D.  
Senior Vice President and Chief Medical Officer  
March of Dimes Foundation**

United States Senate Committee on  
Environment and Public Works

Hearing: The Frank R. Lautenberg Chemical  
Safety for the 21<sup>st</sup> Century Act

Wednesday, March 18<sup>th</sup>, 2015  
9:30am  
406 Dirksen Office Building  
Washington, DC 20510



Chairman Inhofe, Ranking Member Boxer, and members of the Committee – thank you for the invitation to testify at this critical hearing. My name is Dr. Edward R. B. McCabe, and I am a pediatrician and geneticist serving as Senior Vice President and Chief Medical Officer of the March of Dimes Foundation, a unique collaboration of scientists, clinicians, parents, members of the business community and other volunteers affiliated with 51 chapters representing every state, the District of Columbia and Puerto Rico. I appreciate this opportunity to testify today on the critical issue of protecting Americans – specifically, vulnerable populations like pregnant women, children, and infants – from toxic chemical substances.

For over 75 years, the March of Dimes has promoted maternal and child health through activities such as funding research and field trials for the eradication of polio, promoting newborn screening, and educating medical professionals and the public about best practices for healthy pregnancies. Today, the Foundation works to improve the health of women, infants and children by preventing birth defects, premature birth and infant mortality through research, community services, education and advocacy.

#### **The Toxic Substances Control Act of 1976**

Broad consensus exists among stakeholders that the federal government should play a key role in the regulation of chemicals. Ensuring that Americans are not exposed to dangerous substances clearly represents a compelling national interest, and it requires expertise that the vast majority of individuals lack. It would not be reasonable to expect the average American to investigate the safety of chemicals, to avoid products that could possibly contain questionable or dangerous substances, or to obtain sufficient data from manufacturers and retailers to make informed decisions. The federal government is clearly the appropriate party to obtain data, to make evidence-based safety determinations, and to enforce uniform standards to advance the federal interest in protecting public health.

Unfortunately, our current federal framework for the regulation of toxic substances is badly antiquated. As you know, the Toxic Substances Control Act, passed in 1976, represents the last meaningful and comprehensive action taken in this field. The now-outdated rules constructed in 1976 still govern the introduction and use of chemicals today, even though the science has advanced in ways almost unimaginable at its passage.

Today, stakeholders agree that the old system simply does not work, and never did. Under the TSCA framework, even a substance as demonstrably deadly as asbestos could not be banned. In fact, in the nearly 40 years of its existence, TSCA has enabled the regulation only five chemicals or chemical classes out of more than 80,000 chemicals currently used in commerce. The current law requires industry to provide toxicity data if it possesses it, but does not compel anyone to produce such evidence if it does not exist, thus creating a perverse incentive for industry to avoid the investigation of risk. In short, TSCA has failed spectacularly in its stated purpose of regulating toxic substances to protect public health.

#### **The Maternal and Child Health Case for TSCA Reform**

The danger posed by certain substances to human health has been known for hundreds, if not thousands, of years. Exposure to toxic substances such as lead and mercury were recognized to cause neurological damage long before there was any understanding of the underlying mechanisms at work. More recently, studies have revealed associations between adverse birth outcomes and exposure to substances such as solvents,<sup>1</sup> phthalates,<sup>2,3</sup> and chemicals like Bisphenol A.<sup>4</sup> At the same time, however, chemicals and other toxic substances play a vital role in modern everyday life. The federal government must therefore establish a system of review and regulation that permits certain uses while preventing dangerous exposures, particularly for maternal and child health.

The safe management of toxic substances is especially important to pregnant women and children because they are more vulnerable to the potential dangers. In their October 2013 joint committee opinion on environmental toxicants, the American College of Obstetricians and Gynecologists (ACOG) and the American Society for Reproductive Medicine (ASRM) stated, "Exposure to environmental chemicals and metals in air, water, soil, food and consumer products is ubiquitous."<sup>5</sup> Biomonitoring programs at the Centers for Diseases Control and Prevention (CDC) and individual studies have established that dozens or hundreds of chemicals can be found in the tissues of individuals of all ages, including the fetus and newborn. Analysis of National Health and Nutrition Examination Survey data from 2003-2004 demonstrated that virtually every pregnant woman in the United States is exposed to at least 43 different chemicals.<sup>6</sup> Ample reason exists for concern that the developing fetus, newborn, and young child are at increased risk of health consequences from chemical exposures. ACOG and ASRM noted that prenatal exposure to environmental chemicals is linked to various adverse health consequences, and patients' exposures at any point in time can lead to harmful reproductive health outcomes.<sup>7</sup>

Children face a greater threat from toxic chemicals because of their immature and growing systems, which may be less efficient at detoxifying and eliminating harmful substances; because they have longer life expectancies (allowing more time for bioaccumulation and associated damage); and because they face proportionately higher exposure to certain chemicals and related substances.<sup>8</sup> Children's smaller sizes mean that they have a greater surface area to body mass ratio, so topical exposure can have an outsized effect. They eat and drink more food and water per unit of body weight than adults do. Adjusted for body weight, young children breathe more air than adults. Given these increased vulnerabilities, pregnant women and children must be given an additional margin of protection beyond other populations.

#### **Principles for an Effective, Efficient, Modernized Framework for Chemical Regulation**

The legislation before the Committee today, developed by Senators Tom Udall (D-NM) and David Vitter (R-LA) and cosponsored by numerous other Senators including Chairman Inhofe, represents a critical step forward toward establishing a system of chemicals regulation that will be protective of maternal and child health. Their persistent, bipartisan efforts are highly commendable, and the March of Dimes would like to extend our appreciation to each of you for your roles in this work.

As this Committee considers chemical reform legislation, the March of Dimes would like to share with you four principles that we believe are essential to the successful reform of America's system of regulating toxic chemicals. Legislation that meets these principles would represent a vast improvement in chemical safety for children and families everywhere.

**1. Legislation should specifically protect the health of pregnant women, infants, and children.** As I have noted, these populations are especially vulnerable to toxic substances. Any meaningful chemicals reform legislation must recognize the elevated risks posed by some chemicals for maternal and child health and incorporate special protection for these groups.

**2. Legislation should establish an efficient and effective system and timetable for prioritizing and assessing chemicals.** Given that over 80,000 chemicals are currently in commerce across our nation, reform legislation must establish a sensible, practical framework for the appropriate prioritization and assessment of chemicals in a timely fashion. A system that allows for indefinite timeframes and evaluation of only small numbers of chemicals will fail to protect the health of pregnant women and children.

**3. Legislation should include a mechanism for requiring the generation of scientific data if existing data is insufficient to determine the safety of a substance.** Under the current, failed system, chemical manufacturers have a disincentive to study the impact of their products, which is antithetical both to transparency and to public health. In order to conduct appropriate safety assessment, the government must have the ability to require studies to be conducted to produce data on safety, especially related to maternal and child health.

**4. Legislation should provide timely access to chemical information for health care providers and first responders in critical circumstances.** Health care providers and first responders must have immediate access to vital chemical information when they respond to known or suspected exposures, both to treat their patients and to protect themselves. Tragic consequences can result when doctors, paramedics, firefighters and others do not have the information necessary about chemicals involved in poisonings, leaks, and similar emergencies. Reform legislation must ensure that those who may be risking their own health to assist others must have the information necessary to make informed decisions.

#### **Conclusion**

In conclusion, reforming the framework under which the U.S. regulates chemicals and potentially toxic substances is critical and long overdue. Today, a real solution appears to be within reach. The health of every American, but particularly of vulnerable individuals like pregnant women and children, relies upon the ability of the Congress to come together to produce meaningful reform.

Mr. Chairman, this legislation represents an important step forward toward finally reforming the Toxic Substances Control Act. On behalf of March of Dimes, I thank you, as well as Senators Udall and Vitter, for your hard work reaching across the aisle and

working to address the needs and concerns of many stakeholders. I hope the March of Dimes can continue to be a partner and a resource as Congress works to produce a successful reform bill that protects the health of all Americans.

Thank you for this opportunity to testify, and I look forward to addressing any questions you might have.

<sup>1</sup> Cordier S, Garlantézec R, Labat L, Rouget F, Monfort C, Bonvallot N, Roig B, Pulkkinen J, Chevrier C, Multigner L. Exposure during pregnancy to glycol ethers and chlorinated solvents and the risk of congenital malformation. *Epidemiology*. 2012 Nov;23(6):806-12.

<sup>2</sup> Ferguson KK, McElrath TF, Meeker JD. Environmental phthalate exposure and preterm birth. *JAMA Pediatr*. 2014 Jan;168(1):61-7.

<sup>3</sup> Centers for Disease Control and Prevention. 2012. *Factsheet: Phthalates*. [http://www.cdc.gov/biomonitoring/Phthalates\\_FactSheet.html](http://www.cdc.gov/biomonitoring/Phthalates_FactSheet.html). Accessed March 13, 2015.

<sup>4</sup> Snijder CA, Heederik D, Pierik FH, Hofman A, Jaddoe VW, Koch HM, Longnecker MP, Burdorf A. Fetal Growth and Prenatal Exposure to Bisphenol A: The Generation R Study. *Environ Health Perspect*. 2013;121:393–398.

<sup>5</sup> American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women and American Society for Reproductive Medicine Practice Committee. Exposure to Toxic Environmental Agents. Committee Opinion No. 575, October 2013.

<sup>6</sup> Woodruff T, Zota A, Schwartz J. Environmental chemicals in pregnant women in the United States: NHANES 2003-2004. *Environ Health Perspect*. 2011;119(6).

<sup>7</sup> American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women and American Society for Reproductive Medicine Practice Committee. Exposure to Toxic Environmental Agents. Committee Opinion No. 575, October 2013.

<sup>8</sup> American Academy of Pediatrics. Policy Statement – Chemical Management Policy: Prioritizing Children's Health. *Pediatrics*. 2011;127(5).

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April 14, 2015

The Honorable Barbara Boxer  
Ranking Member  
Committee on Environment and Public Works  
United States Senate  
Washington, DC 20510

Dear Senator Boxer,

Thank you for the opportunity to provide additional input on this issue of critical importance to maternal and child health. The March of Dimes is committed to improving the health of pregnant women, infants, and children, and reforming the Toxic Substance Control Act of 1976 (TSCA) presents an important opportunity to impact maternal and child health.

We are pleased to provide the following responses to the Questions for the Record you submitted to the March of Dimes following the March 18, 2015 hearing entitled, "Examining the Frank R. Lautenberg Chemical Safety for the 21st Century Act (S. 697)."

- a. *Do you agree that it is important for any TSCA reform bill to include real deadlines for implementing protections and accelerated timeframes for addressing the chemicals of greatest concern, including the 1,000 chemicals identified by Assistant Administrator Jim Jones that pose the greatest threat?*

Legislation should establish an efficient and effective system and timetable for prioritizing and assessing chemicals. Given that over 80,000 chemicals are currently in commerce across our nation, reform legislation must establish a sensible, practical framework for the appropriate prioritization and assessment of chemicals in a timely fashion. A system that allows for indefinite timeframes and evaluation of only small numbers of chemicals will fail to protect the health of pregnant women and children.

- b. *Would inclusion of such provisions be an important consideration before you would give your support to a TSCA reform bill?*

The inclusion of provisions that improve safety for pregnant women and children will be essential to March of Dimes' endorsement of any TSCA reform legislation. As noted during the hearing, March of Dimes support will be contingent on legislation adhering to our principles for meaningful TSCA reform:

1. **Legislation should specifically protect the health of pregnant women, infants, and children.** These populations are especially vulnerable to toxic substances. Any meaningful chemicals reform legislation must recognize the elevated risks posed by some chemicals for maternal and child health and incorporate special protection for these groups.
2. **Legislation should establish an efficient and effective system and timetable for prioritizing and assessing chemicals.** Given that over 80,000 chemicals are currently in commerce across our nation, reform legislation must establish a sensible, practical framework for the appropriate prioritization and assessment of chemicals in a timely fashion. A system that allows for indefinite timeframes and evaluation of only small numbers of chemicals will fail to protect the health of pregnant women and children.


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3. **Legislation should include a mechanism for requiring the generation of scientific data if existing data is insufficient to determine the safety of a substance.** Under the current, failed system, chemical manufacturers have a disincentive to study the impact of their products, which is antithetical both to transparency and to public health. In order to conduct appropriate safety assessment, the government must have the ability to require studies to be conducted to produce data on safety, especially related to maternal and child health.

4. **Legislation should provide timely access to chemical information for health care providers and first responders in critical circumstances.** Health care providers and first responders must have immediate access to vital chemical information when they respond to known or suspected exposures, both to treat their patients and to protect themselves. Tragic consequences can result when doctors, paramedics, firefighters and others do not have the information necessary about chemicals involved in poisonings, leaks, and similar emergencies. Reform legislation must ensure that those who may be risking their own health to assist others must have the information necessary to make informed decisions.

Thank you for the opportunity to provide input on TSCA reform. The March of Dimes appreciates your efforts and your advocacy on behalf of women and children who could benefit greatly from a modernized chemicals regulatory framework. If the March of Dimes can be of assistance on these or any other efforts to improve maternal and child health, please do not hesitate to call upon us.

Sincerely,



Edward R. B. McCabe, M.D., Ph.D.  
Senior Vice President and Chief Medical Officer  
March of Dimes Foundation

Responses by Edward McCabe to Additional Questions  
from Senator Boxer

1. Dr. McCabe, you state that indefinite timeframes and evaluation of only a small number of chemicals will fail to protect the health of pregnant women and children. This is one of the serious flaws of the Vitter-Udall bill.

We are pleased to provide the following responses to the Questions for the Record you submitted to the March of Dimes following the March 18, 2015 hearing entitled, "Examining the Frank R. Lautenberg Chemical Safety for the 21st Century Act (S. 697)."

- a. *Do you agree that it is important for any TSCA reform bill to include real deadlines for implementing protections and accelerated timeframes for addressing the chemicals of greatest concern, including the 1,000 chemicals identified by Assistant Administrator Jim Jones that pose the greatest threat?*

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Senator INHOFE. Thank you, Dr. McCabe. Dr. Dennison.

**STATEMENT OF RICHARD A DENISON, PH.D., LEAD SENIOR  
SCIENTIST, ENVIRONMENTAL DEFENSE FUND**

Mr. DENISON. Thank you, Chairman Inhofe, Ranking Member Boxer and other members of the committee.

The Environmental Defense Fund has been working to reform this badly broken and outdated law for 20 years, and I have personally for the past 15 years. That is why EDF supports the Lautenberg Act as a solid compromise that fixes the biggest problems in the current law, is health protective and has the strong bipartisan support necessary to become law.

This legislation did not arise suddenly in this Congress. It is actually the culmination of a decade of hard work by the late Senator Frank Lautenberg, who had the courage to recognize that we would not get reform without opening up a bipartisan path. Since he and Senator Vitter introduced their bill, the first bipartisan TSCA reform bill, in 2013, Senator Udall has led negotiations with Senator Vitter and has steadily and significantly strengthened the bill's health protections. They have worked tirelessly to listen to and incorporate input from other members and from hundreds of stakeholders.

The need for reforming this law is urgent. It has been pointed out that it has been almost 40 years since the core provisions have been touched. Americans have been exposed, meanwhile, to hundreds and thousands of chemicals every day and only a small fraction have ever been adequately reviewed. EPA cannot, under the law, regulate even known dangers like lead, formaldehyde and asbestos.

The law has not kept up with science. It is increasingly linking common chemicals to cancer, infertility, diabetes, Parkinson's and other illnesses. Pregnant women, infants and children are especially vulnerable, as Drs. McCabe and Goldman have pointed out.

I have spent much of my professional career pressing EPA to act under this flawed law. I have been on the opposite side of the table from the chemical industry on nearly every issue. But rare political circumstances have opened a narrow window to pass meaningful reform. That is because the industry has finally realized that they need a stronger Federal system in order to restore Americans' confidence in the safety of chemicals.

We believe that Congress now has the best chance in a generation to bring this law into the 21st century. And let me just mention a couple of the things that it does.

It mandates safety reviews for all of those chemicals that TSCA grandfathered in 40 years ago and for new chemicals before they can enter the market. It explicitly requires that when EPA judges the safety of a chemical and regulates it, it ensures the protection of vulnerable populations. It makes far more information available about chemicals by limiting the ability of companies to declare that information confidential.

None of the provisions in the bill are perfect, from our perspective. Indeed, most of them clearly represent compromises. But taken individually and collectively, they are much more protective than the current law.

Let me briefly turn to the most contentious issue in this debate: preemption. Striking the right balance has proven to be both exceedingly difficult and critical to garnering bipartisan support needed to actually pass a law. The bill is more preemptive than current law. But it is much less preemptive than the original bill.

All State actions before 2015 would be grandfathered in, regardless of what EPA does later. State actions taken after 2015 remain in effect until and unless EPA identifies a chemical and starts an assessment and completes that assessment. Those actions stay on the books. That assessment has to address the same uses and the same environmental concerns in order for it to preempt State action.

Low priority designations are no longer preemptive. Once EPA initiates and sets the scope of an assessment, it is true that new actions by States could not be taken. However, those existing actions would remain in effect until the end of that process.

Finally, even after EPA takes final action on a chemical,

Federal preemption is limited in certain very important ways. Only restrictions by States are preempted. Other types of requirements, for reporting, assessment, monitoring and the like, are never preempted. And only State restrictions on uses and concerns that are within the scope of EPA's review and determination are preempted. States can still regulate a chemical for other uses and to address other concerns.

Now, it needs to be noted that the current patchwork of State regulations and laws, which we have strongly supported, cover only a small number of chemicals and reach only a fraction of the American public. While nearly 200 actions have been taken by States to restrict chemicals, those actions have only restricted about a dozen chemicals or chemical categories. There is a huge problem we have that demands a Federal solution.

Let me conclude with this. The failures of TSCA are a serious and growing calamity, and Congress needs to act now. We simply can't afford to have the best opportunity to reform this law squandered. Thank you.

[The prepared statement of Mr. Denison follows:]



TESTIMONY OF

RICHARD A. DENISON, Ph.D.  
LEAD SENIOR SCIENTIST  
ENVIRONMENTAL DEFENSE FUND

BEFORE

THE U.S. SENATE  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

AT A HEARING ON

S. 697  
THE FRANK R. LAUTENBERG  
CHEMICAL SAFETY FOR THE 21<sup>ST</sup> CENTURY ACT

18 MARCH 2015

Environmental Defense Fund (EDF) has been working to reform the Toxic Substances Control Act (TSCA) for 20 years, and I have for the past 15 years. That is why I am so pleased today to provide EDF's endorsement of the Frank R. Lautenberg Chemical Safety for the 21st Century Act. The bill is a solid compromise that fixes the biggest problems with our current law, is health-protective – and has the strong bipartisan support necessary to become law.

This legislation did not suddenly arise in this Congress; it is the culmination of a decade of legislative effort, most of it led by the late Senator Frank Lautenberg, who grasped early on the pressing need to reform TSCA, and had the courage to recognize that such reform would never be realized without opening up a bipartisan path forward.

The legislation is built on the Chemical Safety Improvement Act, a bill introduced by Senator Lautenberg and Senator David Vitter in May 2013 that garnered 13 Democratic and 13 Republican cosponsors in the last Congress. Since then, the bill has only gotten better: Its health protections have steadily been strengthened as a result of negotiations led by Senator Tom Udall with Senator Vitter to address major concerns raised about the original bill. The Senators have worked tirelessly to listen to and incorporate input from other Members and hundreds of stakeholders, and to strike a balance between competing interests on dozens of contentious issues within the scope of the legislation.

The need for reform is indeed urgent: TSCA's core provisions, the main law that is supposed to protect us from toxic chemicals, haven't been updated for almost 40 years. In that time, the diversity and uses of industrial and consumer chemicals have greatly expanded. Americans are exposed to thousands of chemicals every day, and only a small fraction have ever been adequately reviewed for safety. The law is so badly broken that our government lacks the ability to regulate even known dangers such as lead, formaldehyde and asbestos. And the current patchwork of state regulations covers only a small number of chemicals and extends its protections to only a fraction of the American public.

The law hasn't kept pace with science, which increasingly links common chemicals to cancer, infertility, diabetes and Parkinson's and other illnesses. Pregnant woman, infants, and children are especially vulnerable: A growing body of research from fields such as cell biology and epigenetics is demonstrating how even low-level exposures to certain chemicals can interfere with early development in ways that have life-long consequences for health. Babies in the U.S. are born with hundreds of chemicals already in their bodies.

During my 28 years at EDF, I have experienced firsthand the failings of our current law. I've spent much of my professional career pressing the Environmental Protection Agency (EPA) to find ways to use or work around its highly constrained authority under the law to address chemical risks. Most of this time, right up to the present day, I've been on the opposite side of the table from the chemical industry on nearly every issue.

Rare political circumstances have opened a narrow window to pass meaningful reform. This has come about in part because much of the industry finally realizes that a stronger federal system is necessary to restore Americans' confidence in the safety of chemicals. EDF believes that Congress now has the best chance in a generation to better protect our health by bringing TSCA into the 21st century. But every day we wait means another day before we can start to protect millions from the threats posed by dangerous chemicals.

The Frank R. Lautenberg Chemical Safety for the 21st Century Act (FRL21) fixes the key flaws in our current law. With respect to each core element of TSCA, the bill gives the EPA the tools necessary to strengthen health protections for American families:

- It mandates safety reviews for all chemicals in active commerce.
- It requires a safety finding for new chemicals before they can enter the market.
- It replaces TSCA's burdensome cost-benefit safety standard—which prevented EPA from banning asbestos—with a pure, health-based safety standard.
- It explicitly requires protection of vulnerable populations like infants and pregnant women.
- It gives EPA enhanced authority to require testing of both new and existing chemicals.
- It sets aggressive, judicially enforceable deadlines for EPA decisions.
- It makes more information about chemicals available, by limiting companies' ability to claim information as confidential, and by giving states and health and environmental professionals access to confidential information they need to do their jobs.

I have attached a [factsheet](#) and a [detailed analysis](#) of these and other major improvements FRL21 makes over both TSCA and the original bill.

None of these provisions is perfect from our perspective – indeed, most of them clearly represent compromises. However, taken both individually and in aggregate, they are much more health-protective than current law. And they will deliver more and better information on the safety of chemicals to the public, consumers and the market so that they, too, can act to reduce harm from exposures to toxic chemicals.

Let me briefly address the most contentious aspect of the debate over TSCA reform: the extent to which the bill would preempt state authority to restrict chemicals. The bill is more preemptive than current TSCA, but far more narrow than the original 2013 bill. Striking the right balance has proven to be both exceedingly difficult and critical to garnering the bipartisan support needed to pass a law. Here's what the bill does:

- All state actions taken on all chemicals before 2015 are grandfathered in and never preempted regardless of subsequent EPA action.

- State actions taken after 2015 on a chemical remain in effect until and unless EPA lists that same chemical as a high priority, and takes final action to address the same uses and the same health and environmental concerns.
- State actions are not preempted by EPA's designation of a chemical as low-priority.
- Once EPA initiates and sets the scope of an assessment of a high-priority chemical, a state cannot take a *new* action to restrict that chemical.
  - However, existing state actions not grandfathered in remain in effect until EPA completes its safety assessment and determination and any required regulation.
- Even after EPA takes final action on a chemical, federal preemption is limited:
  - Only states' *restrictions* on chemicals are pre-empted; other types of requirements for reporting, assessment, monitoring, and the like are never preempted.
  - Only state restrictions on uses and health or environmental concerns that *fall within the scope* of EPA's review of a chemical are preempted; states can still regulate that chemical for other uses and to address other concerns.
  - States can apply for waivers to allow them to impose restrictions beyond EPA's, although the waiver requirements are more onerous than under current TSCA.

Let me conclude with this: The failures of TSCA represent a serious and growing public health calamity. Congress must act now; American families can't afford to have the best opportunity ever to reform this broken law squandered.

Environmental Defense Fund looks forward to working with this Committee and other stakeholders to move this bipartisan legislation forward and ensure the strongest possible bill becomes law. We urge the Committee to take up and advance the Frank R. Lautenberg Chemical Safety for the 21st Century Act as if our lives depended on it – because they do.

Response by Richard A. Denison to an Additional Question  
from Senator Boxer

1. *Mr. Denison, your testimony speaks extensively about the state preemption provisions in the Udall-Vitter bill. Since you are a scientist and not an attorney, do you agree that deference should be given to the expertise of the Attorneys General of California, Massachusetts, New York, Iowa, Maine, Maryland, Oregon, Vermont, and Washington who have expressed serious concerns about the impacts of the Udall-Vitter bill on their state air, water, and toxics laws?*

Response:

Thank you for your question and for the opportunity to testify before the committee. I believe Members of the committee should, of course, give due consideration to the views of the state Attorneys General you mention, as well as the letters that Members have received from other Attorneys General and from former federal officials, which were submitted for the record. These include:

- A letter dated March 17, 2015, from the Attorneys General of Alabama, Georgia, Louisiana, Michigan, North Dakota, South Carolina, and Utah.
- A letter dated March 17, 2015, from the Attorney General of New Mexico to Senators Udall and Heinrich.
- A letter dated March 18, 2015, from three former EPA General Counsels, a former EPA Acting Administrator and Assistant Administrator, and a former U.S. Department of Justice Assistant Attorney General.

Senator INHOFE. Thank you, all of you, for your excellent and thoughtful and timely statements.

I am going to ask some basic questions to each one of you, even though your testimony probably would have already told us what your answer is going to be. I just want to make sure it is out there, so that we can get these principal positions on record.

Dr. DENISON, you have 15 years invested in this thing right now. You as an individual and then I will as if EDF has the same position, do you have an official position supporting or opposing this bill?

Mr. DENISON. Senator, I personally and EDF supports this legislation as a solid compromise.

Senator INHOFE. Thank you. Dr. McCabe, what about the March of Dimes?

Dr. MCCABE. The March of Dimes has not endorsed this legislation, but we support the beginning of a dialog. We think it is time, it is 40 years. I was a resident 40 years ago, and those in the room can see that was a long time ago. Our vulnerable women, children and infants deserve this. So we support the law, we think it is an important place to start, but there is a long way to go.

Senator INHOFE. That is very good, thank you. Dr. Goldman.

Dr. GOLDMAN. Yes, I think as you heard from my testimony, I do support this legislation, at the same time recognizing that there are avenues that could be taken to make it stronger.

Senator INHOFE. I see. And General Frosh, does the State of Maryland have a position on this bill?

Mr. FROSH. Mr. Chairman, I am speaking for myself as attorney general.

Senator INHOFE. So that answer is no?

Mr. FROSH. I do not support it with the preemption provisions.

Senator INHOFE. I see. Mr. Cook, I think we know what your answer is.

Mr. COOK. Yes, Mr. Chairman, I come from the environmental wing of the environmental movement.

[Laughter.]

Mr. COOK. I do not support this legislation personally. EWG does not, and I can't name any other major national environmental group that does.

Senator INHOFE. Thank you, Mr. Cook. Dr. Denison, do you believe this bill represents a significant improvement over current law?

Mr. DENISON. Yes, Senator, I do.

Senator INHOFE. How about you, Dr. McCabe?

Dr. MCCABE. Yes. That is the substance of my testimony.

Senator INHOFE. Dr. Goldman.

Dr. GOLDMAN. I do think it does.

Senator INHOFE. And Dr. Denison, do you believe this bill significantly increases protections to public health, including for the most vulnerable, like children and pregnant women?

Mr. DENISON. I do, Mr. Chairman.

Senator INHOFE. Dr. McCabe.

Dr. MCCABE. Yes, Mr. Chairman.

Senator INHOFE. Dr. Goldman.

Dr. GOLDMAN. Yes.

Senator INHOFE. This question would be for Dr. Denison and Dr. Goldman. If Congress fails to pass a bipartisan TSCA reform bill, what are the chances of all Americans being protected from chemicals like asbestos?

Mr. DENISON. Mr. Chairman, I believe those prospects are very low.

Dr. GOLDMAN. Thank you. I believe we would continue to see the same pace of progress that we have seen since 1976.

Senator INHOFE. Thank you. Senator Boxer.

Senator BOXER. Thanks, Mr. Chairman, very much.

Dr. Goldman, am I correct in assuming you would not support a bill that you believe was worse than current law?

Dr. GOLDMAN. You are absolutely correct.

Senator BOXER. OK. So I hope you will read the letters I will put in the record of the leading health experts, not chemical companies or anyone affiliated with them, who say this is worse than current law. I am not asking you about it, I am just going to ask if you will read those letters and be back to me with your reasons for opposing them.

Dr. GOLDMAN. I will read those.

Senator BOXER. Thank you very much. And please let me know, because I don't understand why you are doing this, given the tremendous opposition of the whole environmental community, the health community, the breast cancer folks, the autism folks. It just doesn't add up. But I want you to read it and let me know.

Dr. Goldman, Attorney General Frosh said in his statement that this bill, S. 697, imposes a tangled web of preemption that ties States' hands at every turn. He is sitting next to you, he is doing his job, this is his view. Nine attorneys general who represent more than a majority of the Country agree with him in that.

Since you are a physician and not an attorney and you know this bill is going to be negotiated, do you think going forward that the concerns of the attorneys general should be considered as we move forward?

Dr. GOLDMAN. I think I said in my oral testimony that I think the right balance needs to be struck.

Senator BOXER. If you could just say, I am asking yes or no. Do you think these nine attorneys generals views should be considered as we move forward?

Dr. GOLDMAN. Congress should consider their views.

Senator BOXER. Thank you very much.

Mr. Cook, recent reports indicated that floor boards that were imported from China contained high levels of formaldehyde, a known carcinogen. I don't think there is an argument about that. Do you agree that the Vitter-Udall bill would make it harder for EPA to intercept imported products containing dangerous chemicals like this? I am talking about, I think it is Section 14, is that right?

Mr. COOK. I agree that that is the case.

Senator BOXER. Because it really undermines the authority of EPA to intercept imported products that contain unsafe chemicals, is that correct?

Mr. COOK. That is correct.

Senator BOXER. So anyone who sits here and says this is better than current law, I urge you, Dr. Denison and Dr. McCabe and Dr. Goldman, to look at this. Because right off the bat, these products are going to get into the Country.

On preemption, Mr. Denison, you authored a paper, and I am quoting from it: "Federal policy reform should establish floors, not ceilings, for State government action and should only preclude State actions that are less protective of health." Do you still stand by your statement?

Mr. DENISON. Senator Boxer, that was a statement I made in 2009.

Senator BOXER. Yes, and I am going to put it into the record, without objection.

[The referenced information follows:]

## Ten Essential Elements in TSCA Reform

by Richard A. Denison

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### Editors' Summary:

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Congress enacted TSCA in 1976 to control risks from chemicals in commerce. It requires the government to review most new chemicals while they are being developed and it gives government the power to regulate chemicals already in or entering commerce if they create an "unreasonable risk" to health or to the environment. Yet current policy hinders government's ability to generate information and to act on such information when it indicates significant risk. This Article identifies 10 elements that can facilitate a shift toward knowledge-driven policies that motivate and reward, rather than impede and penalize, the development of information sufficient to provide a reasonable assurance of chemical safety. Adopting a more comprehensive approach that seeks to develop good information on most or all chemicals would allow us to select safer chemicals with confidence.

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For the last several decades, government policy has granted the tens of thousands of industrial chemicals already in commerce a strong "presumption of innocence." In the absence of clear evidence of harm, companies have largely been free to produce and use such chemicals as they've seen fit. This policy contrasts sharply with the "presumed guilty until proven innocent" approach adopted for pharmaceuticals and pesticides. For these substances, producers have the burden of providing to the government information demonstrating their safety, at least when used as intended.

Yet for industrial chemicals, the opposite is true: Government—and, hence, the public—shoulders the burden of proof. In what amounts to a classic *Catch-22*, *government must already have information sufficient to document potential risk, or at the very least, extensive exposure, in order to require the development of information sufficient to determine whether there is actual risk*. This burden is so high that in the 32 years since the Toxic Substances Control Act (TSCA)<sup>1</sup> was enacted, the U.S. Environmental Protection Agency (EPA) has required testing for only about 200 chemicals.<sup>2</sup>

Current policy essentially says: "We'll consider developing a better understanding only of those chemicals that we already have good reason to believe pose a risk." This is rather like the old adage about looking for lost car keys at night only under the streetlight because the light is better there. So when it comes to choosing among several available options to provide a desired chemical function, or to replacing a problematic chemical, we are often in the dark and run the risk of simply "replacing the devil we know with the devil we don't." Society remains largely ignorant about the risks of the great majority of chemicals because we only investigate those about which we already know something. That means we fail to learn not only which chemicals pose risks, but also which chemicals pose little or no risk. Adopting a more comprehensive approach that seeks to develop good information on most or all chemicals would allow us to select safer chemicals with confidence.

TSCA places an even higher—some would say impossibly high—burden on EPA before it can act to control a chemical. Government must effectively prove beyond all reasonable doubt that a chemical poses a risk in order to take any regulatory action to restrict its production or use. Since adoption of

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1. 15 U.S.C. §§2601-2692, ELR STAT. TSCA §§2-412.

2. Since 1979, EPA has used its test rule authority under TSCA §4, 15 U.S.C. §2603, to require testing of about 200 chemicals. For about 60 of these chemicals, the data were obtained through §4 Enforceable Consent Agreements (ECAs), which EPA uses as an alternative to test rules in cases where there is agreement with industry on the need and scope of testing. OFFICE OF POLLUTION PREVENTION & TOXICS (OPPT), U.S. EPA, OVERVIEW: OFFICE OF POLLUTION PREVENTION AND TOXICS PROGRAMS 4, 15 (2007), available at <http://www.epa.gov/oppt/pubs/oppt101c2.pdf> [hereinafter OPPT OVERVIEW, 2007].

TSCA in 1976, EPA has succeeded in mandating restrictions on the production or use of only five substances.<sup>3</sup>

By allowing action only once there is clear evidence of harm, current policy does not reward, and may well provide a sizeable disincentive against, the gathering of better information about chemicals. A company is likely to view undertaking this activity as only increasing the likelihood that evidence of harm will be uncovered. And where the default in the face of any uncertainty is no action, industry has an incentive to seek to perpetuate rather than resolve the uncertainty.

As recognition of these problems has increased, calls for reforming TSCA have become more urgent. This Article lays out 10 essential elements in any such reform.

### I. Establish a Policy and Develop and Apply Criteria to Identify and Act to Control All Chemicals of Concern

Outside the vague and undefined concept of “unreasonable risk,” TSCA provides no basis on which to identify what attributes of chemicals should trigger action. Establishing such a policy framework is critical to direct and drive further needed efforts: developing information about chemicals focused on those attributes; efficiently prioritizing and assessing chemicals against the relevant criteria; and undertaking appropriate actions to reduce production, use, and release of chemicals of concern and to replace them with alternatives known to be of lesser or no concern.

Attributes and their associated criteria can be hazard-based or exposure-based. Such criteria-driven policies have become core elements and drivers in other countries’ recent reforms of chemicals policies. For example, the Canadian Environmental Protection Act (CEPA), as amended in 1999, required health and environmental agencies to use available information to categorize each of the roughly 23,000 previously unassessed chemicals on its domestic substances list to identify chemicals that are persistent, bioaccumulative, inherently toxic to humans or nonhuman organisms, or of greatest potential for exposure to humans.<sup>4</sup>

REACH (Registration, Evaluation, Authorisation, and Restriction of Chemicals),<sup>5</sup> the European Union’s recently adopted chemicals regulation, is also attribute- and criteria-driven. It uses hazard-based criteria, surrogates for exposure and use attributes, to drive the processes it puts in motion of

registering, evaluating, and authorizing use of an estimated 30,000 chemicals.<sup>6</sup>

In the United States, some states have adopted policies that focus on particular chemical classes or uses to identify and drive action on chemicals of concern. Maine, for example, has prioritized the elimination of mercury-containing products.<sup>8</sup> In Washington, priority has been placed on identifying and restricting use of PBT chemicals, focusing initially on mercury and brominated flame retardants.<sup>9</sup> More recently, both states as well as California have passed broader bills that establish policies and set in motion processes to identify and act to control chemicals of concern.<sup>10</sup>

*Recommendation:* TSCA should rest on clear policy objectives and criteria for identifying and acting to control chemicals of concern. These criteria should be used to determine information requirements, prioritize chemicals for assessment, and decide whether and what risk management is needed.

The policy should allow chemicals of concern to be identified based on their hazard or exposure characteristics, not just on risk; hence, hazard- and exposure-specific, as well as risk-based, criteria should be articulated. EPA should be authorized and required to assess and impose risk management measures on chemicals that meet such criteria.

### II. Separate Scientific Decisions as to Whether a Chemical Is of Significant Concern From Policy Decisions as to How Best to Address Such Concerns

TSCA’s only articulation of a safety standard, that of “unreasonable risk,” demands that EPA answer much more than the scientific question of whether a chemical may or will harm people or the environment. It must also consider the economic and social costs of imposing controls on the chemical, including the benefits of the chemical, the availability of alternatives, and the impact of regulation on the economy, small businesses, and innovation.<sup>11</sup> EPA must also demonstrate that any proposed control is the least burdensome it could have

7. See *id.* art. 57.

8. See Maine Department of Environmental Protection, *Mercury Products*, <http://www.maine.gov/dep/mercury/products.htm>.

9. See Washington Department of Ecology, *PBT Initiative*, <http://www.ecy.wa.gov/programs/pbt/>.

10. In 2008, Maine adopted the Act to Protect Children’s Health and the Environment from Toxic Chemicals in Toys and Children’s Products, which calls for the state eventually to identify 100 chemicals of high priority and for producers or manufacturers of such chemicals to register their use with the state. See *Janus*, <http://state.me.us/legis/LawMakerWeb/externalsiteframe.asp?ID=280027552&LD=2048&Type=1&SessionID=7>. Also in 2008, Washington passed the Children’s Safe Products Act of 2008, which calls for the virtual elimination of phthalates, lead, and cadmium in children’s products and requires the state to develop an inventory of potentially harmful chemicals. See *apps.leg.wa.gov/documents/bills/docs/2007-08/Pdf/Amendments/Senate/2647-S2\_E%20AMS%20ENCR%20S5756.E.pdf*. In September 2008, California passed AB 1879, which calls for the development of regulations to establish processes to identify, prioritize and evaluate chemicals of concern and their potential alternatives. See [http://www.leginfo.ca.gov/pub/07-08/bills/asm/ab\\_1851-1900/bb\\_1879\\_bill\\_20080929\\_chaptered.html](http://www.leginfo.ca.gov/pub/07-08/bills/asm/ab_1851-1900/bb_1879_bill_20080929_chaptered.html).

11. 15 U.S.C. §2605(c)(1).

3. The five substances are: polychlorinated biphenyls (PCBs), by virtue of a mandate from Congress; fully halogenated chlorofluorocarbons used as aerosol propellants; dioxin in certain wastes; asbestos (limited to products no longer in commerce); and hexavalent chromium used in water treatment chemicals in comfort cooling towers. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *CHEMICAL REGULATION—OPTIONS EXIST TO IMPROVE EPA’S ABILITY TO ASSESS HEALTH RISKS AND MANAGE ITS CHEMICAL REVIEW PROGRAM* 58 (2005) (GAO-05-458), available at <http://www.gao.gov/new.items/d05458.pdf> [hereinafter GAO, 2005].

4. 15 U.S.C. §§2601(b)(2) & 2604(c).

5. See Canadian Environmental Protection Act, 1999, R.S.C. ch. 33, §73 (1999) (Can.), available at [http://www.ec.gc.ca/CEPARegistry/the\\_act/Contents.cfm](http://www.ec.gc.ca/CEPARegistry/the_act/Contents.cfm) [hereinafter CEPA].

6. Regulation (EC) 1907/2006, 30.12.2006 J.O. (396) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:396:0001:0849:EN:PDF> [hereinafter REACH].

proposed.<sup>12</sup> Finally, it must demonstrate that no other statute could address the concern.<sup>13</sup>

The result is a blurring together of what should be two distinct questions: Does a chemical pose a significant risk? If so, what should be done about it? In effect, TSCA precludes EPA from identifying a chemical that poses a significant risk unless it can also demonstrate that the risk could be or is *unreasonable*. While both questions are appropriate for government to answer, precluding government from providing a clear answer to the first question effectively denies both the public (citizens and consumers) and private entities their right to act on their own to reduce risks even in the absence of government action.

This policy again stands in contrast to those of Canada and the EU. Under CEPA, the determination of whether a chemical is “CEPA-toxic” and requires some type of regulatory or other risk management action is separate from the determination of how risk should be managed.<sup>14</sup> The former decision does not entail consideration of economic and social factors, the benefits of the chemical, or the availability of alternatives, although these types of factors do influence the subsequent decision about what risk management measures to impose.

Similarly, under REACH, the activity of identifying “substances of very high concern” based on application of objective criteria is wholly separate from both industry’s and government’s subsequent decisions relating to managing and regulating such chemicals. Economic and social factors, the costs and benefits of the chemical, and the availability of alternatives are all considered in determining whether to grant such substances use-specific authorizations<sup>15</sup> (although the burden of analyzing these factors as well as the burden of proof rest with the industry applicant for authorization rather than with government).

**Recommendation:** The determination as to whether an existing chemical is of sufficient concern to require the imposition of controls should be based *solely* on its hazard, exposure, or risk characteristics. Socioeconomic factors may play a role in determining what measures should be mandated, but they should not influence the decision about whether a chemical warrants control.

### III. Eliminate the All-or-Nothing Approach to Regulation Under TSCA

The range of regulatory measures that EPA can impose on a chemical under TSCA §6 is very broad. On one end of the spectrum, EPA can merely require recordkeeping or monitoring, or communication or labeling of potential risks. On the other end, it can ban all production and use of a chemical. Yet to exercise any of these authorities, EPA must meet the same standard of proof: It must demonstrate that the chemical “presents or will present an unreasonable risk.” If EPA can-

not meet its burden, it cannot impose even the most innocuous of measures, even those such as monitoring for releases or exposures that could help to clarify both the certainty and magnitude of risk.

In contrast, CEPA §64 allows designation of a chemical as CEPA-toxic—and hence eligible for regulation<sup>16</sup>—based on a showing of *potential* harm. This showing can be based on evidence of significant hazard or exposure, not necessarily both, and applies to substances that enter or *may* enter the environment.<sup>17</sup> A substance may be “suspected” of being toxic if either its hazards or exposure potential are of concern.<sup>18</sup>

REACH is underpinned by the precautionary principle, which the European Commission indicates applies “where scientific evidence is insufficient, inconclusive or uncertain and there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection.”<sup>19</sup>

While the principle’s implied allowance for government to act even in the face of scientific uncertainty is typically highlighted (and often criticized by U.S. government and industry representatives), another of its core elements is far less frequently acknowledged or understood: its reliance on the so-called proportionality principle.<sup>20</sup> Measures taken to address potential or uncertain risk are to be in proportion to the appropriate level of protection to be achieved and should reflect the associated uncertainty and magnitude, e.g., severity, reversibility, etc., of the potential harm.

**Recommendation:** Reforms to TSCA should provide a calibrated approach that would provide for application of specific risk management measures in proportion to the strength of evidence of risk as well as the magnitude of risk. Further, EPA should be allowed to initiate action in response to less than absolute evidence of harm. And the Agency should be able to impose controls that address potential harm as well as uncertain, but potentially significant, harm.

### IV. Shift the Burden of Proof From Government to Demonstrate Harm to Industry to Demonstrate Safety

Under TSCA, the government must demonstrate that a chemical is or could be harmful before any action can be taken. Those who produce and use chemicals bear no burden of

16. Once a substance is found to be CEPA toxic and placed on the List of Toxic Substances, the government has two years to develop and propose a management strategy and an additional 18 months to finalize the strategy. See *A Guide to Understanding the Canadian Environmental Protection Act, 1999* 11-13 (Dec. 10, 2004), available at [http://www.ec.gc.ca/CEPARRegistry/the\\_act/guide04/toc.cfm](http://www.ec.gc.ca/CEPARRegistry/the_act/guide04/toc.cfm).

17. CEPA, *supra* note 5, §64.

18. GUIDELINES FOR THE NOTIFICATION AND TESTING OF NEW SUBSTANCES: CHEMICALS AND POLYMERS 97-98 (Environment Canada & Health Canada 2005), available at <http://www.ec.gc.ca/substances/nsh/pdf/cpguidem688.pdf>.

19. See COMMISSION OF THE EUROPEAN COMMUNITIES, COMMUNICATION FROM THE COMMISSION ON THE PRECAUTIONARY PRINCIPLE 8 (2000), available at [http://ec.europa.eu/dgs/health\\_consumer/library/pub/pub07\\_en.pdf](http://ec.europa.eu/dgs/health_consumer/library/pub/pub07_en.pdf).

20. See *id.* at 18.

12. *Id.* §2605(a).

13. *Id.* §2605(c) & 2606.

14. See U.S. GENERAL ACCOUNTING OFFICE, TOXIC SUBSTANCES CONTROL ACT—LEGISLATIVE CHANGES COULD MAKE THE ACT MORE EFFECTIVE 26 (1994) (GAO/RCEID-94-103), available at <http://archive.gao.gov/t2pbat2/152799.pdf>.

15. See REACH, *supra* note 6, tit. VII.

demonstrating, or even being routinely required to provide the information necessary to determine whether, their chemicals are safe.

This policy stands in marked contrast to those affecting other classes of chemicals, most notably pharmaceuticals and pesticides, which are regulated under other statutes. Producers must generate extensive data demonstrating the safety of these chemicals, and government review and approval are required as conditions for their entering or remaining on the market. For example, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), pesticides are subject to extensive testing and government approval processes before they can be registered<sup>21</sup>:

EPA must first ensure that the pesticide, when used according to label directions, can be used with a reasonable certainty of no harm to human health and without posing unreasonable risks to the environment. To make such determinations, EPA requires more than 100 different scientific studies and tests from applicants.<sup>22</sup>

FIFRA also requires pesticides already in use to be reregistered and reassessed for safety.<sup>23</sup>

It may have been reasonable not to expect most industrial chemicals to pose health or environmental risk based on the science available at the time TSCA was enacted, given that many or most of them were not intentionally designed to be biologically active. But recent advances have deepened our understanding of the myriad ways by which chemicals can enter and accumulate in the environment, lead to exposure of people or other organisms, and exert adverse effects.

Chemicals widely used in consumer products—including phthalates used as plasticizers, polybrominated diphenyl ethers (PBDEs) used as flame retardants, and several families of perfluorinated chemicals used in coatings for textiles, cookware, and food packaging—were thought to be safely embedded in polymers or other matrices and, hence, to pose no risk of exposure. Yet they are present in the bodies of virtually all people on earth.

*Recommendation:* Chemical manufacturers should be required to demonstrate the safety of their products as a condition for entering or remaining on the market, using a standard that establishes a reasonable certainty of no harm. Where government bears the burden of demonstrating harm in order to act, the default in the face of inadequate data or high uncertainty is to implicitly assume safety and take no action. Shifting the burden of proof to industry would help create incentives to expedite information development and assessment and to reach closure and agreement, rather than perpetuate uncertainty.

Manufacturers should also be responsible for developing information sufficient to demonstrate safety. They are best able to maximize the efficiency of producing the information and to allocate those costs to all users of the chemicals. They

are also best able to internalize such costs and information and use them to minimize risk from their products.

EPA should be required to determine whether manufacturers have met their burden of proof of safety.

## V. Require Comprehensive Hazard Information as a Condition for Existing Chemicals to Remain On, and for New Chemicals to Enter, the Market

TSCA's Preamble states:

It is the policy of the United States that . . . adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that the development of such data should be the responsibility of those who manufacture and those who process such chemical substances and mixtures.<sup>24</sup>

This statement applies to all chemicals and places the burden of data generation squarely on chemical producers and processors. Yet the reality under TSCA has been far different.

For the great majority of chemicals already in commerce, few data are available to the public or to EPA to characterize their hazards. EPA's authority to require testing of chemicals is highly constrained. First, it must have enough information about a chemical to demonstrate that it "may present an unreasonable risk" or that it is produced in large quantities and results in significant environmental releases or human exposures. EPA must also demonstrate that insufficient information exists to determine the effects of the chemical on health or the environment, and that testing is necessary to develop such information.<sup>25</sup> Finally, EPA must, on a case-by-case basis, promulgate a regulation, which typically takes many years and substantial agency resources.<sup>26</sup> In contrast, Canadian officials need only promulgate a Ministerial notice to require testing,<sup>27</sup> while REACH mandates that a minimum data set be developed for all chemicals produced annually above one metric ton per producer (applicable immediately for new chemicals and phased in over time for chemicals already in commerce).<sup>28</sup>

Large data gaps and limited regulatory authority to fill them have led EPA to rely on voluntary efforts to obtain more information on existing chemicals. The most notable of them is the U.S. High Production Volume (HPV) Chemicals Challenge<sup>29</sup> under which producers of HPV chemicals were asked voluntarily to develop and make public a "base set" of screening-level hazard information on their chemicals.<sup>30</sup> Because it

24. 15 U.S.C. §2601(b)(1).

25. 15 U.S.C. §2603(a)(1)(A)(ii) and (iii), ELR STAT. TSCA, §4(a)(1)(A)(ii) and (iii).

26. A TSCA §4 rule can take between 2-10 years to promulgate and requires significant resources. GAO, 2005, *supra* note 3, at 26.

27. See CEPA, *supra* note 5, §71(e).

28. REACH, *supra* note 6, art. 23.

29. See U.S. EPA, *High Production Volume Challenge*, at <http://www.epa.gov/chemrisk/index.htm>.

30. The base set is based on the Screening Information Data Set developed by the Chemicals Committee of the Organization for Economic Cooperation and Development. For a list of the data elements, see U.S. EPA, *Determining the Adequacy of Existing Data*, app. A, <http://www.epa.gov/chemrisk/pubs/genel/daa/daa.htm>.

21. 7 U.S.C. §§136-136y, ELR STAT. FIFRA §52-54.

22. See Office of Pesticides, U.S. EPA, *Regulating Pesticides*, <http://www.epa.gov/pesticides/regulating/index.htm#eval>.

23. See Office of Pesticides, U.S. EPA, *Pesticide Reregistration Facts*, [http://www.epa.gov/oppoedrl/reregistration/reregistration\\_facts.htm](http://www.epa.gov/oppoedrl/reregistration/reregistration_facts.htm).

is voluntary, it sidesteps the “unreasonable risk” and other findings EPA must make to compel data development and submission. However, for the same reason, EPA has had limited recourse to ensure full participation by manufacturers or the timely submission of complete and high-quality hazard data sets for HPV chemicals, and the program has fallen well short of its goals.<sup>31</sup>

For new chemicals, TSCA provides EPA with premanufacturing review authority. Two major constraints apply, however. First, TSCA precludes EPA from requiring upfront development and submission of a minimum set of data on a chemical's hazards.<sup>32</sup> As a result, the majority of new chemical notifications EPA receives actually contain no hazard data.<sup>33</sup> Second, TSCA grants EPA typically only one bite at the apple—a one-time, 90-day review opportunity. Once that review is completed and manufacture commences, the chemical is placed on the TSCA Inventory, becomes an “existing” chemical, and any company can manufacture and use it without even having to notify EPA it is doing so. Any conditions EPA imposes apply only to the original notifier, unless EPA also promulgates a significant new use rule (SNUR) specific to that chemical.<sup>34</sup>

These limitations—little if any hazard data and one-time review at the premanufacturing stage, well before the full picture of the actual production, use and exposure, and lifecycle impacts of a chemical has emerged—are in contrast to prac-

tices in Canada and the EU. Both of those systems employ multi-tiered notification and assessment systems, and both mandate submission of minimum data sets, the scope of which increases as production and use expand.<sup>35</sup>

**Recommendation:** Reform of TSCA needs to provide EPA with broad authority, without having to demonstrate potential or actual risk, to require industry to generate and submit any data or other information necessary to gain a thorough understanding of the potential risks of any chemical of interest or concern. Submission of minimum data sets should be required of all chemicals, both new and existing.

Companies should be required to notify EPA whenever significant changes occur in a chemical's production volume or use pattern. Government should be authorized and required to request any additional information needed for a re-review of such chemicals to assess the effects of such changes.

For new chemicals, a tiered scheme should be used, with increasing information required as production increases and the extent or diversity of uses expands. While there is merit in retaining the first notification at the premanufacturing stage, even in the absence of a significant data requirement, such an approach needs to be coupled with subsequent notifications accompanied by sufficient data.

## VI. Require Robust Data on Chemical Uses and Exposures

For industrial chemicals already in commerce, EPA requires reporting of only limited information on how chemicals are used and the extent to which environmental releases or exposures to workers, consumers, or the environment may occur, and it does so infrequently. TSCA requires such reporting only from chemical manufacturers (and in some cases, processors), but not from the companies that use the chemicals, whether directly or as ingredients in products.

Because of recent amendments, EPA's Inventory Update Rule (IUR) now requires limited reporting on use and exposure.<sup>36</sup> Beginning in the 2006 reporting cycle, all manufacturers of non-exempt<sup>37</sup> chemicals in amounts of 25,000 pounds or more per year per site must report “known or reasonably ascertainable” information pertaining to:

- the number of workers reasonably likely to be exposed to the chemical substance at the site;
- physical form(s) of the chemical substance as it leaves the submitter's possession, along with the associated percent of total production volume; and

31. For a full description of the HPV Challenge and what it has and has not accomplished, see RICHARD A. DENISON, *HIGH HOPES, LOW MARKS: A FINAL REPORT CARD ON THE HIGH PRODUCTION VOLUME CHEMICAL CHALLENGE* (Environmental Defense Fund 2007), available at [http://www.edf.org/documents/6653\\_High-HopesLowMarks.pdf](http://www.edf.org/documents/6653_High-HopesLowMarks.pdf).

32. Any requirement for submitting hazard data for a new chemical under TSCA §5 is limited to existing test data already “in the possession and control” of the notifier of the new chemical (§5(d)(1)(B)) and to descriptions of any other relevant information that is already known or “reasonably ascertainable” to the notifier (§5(d)(1)(C)). The lack of an upfront minimum data requirement may in part reflect the fact that notification takes place *premanufacture*, when it may not be realistic to expect a company to have conducted much testing. EPA's intervention at this stage has the advantage of flagging potential concerns before manufacturing has commenced and before significant financial investment has been made by the producer. It also may allow redesign of the manufacturing process or the chemical itself to eliminate or reduce any concern in advance of commercialization. However, the lack of data on a chemical's hazards and other properties, and the more speculative nature of information on its potential uses, releases, and exposures can severely limit the robustness of any risk evaluation conducted at this stage. See GAO, 2005, *supra* note 3, at 10-16.

33. According to EPA, 67% of PMNs contain no test data and 85% of PMNs contain no health data. OPPT OVERVIEW, 2007, *supra* note 2, at 8. More than 95% of PMNs contain no ecotoxicity data. OPPT, U.S. EPA, DRAFT Q&A FOR THE NEW CHEMICALS PROGRAM 1-55 (answer to question 118-5) (undated), <http://www.epa.gov/opptintr/newchems/pubs/qanda-newchems.pdf>. EPA can, and, for a small fraction of new chemicals, does, require some testing or data development on a case-by-case basis where it is able to meet the statutory burdens for requiring testing. A requirement for such data may be included in a TSCA §4 Enforceable Consent Agreements (ECAs), which EPA uses as an alternative to test rules in cases where there is agreement with industry on the need and scope of testing. EPA has issued such orders for about 60 chemicals. See OPPT OVERVIEW, 2007, *supra* note 2, at 15. Alternatively, EPA may negotiate with the notifier a voluntary agreement to conduct testing, which is known as a Voluntary Testing Action. Through the end of September 2005, EPA had negotiated about 300 Voluntary Testing Actions. See OPPT OVERVIEW, 2007, *supra* note 2, at 11.

34. SNURs, which EPA has issued for about 7% of new chemicals, typically extend the same conditions imposed on the original notifier to any other manufacturer and require that anyone else who begins producing or using the chemical outside of such conditions first notify EPA. See OPPT OVERVIEW, 2007, *supra* note 2, 9-11.

35. See RICHARD A. DENISON, *NOT THAT INNOCENT: A COMPARATIVE ANALYSIS OF CANADIAN, EUROPEAN UNION AND UNITED STATES POLICIES ON INDUSTRIAL CHEMICALS III-4 to III-6* (2007), available at <http://www.edf.org/chempolicyreport>.

36. See U.S. EPA, TSCA Inventory Update Rule Amendments, 68 Fed. Reg. 847 (Jan. 7, 2003), available at <http://www.epa.gov/fedrgstr/EPA-TOX/2003/January/Day-07a/2009.htm>.

37. Certain chemicals on the TSCA Inventory are fully or partially exempted from IUR reporting. See OPPT, U.S. EPA, QUESTIONS AND ANSWERS FOR REPORTING FOR THE 2006 PARTIAL UPDATING OF THE TSCA CHEMICAL INVENTORY DATABASE 7-10 (2006), available at [http://www.epa.gov/opptintr/iur/pubs/guidance\\_qanda.pdf](http://www.epa.gov/opptintr/iur/pubs/guidance_qanda.pdf) (answers to questions 30-37).

- the maximum concentration of the chemical substance as it leaves the submitter's possession.

For chemicals manufactured in amounts of 300,000 pounds or more per year per site, additional information is required, including the number of downstream processing and use sites, the number of workers reasonably likely to be exposed, and the types of commercial and consumer uses. Manufacturers, however, only need to report this additional information to the extent it is "readily obtainable." While EPA has yet to release any data from the 2006 IUR reporting cycle, early indications are that significant amounts of the requested information were not submitted because they were deemed by submitters to be "not readily obtainable."<sup>38</sup> This result is not surprising, as manufacturers frequently have only limited access to information about downstream uses.<sup>39</sup>

Reporting requirements now cover fewer than 8,000 chemicals. At most, a few thousand of these are subject to the more extensive reporting that extends to downstream processing and use information. Reporting is required only once every five years and then only for a single reporting year. Infrequent reporting yields a highly inaccurate picture of actual manufacturing levels and use patterns over time,<sup>40</sup> and this inaccuracy is likely to extend to the use and exposure information EPA is now beginning to collect.

EPA may require manufacturers and processors of specified chemicals to report basic manufacture and use information under TSCA §8(a).<sup>41</sup> But each request requires a case-by-case rulemaking and provides for only one-time reporting, although a single rule can cover multiple chemicals. EPA has standardized this type of regulation in the form of a Preliminary Assessment Information Reporting rule, a few dozen of which have been issued for about 1,200 chemicals.<sup>42</sup>

For new chemicals, Premanufacture Notifications (PMNs) must include basic information on anticipated use, production volume, exposure, and release—but only to the extent it is known or reasonably foreseeable by the submitter at the pre-manufacture stage. The only other circumstances under TSCA requiring reporting of changes in manufacture or use are the rare cases where a new chemical is subject to such a condition during PMN review or when a chemical is subject to a SNUR that includes such a requirement (called a "volume SNUR").<sup>43</sup>

REACH offers two major innovations in this regard. First, REACH compels the bidirectional flow of information along the chain that links chemical producers, processors, distributors and users.<sup>44</sup> Suppliers typically have limited knowledge of how or by whom their chemicals are used, and users have limited knowledge of the characteristics of the substances they receive or appropriate risk management measures recommended by the producers. REACH requires suppliers to inform their customers about the hazards and risks of their chemicals and about risk management measures that need to be applied. In turn, it requires downstream users to give their suppliers sufficient information on their use(s) of a substance so the supplier can evaluate exposure and identify risk management measures that are then communicated back to the users.<sup>45</sup>

Second, while REACH has no direct counterpart to the TSCA IUR periodic reporting requirement, information is updated as new and existing chemicals move along the program's multi-tiered registration scheme. In addition, REACH requires registrants to update and resubmit "without undue delay" their registrations whenever there is any significant change in status, including any new use, as well as any new knowledge of risks.<sup>46</sup>

In addition to chemical usage, directly measuring chemicals in human (or other organisms') tissues or fluids can be a powerful means of gauging the actual extent of exposure, and has the further advantage of effectively integrating all exposure sources. Since 1999, the Centers for Disease Control's National Health and Nutrition Examination Survey has measured the levels of a limited number of chemicals and their metabolites in samples of human blood and urine every two years.<sup>47</sup> Biomonitoring to date has focused on chemicals already known to be hazardous and on chemicals that are known to bioaccumulate, which are only a subset of chemicals of potential health concern. Government has yet to conduct broader, more exploratory biomonitoring—aimed at identifying the full range of xenobiotics to which humans are exposed, as one means of identifying chemicals that are priorities for further scrutiny with respect to both hazard and exposure. In addition, the extent of sampling conducted to date is too limited to provide the degree of geospatial "resolution" that

38. Such cases are so common that EPA has coined an acronym for use as shorthand: "NRO." See Richard A. Denison, *Environmental Defense Fund's Comments on ChAMP: EPA's Recent Commitments and Possible New Initiatives for Existing Chemicals*, May 2, 2008, available at [http://www.edf.org/documents/7871\\_Comments\\_ChAMP\\_May08.pdf](http://www.edf.org/documents/7871_Comments_ChAMP_May08.pdf).

39. See references in note 44, *infra*.

40. See U.S. EPA, NATIONAL POLLUTION PREVENTION AND TOXICS ADVISORY COMMITTEE (NPPATC), BROADER ISSUES WORK GROUP, INITIAL THOUGHT-STARTER: HOW CAN EPA MORE EFFICIENTLY IDENTIFY POTENTIAL RISKS AND FACILITATE RISK REDUCTION DECISIONS FOR NON-HPV EXISTING CHEMICALS? 3-4 (Draft Oct. 6, 2005), available at <http://www.epa.gov/oppt/ppac/pubs/finaldraftnonhpvpaper051006.pdf>. See also Comments on Proposed Rule, TSCA Inventory Update Reporting Revisions (Feb. 18, 2005), available at <http://www.regulations.gov/fdmspublic/ContentViewer?objectId=09000064800ae9de&disposition=attachment&contentType=pdf>.

41. See U.S. EPA, EPA AUTHORITIES UNDER TSCA 23 (2005), available at <http://www.epa.gov/oppt/ppac/pubs/tscauthorities71105.pdf>.

42. OPPT OVERVIEW, 2007, *supra* note 2, at 16.

43. U.S. EPA, *supra* note 41, at 16.

44. For more discussion of information flow in the context of improved chemicals assessment and management, see Richard A. Denison, *Improving Information Flows—In Supply Chains and Beyond*, paper presented at the North American Dialog on "Framing a Future Chemicals Policy," Boston, Mass., Apr. 2005, available at <http://www.chemicalspolicy.org/downloads/W3-InformationFlow.doc>; and Rachel Massey, *Sharing Knowledge about Chemicals: Policy Options for Facilitating Information Flow*, in *OPTIONS FOR STATE CHEMICALS POLICY REFORM: A RESOURCE GUIDE* 69-96 (Lowell Center for Sustainable Production, University of Massachusetts at Lowell 2008), available at <http://www.chemicalspolicy.org/downloads/OptionsforStateChemicalsPolicyReform.pdf>.

45. Two entire titles of REACH are devoted to these tasks: Title IV covers Information in the Supply Chain and Title V covers Downstream Users.

46. REACH, *supra* note 6, art. 22.

47. The latest survey was published in 2005 and tested samples collected in 2001 and 2002 for 148 chemicals. While many of the chemicals included are either "historical" or unintentionally produced substances, human biomonitoring for substances still in commerce has increased in the more recent survey. See CENTERS FOR DISEASE CONTROL & PREVENTION, *THIRD NATIONAL REPORT ON HUMAN EXPOSURE TO ENVIRONMENTAL CHEMICALS* (2005), available at <http://www.cdc.gov/exposurereport/report.htm>.

is needed to begin to elucidate exposure routes for chemicals found in human tissues.

**Recommendation:** As with hazard data, EPA should have broad authority to require industry—both chemical manufacturers and downstream users of chemicals—to generate and submit any use, release, or exposure data or other information necessary to gain a thorough understanding of the potential risks of any chemical of interest or concern. Submission of minimum sets of such data should be required of all chemicals, both new and existing.

Companies should be required to notify EPA whenever significant changes occur in a chemical's production volume or use pattern. Government should have authority and be required to request any additional information needed for a review of such chemicals to assess the effects of such changes.

In addition, biomonitoring should be required for any chemical for which there is any reason to suspect human exposure. To avoid conflicts of interest, the government should conduct biomonitoring at manufacturers' expense.

## VII. Improve Integrity and Credibility of Industry-Generated Data

Essentially all policies affecting chemicals worldwide—whether industrial chemicals or drugs, cosmetics ingredients, pesticides, or food additives—rely on data chemical manufacturers generate. It is critical, therefore, that every effort be made to ensure that industry-generated data used to formulate and support public policy are—and are seen as—credible. This need is even more pronounced when one considers the obvious financial incentives industry has in minimizing testing costs and being able to state that its products are safe.

**Recommendation:** To ensure a high degree of public trust in the government's assessment and management of chemicals, sound policy should<sup>48</sup>:

- Establish a registry of health- and safety-related studies to ensure that all study results, along with details of the method used in each study, are reported and made available to the public. This is similar to what already occurs in pharmaceuticals regulation.
- Provide government access to all records of privately sponsored research used in setting or implementing public policy. Such a requirement already exists for publicly funded research.
- Require privately funded researchers whose research is used in public policy settings to disclose the source of their funding and the extent of sponsor review or approval, as well as potential financial conflicts of interest. A growing number of scientific journals and organizations require such disclosures.

48. Many of these proposals are liberally adapted from RENA SPENZOR ET AL., *SAVING SCIENCE FROM POLITICS: NINE ESSENTIAL REFORMS OF THE LEGAL SYSTEM* (Center for Progressive Reform 2000), summary available at <http://www.progressivereform.org/scienceRescue.cfm>.

- Require independent peer review or certification of studies submitted for use in public policy contexts, along with transparency safeguards to ensure disclosure of the identity of reviewers and any potential conflicts of interest, as well as balanced representation of the scientific community among reviewers.
- Provide unfettered authority and requirements for government to conduct random inspections of laboratories used to develop data submitted by industry and audits of the data submissions.

## VIII. Broaden Public Access to Chemical Data

Independent of the extent to which government itself acts on chemical information to identify and reduce or manage risks, providing broad public access to such information can empower a host of other actors to make better decisions about the chemicals. Such actors include companies and institutions that make, purchase, or sell chemicals or chemical products, as well as citizens and end consumers.

Better access to information may also drive markets to demand more information and to migrate away from chemicals known or suspected of being risky. Indeed, a field of specialization within economics known as information economics has demonstrated that access to information is a critical need if markets are to operate properly, and, conversely, that the lack of robust information can adversely affect market economies.<sup>49</sup>

One of REACH's main strengths is the extent to which the government intends to make public a large amount of the information it receives, including the identification of substances of very high concern that are to be subject to authorization and information about potential substitutes. In contrast to TSCA, REACH includes numerous provisions calling for public access to non-confidential information—including government decisions and the basis for them—and it mandates that most such information be made available on the internet, free of charge.

**Recommendation:** Chemical policy reform should include explicit requirements that government make readily and publicly available, in a timely manner, as much information as possible about chemicals as well as documentation of government decisions and the basis for them.

49. See, e.g., Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics, Part 1*, 47 AM. ECON. 6-26 (2003); Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics, Part 2*, 48 AM. ECON. 17-49 (2004); and JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 73-74, 261 n.2 (W.W. Norton & Co. 2003), all cited in Joseph H. Guth et al., *Require Comprehensive Safety Data for all Chemicals*, 17 NEW SOLUTIONS: J. ENVTL. & OCCUPATIONAL HEALTH POL'Y 233-58 (2005), available at <http://www.louisvillecharter.org/paper.safetydata.shtml>.

### IX. Tighten Conditions Under Which Industry Can Claim Its Submissions as Confidential Business Information

TSCA §14 provides that “manufacturers, processors or distributors” submitting information may designate any such information as confidential and submit it separately. It further states that, with limited exceptions, information considered to be “trade secrets and commercial or financial information obtained from a person and privileged or confidential” that is reported to or otherwise obtained by EPA “shall not be disclosed” except to federal government employees or their designated contractors, or to law enforcement officials.<sup>50</sup> This prohibits EPA from disclosing any information designated by a submitter as confidential business information (CBI) not only to the general public but also to foreign governments, U.S. states, tribes, and local governments.<sup>51</sup>

Although health and safety studies and associated data are not eligible for CBI protection, chemical and company identity can be eligible.<sup>52</sup> This allowance can lead to perverse outcomes, such as that a chemical’s adverse effects on mammalian reproduction must be disclosed, but identification of which chemical causes the effect may be kept a secret.<sup>53</sup>

CBI designations are common; for example, about 95% of PMNs for new chemicals contain information, including chemical identity, designated by the submitter as CBI.<sup>54</sup> There is typically no requirement to reassess such claims even after these chemicals enter commerce.<sup>55</sup> A 1992 EPA study identified extensive problems with respect to the extent of inappropriate CBI claims.<sup>56</sup>

EPA does not always require submitters to provide a justification for such designations at the time they are made.<sup>57</sup> Nor does it require that these claims be reviewed and approved in order to be retained. In addition, such designations are generally not time-limited and, hence, do not expire unless the submitter so designates. EPA may challenge CBI designations on a case-by-case basis, but it rarely does so because of the extensive resources required.<sup>58</sup> In the absence of a successful challenge by EPA, the information must be held as confidential.

The net result of all of these provisions and practices is a system that effectively denies access by the public and even other levels of government to much more chemical information than is legitimately to be claimed CBI.

**Recommendations:** Submitters advancing CBI claims should be required to: specify precisely what information is requested to be kept confidential; make such a request at the time of submission and provide a full justification and documentation in writing; and specify and justify a time period for which the request is made.

EPA should be required to: specify acceptable and unacceptable justifications for, and documentation that must accompany, any confidentiality request; review, in a timely manner, all confidentiality requests and determine whether to accept or deny the requests; and where a request is accepted, set a time period after which disclosure may occur unless a new request is submitted and accepted.

EPA should be able to disclose submitted information for which it has rejected a confidentiality request, after providing a reasonable opportunity for the submitter to rectify the request.

Health and safety information should never be eligible for CBI protection. As a rule, the identity of the associated chemical and of the submitter of the information should also be ineligible; government should explicitly state the basis for any exceptions.

Workers should have access to all available information, whether or not CBI protected, concerning chemical identity, properties, hazards and workplace exposures for any substance with which they work or to which they could be exposed during work.

Other governments, whether those of domestic states, provinces, municipalities, tribes or foreign countries, should be given access to CBI for the purpose of administration or enforcement of a law, under appropriate agreements and where the recipient takes appropriate steps to keep the information confidential.

50. 15 U.S.C. §2613 (citing 5 U.S.C. §552(b)(4) of the Administrative Procedure Act).

51. See OPPT OVERVIEW, 2007, *supra* note 2, at 21.

52. See, for example, such allowance in EPA’s PMN regulations, 40 CFR §720.85(a).

Elsewhere, EPA regulations state that EPA considers chemical identity to be part of the underlying data to a health and safety study. See, e.g., 40 CFR §§716.3 and 720.3(k).

53. An example of where this frequently occurs is in EPA’s public listings of submissions received under TSCA §8(e), which requires the submission of information indicative of substantial risk. Whereas a generic name for the substance must be supplied, its specific name and other identifiers such as Chemical Abstract Service (CAS) number are often listed as “confidential”—as are the names of the submitters themselves. For a recent example, see EPA’s compilation of §8(e) submissions received in July 2000, at <http://www.epa.gov/opptintr/tscas/pubs/8emonthlyreports/2000/8ejul2000.htm>. Oddly, EPA’s guidance for §8(e) submissions states that “EPA considers chemical identity to be part of the underlying data to a health and safety study,” citing 40 CFR §§716.3 and 720.3(k). EPA goes on to state: “Consequently, the confidential identity of a chemical substance will not be protected by EPA unless otherwise provided for under section 14 of TSCA and the interpreting regulations in 40 CFR part 2.” See <http://www.epa.gov/fedrgstr/EPA-TOX/2003/June/Day-03/13888.htm>. Either EPA has not been able or willing to challenge such claims made in §8(e) submissions or the claims have been found to comport with TSCA §14 and the interpreting regulations in 40 CFR pt. 2.

54. GAO, 2005, *supra* note 3, at 5, 32; OPPT OVERVIEW, 2007, *supra* note 2, at 10. The fraction of submitters making CBI claims for chemical identity drops to about 65% for chemicals actually entering commerce, those chemicals for which Notices of Commencement (of manufacture) are filed.

55. An exception is that a claim to keep chemical identity—but not other information—in a PMN confidential expires once manufacture of the chemical commences, unless in filing the required Notice of Commencement the notifier again asserts that the chemical identity is CBI. In this latter case, in contrast to the case when filing a PMN, a justification for the CBI claim must be provided. See 40 CFR §720.85(b).

56. Cited in GAO, 2005, *supra* note 3, at 32-33.

57. Examples of cases where an up-front justification is explicitly required include CBI claims for chemical identity and facility identification under EPA’s TSCA Inventory Update Rule (see <http://www.epa.gov/oppt/nur/pubs/guidance/confidentiality.htm>) and for “substantial risk” information required to be submitted under TSCA §8(e) (see <http://www.epa.gov/oppt/tscas/pubs/confidentialbusinessinformation.htm>).

58. GAO, 2005, *supra* note 3, at 5, 33.

## **X. Allow State Governments to Undertake More Protective Actions**

Given the very limited level of activity at the federal level in advancing policy reforms to better identify and address chemicals of concern, many states have stepped in to fill the void.<sup>59</sup> States have a critical role to play in chemicals policy development and implementation, not only in affecting practice within their borders, but also in innovating new policy approaches and driving national policy forward.

A chemical's use pattern and human or environmental exposure to it is often specific to a geographic region and may change over time. For this reason, such information may be more appropriately developed at the state level. It is reasonable for states to take steps to understand the flow of chemicals within and across their boundaries. States can and do differ with respect to their policy priorities, both from each other and from national priorities. These priorities may be of cultural or historic origins, signify economic conditions, or reflect geospatial distinctions, such as the extent of reliance on groundwater, features of the natural landscape, or the presence of subpopulations dependent on subsistence lifestyles. Given these distinctions, it makes sense that states will pursue approaches that may differ from and in some cases go beyond those of the federal government or other states.

*Recommendation:* While some measures needed to establish effective chemicals policies are best undertaken at the federal level, maintaining a vibrant level of state activity is important both in its own right and in driving the evolution of federal policy. Federal policy reform should establish floors, not ceilings, for state government action and should only preclude state actions that are less protective of health or the environment.

## **XI. Conclusion**

Implementation of the elements identified in this Article can facilitate a shift toward *knowledge-driven* policies that motivate and reward, rather than impede and penalize, the development of information sufficient to provide a reasonable assurance of safety for chemicals. Such policies would also place more of the burden of providing and acting on that information on those who stand to profit financially from the production and use of chemicals, as they are arguably in the best position to internalize such information and use it to design out risk from their products from the outset.

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59. See Massey, *supra* note 44.

Mr. DENISON. Yes. You were chair of this committee at that time.

Senator BOXER. I just want to know if you stand by it. I don't have a lot of time to talk about it.

Mr. DENISON. I supported those statements then and I still support them. But the protections they provide would only be realized if we actually get a law put in place.

Senator BOXER. Very important. Because here is the deal. The people who are experts in the law that are advising all of the public health groups and people that don't have a financial interest in this say that this bill is worse than current law and on top of it, it preempts. And this preemption, you have heard the word a lot of times, this preemption is a fatal flaw of this bill if you care about people. And these attorneys general have come in, and by the way, they didn't even get to see the draft document of the bill until maybe a week ago. And we are continuing to get documents in here.

We just heard from the business community, Sustainable Business Council. I ask unanimous consent to place that into the record. And of course I don't have it in my hand.

Senator INHOFE. Without objection.

[The referenced information follows:]



AMERICAN SUSTAINABLE  
BUSINESS COUNCIL  
ACTIONFUND

March 17, 2015

The Honorable James Inhofe  
Chairman, U.S. Senate Committee on  
Environment  
& Public Works  
205 Russell Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member, U.S. Senate  
Committee on Environment  
& Public Works  
112 Hart Senate Office Building  
Washington, DC 20510

Dear Chairman Inhofe and Ranking Member Boxer:

On behalf of the businesses and business organizations of Companies for Safer Chemicals and the American Sustainable Business Council we are pleased to submit this letter to the committee regarding reform of the Toxic Substances Control Act (TSCA). Meaningful reform will drive innovation and investment, create new industries for safer alternatives and job creation. The bill introduced by Senators Vitter and Udall (S.697) is insufficient to achieve these aims.

The coalition Companies for Safer Chemicals was formed in 2013 to push Congress to modernize the nation's out-of-date and ineffective chemical safety laws. The coalition favors strong reforms that support the industry's innovation of safer and cleaner products. It includes such companies as Seventh Generation Patagonia, Stonyfield Farm, Aubrey Organics, Method, Naturepedic, Badger, Annie's, EILEEN FISHER, Zarbee's Naturals, Earth Friendly Products, and many more companies and business organizations, which together represent thousands of companies.

The coalition endorses reform that reflects three broad principles:

- **TRUE TRANSPARENCY:** We believe that the public and businesses should have access to information regarding the safety of the chemicals in the products they use.
- **TRUE SAFETY:** Federal law should set a minimum acceptable safety requirement, and encourage States to create innovative laws and regulations that further protect human health and the environment.
- **TRUE INNOVATION:** Chemical management should foster solutions that lead to safer and sustainable products and technologies, not codify the status quo.

Based on these principles, the concern with S.697 is primarily in the following areas:

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ASBCOUNCIL.ORG

Senator BOXER. Thank you. But this is over 100 businesses who are lamenting this bill, lamenting this bill, because they are trying to get people away from dangerous chemicals.

Mr. Frosh, some attorneys general have argued the Udall-Vitter bill preemption provisions could apply to much more than State toxics laws, and could also preempt States' clean air, clean water or other environmental laws. Would preemption of State air and water laws have a serious impact on a State's ability to protect their citizens from all types of pollution?

Mr. FROSH. Absolutely it would.

Senator BOXER. OK. Well, this is an area we need to look at.

Mr. Cook, I want to ask you something, it is very important. Because Senator Vitter talked about deadlines. I am sorry, it was another Senator, I can't remember which one. Yes, there are deadlines for studying about 25 chemicals over a 7-year period, and at that time they have to make a decision. But as far as I can tell from the experts looking at this, there is no deadline for actual implementation or action on any chemical. Do you agree with that?

Mr. COOK. That is our interpretation as well, Senator.

Senator BOXER. OK. Let it be clear. There is not one deadline in this bill that requires any action. There is no mention of asbestos. The same core test is put forward in this bill that resulted in asbestos being left as an orphan child. It is a sad situation for us, and I pray, honestly I pray and hope we can fix this bill. We can do it, the New York Times laid out some great ways to start. Let's get with it, because we have tried for a very long time and haven't succeeded.

Senator INHOFE. Thank you, Senator Boxer. Senator Vitter.

Senator VITTER. Thank you, Mr. Chair.

When TSCA was first passed, it was actually done through the Commerce Committee, primarily because unlike other environmental laws that regulate pollutants, TSCA actually regulates products all over the Country and the world, an authority that is granted to the Federal Government by the InterState Commerce Clause. In fact, most products, including pharmaceuticals, medical devices, food, consumer products, are regulated by the Federal Government under statutes with strong preemption language.

Therefore, there is little to no State activity in those areas, yet I don't believe anyone is complaining that we are trampling on States' rights or that is a horrible situation.

Now, I have here what we are going to show you, a couple of maps, actually put out last week by one of our witnesses, the Environmental Working Group. They put out these two maps, among a few others, I think there were six total, meant to illustrate that States are leading when it comes to chemical regulation.

Before anyone asks, no, we have not doctored or changed these maps at all. That is what the Environmental Working Group put out. Two of the examples they used to show that States are somehow leading the way.

Now, in my opinion, when you look at maps like this, it absolutely shows us why we have to fix TSCA through a strong bipartisan compromise like Udall-Vitter. These maps show that only one State has regulated these two different chemicals in question, only a few others are even considering legislation or regulation. Ameri-

cans in 49 of the 50 States have no protections at the State or Federal level.

So based on these maps, I want to ask Dr. Denison and Dr. Goldman, would you say that they help exemplify why we need a strong, meaningful Federal system? Mr. Denison?

Mr. DENISON. Senator, I think they are illustrative of the fact that States have been trying to fill a Federal void for a long time, but there are limits to what States can do. We need a strong Federal system that fills in that map.

Senator VITTER. Dr. Goldman.

Dr. GOLDMAN. EPA has been trying to regulate formaldehyde at least since 1981, to my knowledge. So that is, how many years that there has been the opportunity for State by State regulation to occur? And it just hasn't been done effectively, because it takes a lot of resources to do it. Very few States have the budget to be able to do this kind of work, having done it.

Senator VITTER. Right. And let me ask you both, with the new fee structure and the new authority and enhanced powers given the EPA under Udall-Vitter, don't we have a much better chance of achieving broader protection of public health than we have now?

Mr. DENISON. I believe we do, Senator. I do want to emphasize that this is a huge problem. TSCA dug a very deep hole and we have thousands and thousands of chemicals to work our way through. But we have to get started and we have to empower EPA and give it the resources to do this job.

Senator VITTER. Dr. Goldman.

Dr. GOLDMAN. Yes. I would say yes to your question.

Senator VITTER. OK. Also talking about preemption, Mr. Frosh, every State, State of Maryland included, is regularly preempted from laws, Federal laws governing products in commerce. Should Maryland be able to regulate drugs, for instance, prescription drugs, where they are regularly preempted by the FDA's authority?

Mr. FROSH. What I would say, Senator, is that when you are talking about poison, and that is what we are talking about here, States ought to have the right to regulate, especially where you see the kind of good luck that those charts that you just held up demonstrate.

Senator VITTER. Mr. Frosh, aren't some drugs, improperly used, poison?

Mr. FROSH. Certainly they are.

Senator VITTER. DO you oppose the current system whereby drugs are regulated through complete preemption by the FDA?

Mr. FROSH. I think FDA has done a pretty good job in acting in a timely fashion on approval of drugs.

Senator VITTER. You don't oppose that system, which is built on strong Federal preemption?

Mr. FROSH. I think EPA doesn't share that record of action. When you are talking about poisons, the States ought to have the ability to protect their citizens.

Senator VITTER. OK. Mr. Denison, there has been this attempt over and over to somehow characterize this as a pure industry bill with somehow no support among groups that care about public health and safety, environmental protection, et cetera. Do you agree with that characterization?

Mr. DENISON. I do not, Senator. I would not try to characterize the positions of my colleagues in the environmental community, except to say that I know there is a range of views and a very significant spectrum between myself and Mr. Cook. I will say that many groups support many of the provisions and especially the improvements that you and Senator Udall have made. But they are withholding support to try to get additional improvements. I understand that.

Senator VITTER. OK. Dr. McCabe, sort of along the same lines, do you believe that somehow you and March of Dimes are alone in the public health community interested in moving forward with a meaningful bipartisan bill like Udall-Vitter?

Dr. MCCABE. No, we are not alone. We signed a letter of support with our colleagues, the American Society for Reproductive Medicine, the American Congress of OB-GYN, and the Society for Maternal-Fetal Medicine. So we know that we are not alone. We know that many groups feel that we need to move forward. We are at the beginning of this, but we need to move it forward.

Senator VITTER. Great, thank you.

I would just say in closing, Mr. Chairman, that that illustrates, I think, a robust, healthy debate, which is great. But it does not illustrate, in fact it disproves that somehow this notion that this is an industry bill and the whole public health community, the whole environmental community is opposed to it. That is just flat-out, factually wrong. I think a lot of people properly support the bill and a lot of people properly recognize that the alternative to this bill or something like this bill is the status quo. That is the only meaningful alternative in sight any time soon. We clearly need to do better. Udall-Vitter does much, much, much better. Thank you.

Senator INHOFE. Thank you, Senator Vitter. Senator Carper.

Senator CARPER. Thanks, Mr. Chairman. To our witnesses, it is good to see all of you. Thank you so much for joining us. To my neighbor from Maryland, welcome, it is good to have you here today.

Dr. Denison, are you familiar with a letter, I mentioned one letter I sent about 13 months ago to a number of my colleagues, about 10 of them, to Senator Vitter, outlining nine changes we would like to see made in the bill? And all those have actually been made. But are you familiar with the letter I sent, I think last week, in which I mentioned three ideas, three issues that needed to be addressed?

Mr. DENISON. Yes, Senator, I am.

Senator CARPER. And your thoughts on those, please?

Mr. DENISON. Yes. I believe you mentioned the issue of co-enforcement that has been raised. I believe that is a legitimate concern and I think there is middle ground to be found. I believe a couple of your suggestions were good ones. The concern on the industry side is that a State might do something inconsistent with the Federal requirement. EPA could issue guidance to clarify how that requirement is to be imposed by a State. There could be an appeals process.

So I am troubled by that provision. It is one of the provisions I don't like in an overall package I do support. I think some additional work on that would be appropriate.

Senator CARPER. All right, thank you. I don't know if you have had a chance to look at the letter that a number of us sent a year ago, where we outlined nine things where we would like to have changes made. Those have essentially been addressed, at least in our view. But in your opinion, does this legislation address that request of a year ago in a way that actually gives EPA new tools that it does not have under existing law in order to improve the protection of public health?

Mr. DENISON. Yes, Senator. That letter was very helpful in sharpening the negotiations, I believe. I think there was effort, and successful effort, to address each of those points.

Senator CARPER. All right, thank you. One of the points that I made in the letter that I sent last week deals with the State preemption issue. I highlighted that as an example of what we did in Dodd-Frank with respect to nationally chartered banks, and how nationally chartered banks didn't want States to pass laws, they didn't want State legislators and Governors and attorneys general telling them what to do.

We were able to find some consensus in the way that I laid out, where the Consumer Protection Bureau that we have in Federal law was able to play a role, provide regulations that were endorsed by the, rather, implemented and overseen by the attorneys general. Do you think if we could do that in Dodd-Frank that maybe there is a way to thread the needle here as well?

Mr. DENISON. I do, Senator. That is a useful, although I am not that familiar with that particular case. But I think looking at models in other statutes, the pesticide law, for example, has another model for, seminal for the States in enforcement.

Senator CARPER. Attorney General Frosh, we are going to be looking to you, you don't have to respond now, but we certainly want to have a good conversation with you and our own attorney general and others as well.

Dr. Goldman, you wrote eloquently in your testimony about the cost of inaction as a consequence of a failure to have a functional Federal toxics law. It is a testament to the idea of States as laboratories of democracy that several States have forged ahead with toxics laws in absence of a Federal system. Other States like my own State, Delaware, we don't have the capacity or the resources to run a robust State toxics program and we depend on EPA.

How will having a Federal program help to reduce the impact of toxic exposure for people like those who live in my State and some other States? What would be the cost of inaction?

Dr. GOLDMAN. I think that how people in your State would be benefited is by raising the floor, having a stronger safety standard that would have to apply everywhere in the Country. And also that when new chemicals come on the market that EPA would have to actually affirm that those new chemicals meet that standard. Right now, if EPA doesn't act in 90 days, automatically the chemical enters the market. This bill would tell the EPA, no, you must affirm that it needs the new standard and that it is a health-based standard. It is not a standard for cost-benefit balancing as it is today.

Senator CARPER. All right, thank you.

Colleagues, I would just say, two floors down is the committee room in which the Finance Committee meets. I serve on the Fi-

nance Committee. About 3 years ago we were having a hearing on deficit reduction, and we had some really smart people, brilliant people like we have here today, whose job was to come and tell us what they thought we should do further on deficit reduction.

One of the witnesses was a fellow, Alan Blinder, who used to be vice chairman of the Federal Reserve, he is now a professor of economics at Princeton. He said in his testimony, he said the key to deficit reduction is health care, getting health care costs reined in. He said if we don't do something about that, we are doomed. When it came time to ask questions, I asked him this question. I said, Dr. Blinder, you say the key to deficit reduction is health care costs, and if we don't do something about it, we are doomed. What would you suggest we do? That is what I asked him, what do you suggest we do. He thought for a minute and he said, you know, I am not an expert on this, I am not an economist. But if I were in your shoes, here is what I would do: find out what works; do more of that. That is all he said.

We know what doesn't work. And it is this law we have had for 40 years. We have a lot of good ideas here, we talked about them today, that would actually make it work a whole lot better. We need to pursue those. As we say in Delaware, the only two words in Latin I know are *carpe diem*, or *Carper diem*, seize the day. That day has come.

Senator INHOFE. Thank you, Senator Carper.

Before everyone leaves here, we are going to leave the record open for questions for the record for 2 weeks, without objection.

Senator Markey.

Senator MARKEY. Thank you, Mr. Chairman, very much.

This is another chart that was in that same study. So while only a few States may have acted on formaldehyde or triclosan, there are 169 laws adopted in 35 States that worked to limit, label and manage dangerous chemicals. This is from that same data base. For mercury alone, half the States have acted to protect against that exposure. Why is State action important? Well, when a State bans the use of a chemical like BPA in baby toys, companies work to reformulate the product, to comply and sell these products. Because then nationwide, all children benefit when one State acts. So we should not in any way downplay the role the States play here. Once States act on any of these things, the whole industry has to rethink if the rest of the Nation, at a State level, is going to move.

Dr. Denison, in 2013, you testified on an earlier version of this bill in the House. During that hearing you said that any trigger for State preemption on a chemical "should occur at the final action of the agency, which could mean either that EPA finds the chemical to be safe or that EPA promulgates a rule that restricts the use of that chemical." Do you still stand by that statement?

Mr. DENISON. I did say that, Senator, and I do believe that that would be the preferable approach.

Senator MARKEY. OK, thank you. Now, Mr. Frosh's testimony states the Udall-Vitter bill "includes the near evisceration of State authority to regulate toxic chemicals. For example, the bill prohibits States from taking action on any chemical that EPA has started to study, even though that could create a regulatory black

hole if EPA never takes any action on that chemical. The States would not be regulating, the EPA would not be regulating."

Do any of you disagree that the protections against toxic chemicals that the bill is intended to create would be made stronger if the State preemption provisions were removed?

Mr. DENISON. Senator, I believe that the only way we get the protections that this bill offers is if it gets enacted into law. That means, in my view that —

Senator MARKEY. I didn't say that. Would the bill be stronger if these preemption standards were taken out? Would the bill be stronger? That is all I want to know.

Mr. DENISON. The law would not be stronger —

Senator MARKEY. I don't need your political judgment. I am not looking for your political judgment. I need your technical judgment. Would the bill be stronger?

Mr. DENISON. If it could pass into law, yes.

Senator MARKEY. OK, thank you. Yes. Doctor? Yes or no?

Dr. MCCABE. This is not my area of expertise. It is not in pediatrics or genetics.

Senator MARKEY. We will come back the other way. Mr. Cook.

Mr. COOK. Yes, it unquestionably would be stronger.

Senator MARKEY. Attorney General.

Mr. FROSH. Absolutely, Senator.

Dr. GOLDMAN. I would agree with the other statements.

Senator MARKEY. Mr. Cook, the Udall-Vitter bill says that EPA can have a total of 12 years to complete work on the first 25 high priority chemicals. That means it will take over 100 years to complete work on the 1,000 chemicals EPA has said were in most need of assessment. Do you think that a strong Federal program should include a requirement that the resources to study the safety of more chemicals, more quickly, is included simultaneously?

Mr. COOK. Yes. I think it is vital that we have a faster pace and get more done.

Senator MARKEY. Do any of the rest of you disagree that the more quickly EPA can act to assess chemical risks and acquire needed regulations, the faster the public will be protected from exposures to chemicals that turn out to be unsafe?

Dr. GOLDMAN. I stated in my testimony that Congress could have a higher level of expectation on the pace of effort by EPA.

Senator MARKEY. Do any of you disagree with that comment?

Mr. COOK. No, sir.

Senator MARKEY. OK, thank you.

Mr. DENISON. Senator, I don't disagree, but I would say that there is a balance that needs to be struck. Because we otherwise could have poor assessments done or have EPA finding chemicals they can do quickly rather than those that need the most attention.

Senator MARKEY. No one disagrees. No one disagrees. The Udall-Vitter bill makes it more difficult for EPA to regulate a chemical in a product like furniture or clothing, even after EPA has found that the chemical is unsafe. For example, flame retardant chemicals are found in everything from carpets to couches to clothing. If EPA finds that flame retardants are dangerous under the bill, EPA would have to assess every product that contains them separately. It is not even clear that EPA could assess the use of flame

retardants in all clothing or in all furniture. It might have to assess each type of clothing and each type of furniture separately.

Mr. Cook, do you agree that this will lead to delays in EPA's ability to remove or restrict known dangers from products that children use, wear or are otherwise exposed to, and that this language should be removed?

Mr. COOK. Senator, I am from California. Those are the La Brea tar pits of slowdown in process that you have just mentioned. Yes, it will be very bad.

Senator MARKEY. Thank you, Mr. Chairman.

Senator INHOFE. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Let me start with my, I guess he is not my colleague, because I am not attorney general any longer, but I am always pleased to see attorneys general here.

Attorney General Frosh, you are obviously familiar with the administrative rulemaking process, which has commonalities at the State and Federal level. Are there ways in which a participant, particularly a large industry participant in an administrative rule-making process, can drag it out, make it take longer?

Mr. FROSH. Senator, as one of your alumni once said, I am just a country lawyer, but I can tie you up in knots in the administrative process for years. Yes.

Senator WHITEHOUSE. So it is within the control of the chemical industry to a significant degree how long, what I call this death zone, is, in which no one is allowed to regulate a chemical that is in the high risk category?

Mr. FROSH. That is absolutely right.

Senator WHITEHOUSE. I think that is something that we need to deal with. Dr. Denison, you have said that EPA needs the resources to do this job. I sit on the Environmental and Public Works Committee, I also sit on the Budget Committee where the other side of the aisle is constantly and relentlessly attacking the EPW budget, EPA budget, and I think would dearly love to see the, at least certain folks would dearly love to see the agency largely disabled from enforcement. Why does it make sense to prevent State attorneys general and States from adopting identical legislation and at least having cops on the beat for a rule that we would then all agree is both common and necessary?

Mr. DENISON. Senator, I have indicated already that that is an area of concern that I would to see more addressed as this bill moves forward.

Senator WHITEHOUSE. Let me ask everybody a pretty simple question. From the perspective of public health and safety, does every witness on this panel agree that this would be a better bill if there were co-enforcement by States so that enforcement is not at the mercy of EPA budgets that our colleague are relentlessly attacking, and no what I call death zone, in which there is no one who can put in a regulation of a chemical that is by definition in the high risk category for as long as 7 years and frankly sometimes perhaps longer, because sometimes things die at OMB well beyond what the rules allow?

Dr. GOLDMAN. I could say I think co-enforcement would be an improvement. I also think preemption being triggered by a final

agency action, which is what I think you are asking about with the second question, is also a good idea.

Senator WHITEHOUSE. Does everybody agree?

Mr. FROSH. I certainly agree.

Mr. COOK. I agree.

Senator WHITEHOUSE. Dr. McCabe.

Dr. MCCABE. Yes. And it is important that we are having this bipartisan discussion.

Senator WHITEHOUSE. Dr. Denison.

Mr. DENISON. Yes, Senator.

Senator WHITEHOUSE. OK. So I think we can all agree that those things, we could probably go on with others, but I just focused on those two, since time is short in these hearings. But it also strikes me that in these two areas, it would be very hard to articulate a legitimate industry objection. So I would like to offer anybody a chance to try to do that. Why should there be either no enforcement of a standard that the chemical industry has agreed to live by but just doesn't want to see enforced? That doesn't seem to be a legitimate industry interest. Nor does it seem a legitimate industry interest that there should be a period that they could manipulate lasting 7 years or longer in which a predetermined high-risk, high-priority chemical can't be regulated by anyone?

Dr. Denison, what is the legitimate industry case for either of those, as opposed to just a spirit of compromise?

Mr. DENISON. Senator, you need to ask the industry that question. I would say on enforcement, I think I have been clear. On the second one, that dead zone, as you describe it, could work in either direction. Because those decisions at the end of the process can be challenged by anyone.

So a challenge of a safe finding would also stretch out that period.

Senator WHITEHOUSE. But if you are a chemical company and you have a chemical that you see, uh-oh, there are some problems coming out here, we are starting to see some evidence that it is carcinogenic or poisonous in some way, if you can get it onto the priority list and if you can get it onto the list of 25 and start, get the assessment process started at EPA, which you can control by paying EPA to do that, you can then buy a potentially 7-year period whose length you can manipulate in which not only EPA but nobody else can regulate your chemical no matter how dangerous it is. Is that not a correct statement?

Mr. DENISON. Senator, there is one inaccuracy there, which is, a company that requests EPA to prioritize their chemical that EPA has not itself prioritized, that decision to prioritize that chemical does not have a preemptive effect. That is a deliberate part of the law to prevent exactly what you are talking about.

Senator WHITEHOUSE. So it is only where the industry has forced the choice. But if EPA has been convinced to do it through other reasons, then everything else that I said is accurate?

Mr. DENISON. Senator, that is why there are statutorily enforceable deadlines for each and every step of that process along the way.

Senator WHITEHOUSE. You ever see a recommendation stuck at OMB pass those deadlines?

Mr. DENISON. I don't disagree that is a, there is delay that could happen, regardless of those deadlines.

Senator WHITEHOUSE. My time is long exceeded. I appreciate the Chairman's courtesy.

Senator INHOFE. Senator Merkley.

Senator MERKLEY. I thank you all for your testimony. I think the gist of the conversation is that several different ways have been identified, that there seems to be considerable, unanimous support, as far as I could tell, in regard to the questions Senator Whitehouse was raising as to whether co-enforcement would make the bill better and whether stronger rules enabling States to act when the Fed has not yet put rules into place, there was change in the preemption provisions. I think I heard everyone respond yes. I just want to confirm that. Did I misunderstand? Everyone yes?

[Witnesses respond in the affirmative.]

Senator MERKLEY. Mr. Denison, yes.

Mr. DENISON. Yes.

Senator MERKLEY. So another area where this bill changes is that under current rules, or under the current law, EPA has stronger ability to restrict the importation of articles that have egregious chemicals in them. And under this new version, it would be relying in good faith reliance on the MSDS, that is the Material Safety Data Sheet. Now, the MSDS are often absolutely incorrect in describing the chemicals that are in a product. By one study they are wrong somewhere between 30 to 100 percent of the time. And of the chemicals they do label, they often label far smaller quantities than the actual quantities provided.

Would you all agree that it would be better to have provisions that give EPA a strong ability to regulate imports, rather than a good faith reliance on MSDSs which have been just time and time again shown to be wildly inaccurate?

Yes, Dr. Goldman.

Dr. GOLDMAN. If I may say, I do think that is an area in the draft that needs to be examined. But I also should say that the only imports today that are restricted are the few chemicals that EPA has ever regulated. And not to overestimate the impacts of that provision in current law, which have had very little impact because of the fact that things like formaldehyde, which are imports, are not regulated by EPA. But I do think that that is something that is worth an evaluation to make sure it provides not only EPA but also Customs enforcement with reasonable authority.

Senator MERKLEY. Would anyone else like to comment on that, whether that would make it stronger?

Mr. COOK. I would agree that it needs to be much stronger.

Dr. MCCABE. I would agree as well, Senator.

Senator MERKLEY. OK. Thank you. I was reflecting on some of the debates we have had in Oregon over the inclusion of BPA in plastics, baby pacifiers and the nipples on baby bottles and so forth. We have also had a significant debate in Oregon over the use of BPA in the linings of cans for products. I was just reading an article as Senator Whitehouse was testifying how a company in Oregon has this year been able to eliminate BPA from the cans. It is doing it voluntarily. I don't believe the law was passed in Oregon. I would have to double check that.

But the debate occurred because there was a State-focused discussion on this risk and this concern. And so we see this whether the State conversation is helping to drive a national conversation. I have a concern that if we have a law that basically says, States can't act, and by the way, a very, very slow Federal process, and by the way, when you finish that Federal process you can slightly change the chemical formulation and now you have to start the process all over again, that essentially you have a dysfunctional system only it is worse than the dysfunctional system we have right now. Because right now we have a dysfunctional Federal system with a possibility of State action. But under this law as framed at this moment, we have the possibility of a dysfunctional Federal system with no real opportunity for States to act.

So Mr. Cook, should I not have these concerns?

Mr. COOK. You should absolutely have these concerns. I mean, we have a contradiction here, right? On the one hand, people are testifying that despite all these State actions it really doesn't add up to much, not very many chemicals, doesn't mean anything. And on the other hand, the chemical industry is running here, asking for the first time ever for relief from all these State actions that are causing such chaos.

So you are point on, sir. The issue is, the chemical industry has completely lost the faith of consumers. Completely. And justifiably, because they have been misled and worse, time and again. That has led consumers, constituents, to go to State legislators and ask for fixes. I am so grateful for the charts that Senator Vitter put up. I had a nice shot of them. We have so many other charts I would like to offer to staff. If you ever need charts from the Environmental Working Group, we are here at your disposal.

But the fact is, when those laws pass in the States, they send shock waves through the economy, shock waves through the chemical industry and they begin to respond. That is why they are here today.

Senator MERKLEY. Attorney General Frosh, I got a letter from my AG strongly, strongly concerned about the preemption of State activity. You are here to testify the same. Is this a widely shared feeling among attorneys general across the Country? I realize it has been a very short time to respond.

Mr. FROSH. I believe it is, Senator. General Rosenblum is a leader. There are a number of other attorneys general who have submitted letters to this committee and share my strongly held view that States should be allowed to protect their citizens.

Senator MERKLEY. Thank you very much. Thank you, Mr. Chair.

Senator INHOFE. Thanks to all of you for appearing before the committee and your very thoughtful responses and your perseverance. Thank you for the time that you spent here. It has been very helpful.

We are going to leave the record open for 2 weeks. I would hope the staff would take note of that for questions to be sent in for the record.

Senator BOXER. Mr. Chairman, before we close down, as I had asked you, I have a number of letters to put into the record in opposition to the bill we have just discussed. One from the Catholic Health Association, EWG, one letter signed by the Advocates for

Youth, the National Latina Institute for Reproductive Health, the National Infertility Association, the Union of Concerned Scientists. A whole host of professors from all over the Country, from north, south, east, west, who oppose this bill. The American Sustainable Business Council Action Fund, the Breast Cancer Fund, the Safer Chemicals Healthy Families Environmental Health Strategy Center, the Commonwealth of Massachusetts Office of Attorney General, letter signed by the New York, Iowa, Maine, Maryland, Oregon and Washington attorneys general. State of Washington Department of Ecology. A letter that I think is very instructive, signed by Safer States. Earth Justice. Seventh Generation. Center for Environmental Health.

CalEPA, the Office of the Attorney General, my attorney general, Kamala Harris. We have separate letters from them.

And I just want to say to you, thank you very much for this hearing. I think we have seen some consensus on this panel of how we can fix this flawed bill that the chemical companies love and hurts the people.

[The referenced information follows:]



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**Dignity Health**



**HackensackUMC**



**Children's  
Environmental  
Health Center**

March 17, 2015

The Honorable James Inhofe  
Chairman, U.S. Senate Committee on  
Environment & Public Works  
205 Russell Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member, U.S. Senate Committee  
on Environment & Public Works  
112 Hart Senate Office Building  
Washington, DC 20510

The Honorable Tom Udall  
531 Hart Senate Office Building  
Washington, DC 20510

The Honorable David Vitter  
516 Hart Senate Office Building  
Washington, DC 20510

Dear Chairman Inhofe, Ranking Member Boxer, Senator Udall, and Senator Vitter,

On behalf of the signing health care organizations, we are writing to express our serious concerns about the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (S. 697), which was introduced to reform the Toxic Substances Control Act (TSCA). In its current form, the legislation has serious flaws that undermine protection of human health and the environment and could result in more harm than good if enacted. All of these flaws, however, could readily be addressed by making a limited number of changes.

While the evidence linking chemical exposures to negative health outcomes continues to rise, including increases in disease and conditions such as cancers, birth defects, asthma, and infertility, the federal law created to protect the public from hazardous chemicals has not been updated for thirty-nine years. As a result, products and their manufacture and disposal can release hazardous chemicals with the potential to harm human health and the environment. Exposure to these chemicals results in a disease burden that can significantly increase health care costs.

Moreover, patients and workers in the health care setting are exposed every day to a wide range of chemicals, including cleaners and disinfectants, phthalates in medical devices, flame retardants and formaldehyde in furniture, and solvents and formaldehyde in labs, among many others. These products also have life cycle impacts, affecting the workers who manufacture them and the communities that host manufacturing or disposal facilities.

While we acknowledge the work that has gone into developing this new legislation, we are deeply concerned about the following flaws in its current form:

- Preemption of new state actions on toxic chemicals years before the U.S. Environmental Protection Agency (EPA) has taken any steps to protect people from these substances. The appropriate time to preempt state action is at the effective date of EPA action on a chemical.
- No ability for the public to sue EPA if the agency designates a potentially harmful chemical as a “low priority,” which it can do under the legislation with very little review for safety.
- A weakening of the federal government’s ability to stop the importation of products into the U.S. that contain toxic chemicals.
- Additional and likely insurmountable regulatory hoops for EPA to jump through before it can regulate a product that contains chemicals the agency has already designated as harmful.
- Ban on states from enforcing state restrictions that are identical to federal restrictions, which is a significant departure from other environmental and consumer protection laws.
- Inadequate fees from industry to cover the cost of a robust regulatory program.

Our organizations are committed not only to healing, but to prevention. Addressing the shortcomings of the chemical regulatory system by reforming TSCA is one of the most critical initiatives to prevent disease and to protect public health, but only if it is done right.

Sincerely,  
 Advocate Health Care  
 The Catholic Health Association of the United States  
 Dignity Health  
 Hackensack University Medical Center  
 Health Care Without Harm  
 Mt. Sinai Hospital – Children’s Environmental Health Center

cc: The Honorable John Barrasso	The Honorable Thomas R. Carper
The Honorable Shelley Moore Capito	The Honorable Benjamin L. Cardin
The Honorable Mike Crapo	The Honorable Bernard Sanders
The Honorable John Boozman	The Honorable Sheldon Whitehouse
The Honorable Jeff Sessions	The Honorable Jeff Merkley
The Honorable Roger F. Wicker	The Honorable Kirsten Gillibrand
The Honorable Deb Fischer	The Honorable Cory A. Booker
The Honorable Mike Rounds	The Honorable Edward Markey
The Honorable Dan Sullivan	



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March 17, 2015

The Honorable James Inhofe  
 Chairman  
 Committee on Environment & Public Works  
 410 Dirksen Senate Office Building  
 Washington, DC 20510

The Honorable Barbara Boxer  
 Ranking Member  
 Committee on Environment & Public Works  
 456 Dirksen Senate Office Building  
 Washington, DC 20510

Dear Chairman Inhofe and Ranking Member Boxer:

As the Senate begins its consideration of S. 697, sponsored by Senators David Vitter (R-LA) and Tom Udall (D-NM), it is crucial that the bill receives the careful evaluation it needs before the Senate moves further.

We all agree that the current Toxic Substances Control Act is broken and fails to protect the public from unsafe chemicals. We also acknowledge that bipartisan bills result from compromise.

That said, we are concerned that as currently drafted S. 697 will fail to adequately protect public health and safety.


- The bill's timelines will permit dangerous chemicals to go unregulated for years, if not decades. If even one percent of the more than 80,000 chemicals in commerce are toxic, it would take the Environmental Protection Agency far too long to restrict them under the schedule and regulatory process outlined in the bill.
- The bill doesn't guarantee scientific integrity. It is crucial that the bill more fully ensures that independent science informs chemical safety assessments. We are concerned that as drafted, the bill would open the door to undue influence on the science by the chemical industry.
- The bill doesn't ensure that states can protect their citizens as the EPA undertakes the lengthy process to restrict unsafe chemicals. Current state chemical restrictions won't be affected until the EPA takes action to regulate a specific chemical. But states will have a very hard time trying to regulate any

additional unsafe chemicals after the law is passed because the bill would largely pre-empt state authority to take future action to protect their citizens, and states wouldn't even be allowed to enforce the federal rules. The bill specifically bars states from adopting and enforcing restrictions for unsafe chemicals that are identical with the EPA's. All enforcement would rest with EPA, which lacks the resources to conduct nationwide enforcement on its own.

- Thousands of potentially harmful chemicals may escape scrutiny. The EPA may be tempted to speed up its chemical work by throwing hundreds of chemicals into the low-priority category, meaning the agency decides it has enough information to consider the chemical "likely to meet the applicable safety standard." Once a chemical lands in the low-priority basket, states have 60 days to challenge that decision. But citizens don't have any avenue for compelling the EPA to reconsider.
- The EPA will lack adequate resources to do the job. The bill proposes to levy industry fees of up to \$18 million annually, and a total budget for this new chemical safety work of about \$74 million. Given the challenges facing the EPA in implementing this new program, we would urge sponsors to consider both more robust federal support and increasing industry fees. Major chemical company annual profits are in the billions of dollars, and the toll of toxic chemicals on public health and safety, worker productivity, and the welfare of entire communities near chemical plants is incalculable.

We look forward to working with you to ensure that Congress ultimately approves a truly protective and effective chemical safety bill this year.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Rosenberg", with a stylized, sweeping flourish at the end.

Andrew A. Rosenberg, Ph.D.  
Director, Center for Science and Democracy  
Union of Concerned Scientists



AMERICAN SUSTAINABLE  
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March 17, 2015

The Honorable James Inhofe  
Chairman, U.S. Senate Committee on  
Environment  
& Public Works  
205 Russell Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member, U.S. Senate  
Committee on Environment  
& Public Works  
112 Hart Senate Office Building  
Washington, DC 20510

Dear Chairman Inhofe and Ranking Member Boxer:

On behalf of the businesses and business organizations of Companies for Safer Chemicals and the American Sustainable Business Council we are pleased to submit this letter to the committee regarding reform of the Toxic Substances Control Act (TSCA). Meaningful reform will drive innovation and investment, create new industries for safer alternatives and job creation. The bill introduced by Senators Vitter and Udall (S.697) is insufficient to achieve these aims.

The coalition Companies for Safer Chemicals was formed in 2013 to push Congress to modernize the nation's out-of-date and ineffective chemical safety laws. The coalition favors strong reforms that support the industry's innovation of safer and cleaner products. It includes such companies as Seventh Generation Patagonia, Stonyfield Farm, Aubrey Organics, Method, Naturepedic, Badger, Annie's, EILEEN FISHER, Zarbee's Naturals, Earth Friendly Products, and many more companies and business organizations, which together represent thousands of companies.

The coalition endorses reform that reflects three broad principles:

- **TRUE TRANSPARENCY:** We believe that the public and businesses should have access to information regarding the safety of the chemicals in the products they use.
- **TRUE SAFETY:** Federal law should set a minimum acceptable safety requirement, and encourage States to create innovative laws and regulations that further protect human health and the environment.
- **TRUE INNOVATION:** Chemical management should foster solutions that lead to safer and sustainable products and technologies, not codify the status quo.

Based on these principles, the concern with S.697 is primarily in the following areas:

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ASBCOUNCIL.ORG

**Preemption:** The preemption provision for high-priority chemicals comes far too early in the regulatory process. This is a rollback from existing law that creates a regulatory gap for some of the most dangerous chemicals for up to seven years. Current law should remain; preemption should happen once EPA has made a final determination to exonerate or manage a chemical.

**Transparency/CBI:** While some progress has been made that loosens the overly protective practice of claiming any information as confidential business information (CBI), the provisions grant increased access to EPA but nothing more to businesses in the supply chain. Increased transparency throughout the supply chain will drive the market towards safer alternatives. Downstream businesses will make more informed choices about the products they make or sell to meet the increasing consumer demand for safer alternatives.

**Schedule:** The pace at which S.697 requires EPA to review chemicals is too slow and it is made worse by the one off/one on provision. This pipeline for review will not make a serious dent in the thousands of chemicals that need assessment. Listing chemicals as high-priority is a market signal to innovators and investors that there is an increased likelihood that there will be a market for a safer alternative for a chemical, or for a specific use of a chemical. With a more robust review schedule, more innovators will be working to find safer alternatives, and more investors will be supporting that work.

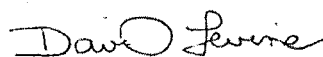
**Fees:** In order for EPA to review an adequate number of chemicals it must have the resources to do the work. Capping the fees will only restrain EPA's activities. A fee system that fully funds the TSCA program is needed.

**Chemicals in Products:** The legislation adds additional hurdles to restrict products that contain a chemical that EPA has determined are a hazard and should be restricted. EPA will have to make an additional legal finding to restrict a water bottle or couch containing that restricted chemical. This additional hurdle will likely face delay through litigation and the unsafe product will remain in commerce.

In an ideal scenario, manufacturers would have to prove their chemicals were safe before they could enter commerce, with their safety information transparently shared throughout the supply chain and regulators would only have to police a relative few unsafe chemicals.

Short of that, a vigorous system with adequate resources and no roadblocks that protect incumbent industries needs to be in place. The Vitter-Udall legislation is insufficient at meeting this standard.

Sincerely,



David Levine, CEO  
American Sustainable Business Council

cc:

The Honorable David Vitter  
The Honorable John Barrasso  
The Honorable Shelley Moore Capito  
The Honorable Mike Crapo  
The Honorable John Boozman  
The Honorable Jeff Sessions  
The Honorable Roger F. Wicker  
The Honorable Deb Fischer  
The Honorable Mike Rounds  
The Honorable Dan Sullivan

The Honorable Thomas R. Carper  
The Honorable Benjamin L. Cardin  
The Honorable Bernard Sanders  
The Honorable Sheldon Whitehouse  
The Honorable Jeff Merkley  
The Honorable Kirsten Gillibrand  
The Honorable Cory A. Booker  
The Honorable Edward Markey

3/15/2015

New Toxics Bill Would Allow the Chemical Industry to Continue to Endanger Public Health



PREVENTION STARTS HERE.

**Help us expose and eliminate the environmental causes of breast cancer.  
Together we can stop this disease before it starts.**

## **New Toxics Bill Would Allow the Chemical Industry to Continue to Endanger Public Health**

### **Breast Cancer Fund opposes newly introduced chemical bill**

**For Immediate Release: March 10, 2015**

**Contact:** Ena Do, (415) 321-2903, [Edo@breastcancerfund.org](mailto:Edo@breastcancerfund.org)

*Attention reporters: Breast cancer survivor Marika Holmgren is available for interviews.*

SAN FRANCISCO – The Frank R. Lautenberg Chemical Safety for the 21st Century Act, introduced today by Senators Tom Udall, D-N.M., and David Vitter, R-La., undermines what few health protections from toxic chemicals now exist, further weakening our failed national chemical law, the Toxic Substances Control Act (TSCA). It advances the interests of the chemical industry and disregards years of work by health care professionals, scientists, public health advocates and state legislators to enact meaningful reform and to prevent diseases linked to chemical exposure.

“There is an urgent need to protect Americans from the dangerous chemicals we are exposed to everyday – unfortunately this bill doesn’t hit the mark on protecting public health,” said Nancy Buermeyer, senior policy strategist at the Breast Cancer Fund. “Congress negotiated with our health and the American public lost out to chemical industry profits. We’re calling on senators from both sides of the aisle to support amendments that transform this bill into a robust defense for people to live free from contamination by toxic chemicals.”

*Marika Holmgren, a breast cancer survivor from Half Moon Bay, Calif., couldn’t agree more.*

*“We may not know everything about the 84,000 chemicals that are approved for use in everyday products, but we know enough to recognize the simple truth that we must eliminate those chemicals that are poisoning us from the shelves of our supermarkets and drugstores,” Holmgren said. “It’s vital that we take action to reduce our daughters, sisters, and mothers’ exposure to chemicals that increase the chances that they’ll hear the same words I heard on February 1, 2007: You have cancer.”*

The legislation fails to protect public health and even makes the EPA’s job more difficult than current law. The bill:

- Makes it much harder for the EPA to regulate consumer products, even when they contain chemicals known to be unsafe.
- Makes it harder for the EPA to implement safeguards for quality control, and stop toxic chemicals coming into the country in products made in China and other countries.

<http://www.breastcancerfund.org/media/press-releases/new-toxics-bill-would-allow-the-chemical-industry-to-continue-to-endanger-public-health.html?print=1>

1/2

3/15/2015

## New Toxics Bill Would Allow the Chemical Industry to Continue to Endanger Public Health

- Does not allow the EPA to take quick action on the worst chemicals, particularly chemicals that persist in the environment and build up in the food chain.
- Prohibits states from passing or enforcing policies protecting the public from chemicals, which the EPA has designated as “high priority.”
- Prohibits states from passing and enforcing regulations identical to federal standards, undermining the overall enforcement of the law.

The Breast Cancer Fund is committed to making this legislation as strong as it can be and live up to its promise of protecting public health. We will engage with our constituents to push for these necessary changes. Our health is simply too precious to risk.

**By the numbers: The Need for Safer Chemicals**

85,000+: The number of chemicals on the market and available for use

1976: The year our nation’s main law aimed at regulating chemicals used in commerce, or the Toxic Substances Control Act (TSCA) is passed.

1,000: The approximate number of new chemicals registered for use every year

200: The number of chemicals tested by the EPA for health effects

5: The number of chemicals that have been banned or regulated since 1976

###

*The Breast Cancer Fund is the leading national organization working to prevent breast cancer by eliminating our exposure to toxic chemicals linked to the disease. [www.breastcancerfund.org](http://www.breastcancerfund.org)*

Breast Cancer Fund 1388 Sutter Street, Suite 400 San Francisco, CA 94109-5400  
(415) 346-8223 or toll-free (866) 760-8223 | [www.breastcancerfund.org](http://www.breastcancerfund.org) | [info@breastcancerfund.org](mailto:info@breastcancerfund.org)



**PREVENTION STARTS HERE.**

March 17, 2015

Dear Senators,

On behalf of the Breast Cancer Fund, I write to express our strong opposition to S. 697, the Frank R. Lautenberg Chemical Safety for the 21st Century Act, introduced by Senators Tom Udall, D-N.M., and David Vitter, R-La.

The Breast Cancer Fund is the leading national organization working to eliminate exposures to toxic chemicals and radiation linked to the disease. Reform of the outdated and ineffective way industrial chemicals are managed in this country has long been a priority of our organization. The Breast Cancer Fund serves on the Steering Committee of Safer Chemicals, Healthy Families, a coalition of over 450 organizations and businesses working to reform the Toxic Substances Control Act (TSCA).

Despite all of our advances in detection and treatment, we have not been able to stem the tide of women, and men, diagnosed with breast cancer. In fact, we are losing ground: today an astonishing 1 in 8 women will be diagnosed with breast cancer in her lifetime. A strong and rapidly growing body of scientific evidence points to exposure to toxic chemicals found in a wide range of sources as being linked to breast cancer and a host of other serious diseases.

S. 697 undermines some of few health protections from toxic chemicals that now exist under TSCA, further weakening our failed national chemical law. It advances the interests of the chemical industry and disregards years of work by health care professionals, scientists, public health advocates and state legislators to enact meaningful policy reform to prevent diseases linked to chemical exposure.

The legislation fails to protect public health and even makes the EPA's job to protect Americans from unsafe chemical exposures more difficult than current law. Among the bills many failings, it:

- Makes it much harder for the EPA to regulate consumer products, even when they contain chemicals known to be unsafe.
- Makes it harder for the EPA to implement safeguards for quality control, and stop toxic chemicals coming into the country in products made in China and other countries.
- Does not allow the EPA to take quick action on the worst chemicals, particularly chemicals that persist in the environment and build up in the food chain.
- Ties the hands of states from protecting the public from chemicals that the EPA has designated as "high priority."
- Prohibits states from passing and enforcing regulations identical to federal standards, undermining the overall enforcement of the law.

By contrast, the Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act, introduced by Senators Barbara Boxer (D-Calif.) and Edward Markey (D-Mass.), would protect the public from exposures to toxic chemicals. While we understand that the legislative process always includes give and take, we must not compromise public health in the process. We call on senators from both sides of the aisle to co-sponsor and support passage of legislation that truly protects the health of Americans, including our most vulnerable citizens -- pregnant women, children, and workers. Our health is simply too precious to risk.

Sincerely,



Jeanne Rizzo, R.N.  
President and CEO

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Dear Senators:

Our diverse coalition of public health, labor, environmental, and business organizations urges you to withhold your support for the pending legislation offered by Senators Vitter and Udall to reform the Toxic Substances Control Act.

In its current form, we must oppose this legislation because it continues to have serious flaws that undermine protection of public health. All of these flaws could readily be addressed by making a limited number of changes in the bill, and we continue to be ready to work with senators to get those changes. Senators Udall and Vitter have made improvements to their legislation over the past two years, and there is no good reason not to address the remaining concerns.

The most important problems include:

- Undue Restrictions on States' Ability to Protect Their Citizens

We generally concur with the analysis circulated by the California Attorney General stating that the bill still "eviscerates state authority." Our primary concern is the timing of preemption for chemicals named as "high priority" by EPA. Under the bill, states are blocked from taking action on a chemical at a point when EPA has merely identified the scope of a safety assessment. That is still years away from any action to protect the public. That gap in time creates a "regulatory void" where harm will go unaddressed, and it provides the potentially regulated company with every incentive to slow down or prolong the federal evaluation process. The appropriate time for preemption is at the effective date of EPA action.

Also, in a significant departure from other environmental and consumer protection laws, the bill bans states from enforcing restrictions that are *identical* to federal restrictions. State co-enforcement is often the primary mode of enforcement, and scholarly reviews of the subject show that it has not been abused, but is in fact, complementary to federal enforcement, and even vital. The ban appears to be nothing more than a naked attempt to limit enforcement under the new program.

We also agree with the Attorney General's analysis in regards to the waiver provision and inadequate protection for state air and water programs.

- The "Low Priority" Loophole

Under the bill chemicals must be separated into two tracks: High Priority or Low Priority. High Priority chemicals are reviewed against the safety standard, and if they flunk that

standard, the EPA is directed to impose appropriate risk management. Low Priority chemicals are not really reviewed at all. EPA makes a judgment as to whether the chemical is "likely to meet" the safety standard without conducting a new assessment. These chemicals are then treated as safe for any and all uses.

Needless to say, a low priority designation will be highly coveted by any chemical company, resulting in enormous pressure on the agency to stretch the murky concept of "likely to meet" as far as possible. Yet this is the one major decision in the bill that the public cannot challenge in court. The omission is conspicuous and an invitation to abuse.

- Practical Limitations on Addressing Chemicals in Products

Consumers have come to increasingly understand the threat of toxic chemicals in consumer products, changing the marketplace. Several retailers and major brands have enacted their own restrictions on chemicals in the products they make and/or sell. This has been a primary driver of TSCA reform.

It is perplexing therefore, that the current draft, in a new provision, makes it harder for EPA to restrict an unsafe chemical in a consumer product. After EPA determined the chemical is unsafe, the EPA would have to jump through additional regulatory hoops to regulate the chemical in a product. There may be dozens of products that use a single chemical and this provision would require EPA to make a legal finding on each, substantially slowing down the agency's work in the area that most consumers would think is the primary point of reform. The new provision should be removed. Once EPA determines the chemical is unsafe, it should be able to address the presence of that chemical in whatever combination of products it deems necessary to protect public health.

Similarly, in the modern American economy most products are made overseas and imported. A system that purports to protect the public from toxic chemicals, especially in consumer products, must have a workable mechanism to address unsafe chemicals coming in from products manufactured overseas. The bill instead weakens EPA's ability to ensure that an imported product does not contain a restricted chemical. The importance of this issue was highlighted just last week, when 60 Minutes featured an investigative report of Lumber Liquidators bringing in formaldehyde treated wood at levels that violated California's standards but were certified as being compliant.

In general, the public health community has moved considerably on a large number of issues in this debate to find a point of accommodation with regulated industry. These remaining issues get at the core question of whether the program will do more harm than good.

Sincerely,

Andy Igrejas  
Safer Chemicals, Healthy Families

David Goldston  
Natural Resources Defense Council

Mark Mitchell, MD  
National Medical Association

Elena Rios, MD  
National Hispanic Medical Association

Maureen Swanson  
Learning Disabilities Association

Tiernan Sittenfeld  
League of Conservation Voters

Jeanne Rizzo, President & CEO  
Breast Cancer Fund

Ted Schettler, MD  
Science and Environmental Health  
Network

Mike Belliveau  
Environmental Health Strategy Center

Kathleen Schuler  
Healthy Legacy Minnesota

Laurie Valeriano  
Washington Toxics Coalition

Michael Green, Executive Director  
Center for Environmental Health

Kathleen A. Curtis, LPN  
Clean and Healthy New York

Harold A. Schaitberger, General  
President  
International Association of Fire  
Fighters

Holly Hart, Legislative Director and  
Assistant to the President  
United Steelworkers

Katie Huffling, RN  
Alliance of Nurses for Healthy  
Environments

Pamela Miller, Executive Director  
Alaska Community Action on Toxics

Bob Wendelgass, President and CEO  
Clean Water Action

Alexis Blizman, JD, Policy Director  
Ecology Center

Rebecca Meuninck, Campaign Director  
Michigan Network for Children's  
Environmental Health

Sarah Doll  
SAFER States

John Rumpler, Senior Attorney  
Environment America



MAURA HEALEY  
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

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March 12, 2015

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

**Re: S.B. 697**

Dear Senator Markey:

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

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

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

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



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

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

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

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

The Commonwealth of Massachusetts has long been recognized as a leader in toxics control regulation. The Massachusetts Toxics Use Reduction Act, Mass. General Laws ch. 211 (“MA TURA”), enacted in 1989, requires Massachusetts companies that use large quantities of specific toxic chemicals to evaluate and plan for pollution prevention opportunities, implement them if practical, and measure and report their results on an annual basis. They must also evaluate their efforts and update their toxics use reduction plans every other year. The statute, which garnered the support of both industry and environmental groups, committed Massachusetts to:

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

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

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

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

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

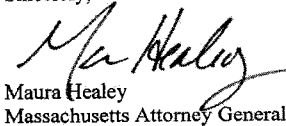
perchlorate, a chemical found in blasting agents, fireworks, military munitions and other manufacturing processes, and linked to interference with thyroid function, have been adopted to protect against hazards related to these chemicals. Although we understand that Congress may not intend to interfere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

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

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

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

Sincerely,



Maura Healey  
Massachusetts Attorney General

cc: The Honorable Elizabeth Warren

**THE ATTORNEYS GENERAL OF  
NEW YORK, IOWA, MAINE, MARYLAND, OREGON AND WASHINGTON**

March 16, 2015

Honorable James M. Inhofe, Chairman  
Senate Committee on Environment and Public Works  
410 Dirksen Senate Office Building  
Washington, DC 20510-6175

Honorable Barbara Boxer, Ranking Member  
Senate Committee on Environment and Public Works  
456 Dirksen Senate Office Building  
Washington, DC 20510-6175

Dear Chairman Inhofe and Ranking Member Boxer:

We, the undersigned Attorneys General, are writing to express our opposition to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, as presently drafted. S. 697 was introduced last week as an amendment to the Toxic Substances Control Act of 1976 ("TSCA"), our national law to protect our citizens and the environment from the risks posed by chemicals and chemical mixtures. In particular, we oppose S. 697's broadly expanded limitations on the ability of states to take appropriate action under state laws to protect against these risks.

In contrast to the existing law, S. 697 would prevent states from adopting new laws or regulations, or taking other administrative action, "prohibiting or restricting the manufacture, processing, distribution in commerce or use" of a chemical substance deemed by the U.S. Environmental Protection Agency ("EPA") to be a "high-priority" for federal review even before any federal restrictions have been established. As a result, a void would be created where states would be prevented from acting to protect their citizens and the environment from those chemicals even though federal restrictions may not be in place for many years. S. 697 also eliminates two key provisions in the existing law that preserve state authority to protect against dangerous chemicals. One is the provision that provides for "co-enforcement" – allowing states to adopt and enforce state restrictions that are identical to federal restrictions in order to provide for additional enforcement of the law. The second is the provision that allows states to ban in-state use of dangerous chemicals.

The Honorable James M. Inhofe  
 The Honorable Barbara Boxer  
 March 16, 2015  
 Page 2 of 6

The goal of TSCA is vitally important: to establish necessary and appropriate restrictions on the manufacture and use of chemicals that present an unreasonable risk of injury to human health or the environment. We strongly support this goal, and recognize the essential contribution that TSCA could make in ensuring the adequate protection of public health and the environment from toxic chemicals. Unfortunately, in practice, TSCA has largely failed to live up to its goal and, as a result, we welcome efforts to reform this important statute.

However, we cannot support S. 697's broad expansion of limitations on the authority of states to protect our citizens from the health and environmental risks posed by toxic chemicals within our states in the name of "reform." In fact, as detailed below, we believe that, rather than bringing TSCA closer to attaining its goal, the draft legislation's greatly expanded limitations on state action would move that goal further out of reach.

#### **I. Preemption of State Action Under TSCA**

Historically and currently, states have been leaders in protecting public health and the environment from toxic chemicals. That exercise of traditional state "police powers" has allowed states to protect their citizens and natural resources, and serve as laboratories for nationwide solutions for threats to human health and the environment.

Our states have adopted laws and regulations that restrict the sale or use of products containing harmful chemicals. Those laws and regulations play a critical role in protecting the health and welfare of our citizens and the natural resources of our states. These laws and regulations include:

- Iowa's restrictions on the sale, distribution, or offering for promotional purposes of a package or packaging component which contains lead, cadmium, mercury, or hexavalent chromium, Iowa Code § 455D.19(3), and its 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).
- The 2008 Maine Act to Protect Children's Health and the Environment from Toxic Chemicals in Toys and Children's Products, codified at 38 M.R.S.A. §§ 1691-1699-B. The legislation directs Maine to publish a list of chemicals of high concern, imposes disclosure requirements for in-state distribution of children's products containing priority chemicals, and authorizes the state to prohibit the distribution of those products for which safer alternatives exist.
- A prohibition under New York's General Business Law, § 396-k, on the import, manufacture, sale or distribution of toxic children's products, and authorization under Executive Law § 63(12) for the New York Attorney General to conduct investigations into violations of that and other laws, and then prosecute and resolve such violations by agreement. The New York Attorney General's Office has taken recent action under these

The Honorable James M. Inhofe  
 The Honorable Barbara Boxer  
 March 16, 2015  
 Page 3 of 6

laws to ensure that retailers in New York do not sell toys and other articles for children that contain dangerous levels of toxic chemicals.

- Oregon's and Iowa's restrictions on use of mercury-containing thermostats. Or. Rev. Stat. § 455.355; Iowa Code § 455D.16(6).
- Washington's and Oregon's restrictions on the toxic flame retardant Deca-BDE. Wash. Rev. Code § 70.76.030; Or. Rev. Stat. § 453.085(16).

These examples underscore the importance of maintaining the complementary, symbiotic relationship between federal and state chemical regulation in any TSCA reform. TSCA currently provides that a state may regulate any chemical unless and until EPA regulates the chemical under § 6. 15 U.S.C. §§ 2617(a)(1) and (a)(2)(B). Once EPA regulates a chemical because it has found that the chemical presents an unreasonable risk, TSCA provides that a state may not enforce an existing regulation or establish a new regulation "which is designed to protect against such risk" after the effective date of that federal regulation. *Id.* § 2617(a)(2)(B). However, existing § 18(a)(2)(B) exempts a state restriction on a chemical from preemption if the state restriction is: (1) identical to EPA's restriction; (2) enacted pursuant to another federal law; or (3) a complete ban on in-state use of the chemical. *Id.* Thus, by allowing states to enact restrictions identical to EPA's, TSCA allows states to "co-enforce" the federal restrictions on toxic chemicals. In addition, subject to EPA approval, existing § 18(b) allows states to establish requirements to protect public health or the environment with respect to a chemical if a state requirement provides a "significantly higher degree of protection" than the EPA requirement, as long as it presents no overt conflict with federal requirements and does not over-burden interstate commerce. *Id.* § 2617(b)(2).

## **II. Preemption of State Action Under S. 697**

### **a. High-Priority Chemicals**

S. 697 would greatly expand TSCA's scope of state preemption. Substantively, § 4A of the act as proposed would require EPA to categorize all existing chemicals as either "low priority" or "high priority." § 6 as proposed would require EPA to make safety assessments and determinations regarding high-priority chemicals and issue restrictions on high-priority chemicals that do not meet the safety standard because they present an unreasonable risk of injury to health or the environment.

§ 18(a) as proposed in S. 697 would not preempt existing state restrictions on high-priority chemicals until EPA has either found that the chemical meets the safety standard or

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 The Honorable Barbara Boxer  
 March 16, 2015  
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imposed restrictions on a chemical that does not meet the safety standard. It would also allow states to maintain existing restrictions or impose new restrictions on low-priority chemicals.<sup>1</sup>

However, under § 18(b) as proposed in S. 697, states would be preempted from imposing any new restrictions on a high-priority chemical once EPA starts its safety assessment. Thus, even though EPA has designated a chemical as high-priority under proposed § 4A(b)(3) because it has the “potential for high hazard or widespread exposure,” states would not be able to protect their citizens and environment from that chemical even though any federal restrictions on it are likely years away. Under proposed § 6(a), EPA may take up to three years after a chemical is categorized as high-priority to conduct a safety assessment and up to two years after a safety assessment is completed to issue restrictions on a chemical. Those deadlines may also be extended by an aggregate length of no more than two years.

Thus, assuming no additional unauthorized delays, S. 697 itself allows up to seven years between a chemical’s high-priority designation and its federal restriction – a period during which states are denied the ability to restrict the chemical in order to protect the health of their citizens and the environment. And history suggests that additional, unauthorized delays will indeed occur.<sup>2</sup>

#### **b. Additional Forms of Preemption**

S. 697 also would eliminate two provisions of the existing law that preserve the ability of states to take action under their own laws. Under § 18(d)(1)(C)(ii)(I) as proposed, state restrictions identical to restrictions issued by EPA under TSCA would no longer be exempt from

<sup>1</sup> Specifically, § 18(a) would provide that a state may not establish a new restriction or enforce an existing restriction on a chemical “found to meet the safety standard and consistent with the scope of the determination made under section 6.” Section 6 applies only to high-priority chemicals. When a chemical is categorized as low-priority under § 4A(b) because it is “likely to meet the applicable safety standard,” no finding whether it meets the standard is required. We note, however, that low-priority status is not necessarily permanent. Under proposed § 4A(b)(9)(A), states must notify EPA of proposed administrative actions, enacted legislation and final administrative action regarding low-priority chemicals, and under proposed §§ 4A(b)(8)(A) and 4A(a)(3)(A)(iii)(III), EPA could respond to such notification by re-designating a low-priority substance as a high-priority one.

<sup>2</sup> We note, for example, that Congress amended TSCA in July 2010 by adding Subchapter VI that sets forth specific formaldehyde standards for composite wood products. Congress directed EPA, “[n]ot later than January 1, 2013,” to promulgate regulations to implement the standards. 15 U.S.C § 2697(d)(1). Presently, EPA anticipates promulgating the regulations by December 2015. See <http://www2.epa.gov/formaldehyde/formaldehyde-emission-standards-composite-wood-products#proposedrule>.

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preemption. Without this exemption, the only means for states to enforce EPA's restrictions on toxic chemicals in their states would be through a citizens' suit in federal court. That would eliminate critical state enforcement tools – state administrative proceedings and judicial actions in state courts – that work in tandem with federal enforcement in states all across the nation to protect our air, water, lands, and citizens from toxic pollutants. Additionally, S. 697 would remove TSCA's current preemption exception for state bans on the in-state use of chemicals, which – as discussed above – has been an important part of states' efforts to safeguard their citizens and natural resources from dangerous chemicals.

While § 18(d)(1)(C) as proposed would add an exception for state restrictions on chemicals relating to air quality, water quality, or waste treatment or disposal, that exception would not cover restrictions that “impose a restriction on the manufacture, processing, distribution in commerce, or use of a chemical substance.” Some chemicals that cause air or water pollution can be controlled before they are emitted or discharged into the environment, and would arguably fit within this exception. However, the risks of many other harmful chemicals – particularly those that are highly toxic, or difficult to control or treat as pollutants – can be effectively reduced only by restricting their use, and such use restrictions by states would be preempted under S. 697.

\* \* \*

In conclusion, we believe that achieving TSCA's goal of ensuring the adequate protection of public health and the environment from toxic chemicals is as important as ever. However, we oppose the provisions in S. 697 that would greatly expand the limits on state action under state law to provide protections against dangerous chemicals. We note that the Attorneys General of California and Massachusetts have sent separate letters to their Senators in which they express their similar opposition to the preemption provisions of S. 697.

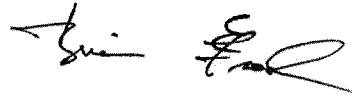
We offer the full assistance of our offices to you and your colleagues to craft TSCA reform legislation that would improve federal regulation of toxic chemicals while preserving the traditional and critical role of states in protecting the health and welfare of their citizens and natural resources.

The Honorable James M. Inhofe  
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Sincerely,



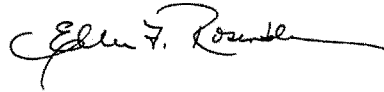
Eric T. Schneiderman  
New York State Attorney General



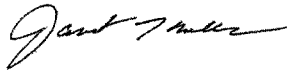
Brian E. Frosh  
Maryland Attorney General



Thomas J. Miller  
Iowa Attorney General



Ellen F. Rosenblum  
Oregon Attorney General



Janet T. Mills  
Maine Attorney General



Bob Ferguson  
Washington State Attorney General



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

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March 17, 2015

The Honorable James Inhofe  
Chairman, U.S. Senate Environment  
and Public Works Committee  
410 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Barbara Boxer  
Ranking Member, U.S. Senate Environment  
and Public Works Committee  
456 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Inhofe and Ranking Member Boxer:

I am writing today to express the Washington State Department of Ecology's (Ecology) significant concern regarding the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (Act) (S.697), recently introduced in the United States Senate, that seeks to reform the Toxics Substances Control Act (TSCA). This outdated statute needs to be overhauled to better protect the health and safety of our citizens, and to recognize the important role of the states as co-regulators. However, TSCA reform must be done well, or it risks weakening public health and environmental protections, slowing or setting back the progress that many states have made to improve protections in their communities.

The current proposal contains deficiencies and risks undermining the important progress states have made over the past four decades in leading our nation toward smarter chemical regulation. Specifically, the areas of concern are:

**The State-Federal Relationship**

- The greatest concern is preemption of new state statutes and administrative actions restricting a chemical substance as soon as the U.S. Environmental Protection Agency (EPA) administrator begins a safety assessment. Essentially, states would be powerless to address critical human health concerns, even though any actual federal action could be years down the road.  
For example, in 2008, Washington enacted restrictions on the flame retardant deca-BDE, helping pave the way to a nation-wide phase-out of this chemical. Had the proposed Act been law in 2008, we could very well still be waiting for action on this harmful toxic chemical.
- The bill would weaken TSCA provisions for states' co-enforcement authority. For example, a state would not be able to enforce a requirement simply because it is identical to a requirement adopted by EPA. Co-enforcement authority is



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essential and needs to be preserved for the states to act as the “backstop” to the federal program, particularly since EPA has seen its budget repeatedly cut in recent years.

#### **The Pace of Progress**

- The proposal envisions EPA taking on 20 high priority chemicals at a time. At this pace, it could take the agency 100 years to review all of the 2,000 chemicals that qualify as high-production volume chemicals.
- In recent years, EPA’s resources have been stretched beyond its ability to achieve current mandates. Ecology is concerned that the proposed fee structure will not provide sufficient resources to accomplish the goals of this Act. Furthermore, Congress should also fund state programs authorized under Section 25 in recognition of the enhanced state-federal relationship.

#### **Burden of Proof**

- EPA must have clear authority to obtain data on chemicals – especially those chemicals suspected of causing harm to pregnant women, children, and other vulnerable populations.
- Industry must bear the burden of proof to show that its use of identified chemicals of concern meet safety standards.

#### **Conclusion**

Federal action to reform the Toxics Substances Control Act is overdue. A sensible federal approach is needed to modernize chemical regulation in the United States. However, part of that sensible approach includes partnering with states, rather than preempting them.

In Washington, our salmon runs, the health of the Puget Sound and the Columbia River, and the health of our children and our communities – are all threatened by toxic pollution resulting in part from the failure of a robust TSCA. Waiting for federal action that may come years down the road or not at all is a poor bet on the future of our state.

Washington’s Legislature is now considering a proposal to overhaul our state’s approach to managing toxic chemicals. If approved, this strategy will help Washington prevent pollution before it occurs, an approach that will be far more effective than attempting to capture these chemicals by regulating wastewater dischargers, or trying to clean toxics up after they have already contaminated the environment.

It is in the nation’s interest to let states continue to be a strong voice in chemical regulation and enforcement. State programs can, and do, complement federal laws.

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Ecology urges you to oppose this bill unless significant changes are included to address the deficiencies outlined above. We do not have these concerns with the Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act that has also been introduced in the Senate.

Finally, Washington State Attorney General Bob Ferguson has expressed similar concerns with this bill in a letter from multiple state attorneys general particularly with respect to preemption of state action.

Thank you for considering these views.

Sincerely,

A handwritten signature in black ink that reads "Maia D. Bellon". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Maia D. Bellon  
Director

cc: The Honorable Patty Murray, United States Senator  
The Honorable Maria Cantwell, United States Senator



**EARTHJUSTICE**  
BECAUSE THE EARTH NEEDS A GOOD LAWYER

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES  
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

March 17, 2015

The Honorable Barbara Boxer  
Ranking Member  
Environment and Public Works Committee  
United States Senate  
456 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Senator Boxer,

On behalf of Earthjustice, I urge you to oppose S. 697, the "Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act". While we acknowledge that several improvements have been made by the sponsors since the legislation was first introduced last Congress, the bill still contains a number of fundamental flaws that compel us to go on record in opposition to it.

As a public interest law firm dedicated to achieving public health and environmental protections for our clients through the courts, the bill's preemptive effects on the ability of states to take future actions to protect their residents from toxic chemicals; the denial of access to the courts for certain key decisions; and the failure to address cumulative exposure to multiple toxic chemicals in environmental justice communities are among our greatest concerns.

While S. 697 recognizes state regulation of toxic chemicals adopted prior to January 1, 2015, it creates a regulatory void that would last for many years for toxic chemicals that a state has not yet regulated but for which EPA has merely begun a review process. For those chemicals that the Environmental Protection Agency (EPA) chooses to designate as "high priority" under the bill, states are preempted from taking their own action when the agency has simply identified the scope of its own assessment. While the bill contemplates final action on a chemical within seven years, in the real world, the timeline for the enactment of adequate protections that comply with our environmental laws can stretch out much further than any deadline. Earthjustice and our clients have first-hand experience with the EPA dragging out statutory deadlines for public safeguards for nearly two decades in spite of several court orders to the contrary.

We are also concerned that new language in the bill will hamstring the EPA from taking effective action to protect the public from the harmful effects of even those high priority chemicals that make it through the review process. Though on paper the bill would give the EPA authority to regulate products containing chemicals that don't meet the safety standard, this new language bars EPA from taking action unless it has evidence that there is *significant* exposure to

the chemical in the product—giving a pass to products with extremely hazardous ingredients for which low-level exposure might pose grave risks.

It is also particularly troubling that citizens and states will only be able to hold the EPA accountable to the handful of chemicals they decide to place on the “high priority” list. It is not only conceivable, but highly likely that many chemicals will be listed by the agency as “low priority” for further action as a result of heavy industry and political pressure. Under S. 697, those who are the most impacted by these decisions, the public, do not have the ability to go to court to challenge the EPA’s decision to place a chemical on the low priority list. It is easy to envision a time in the near future where a chemical’s arrival on the agency’s low priority list will be the regulatory Shangri-La for every chemical manufacturer and their lobbyists.

For the past forty years much of our environmental progress has come about as the result of both States and their residents holding federal agencies accountable to our laws and States being able to enact stronger protections than those provided by the federal government. Please uphold these important values by opposing S. 697 and any TSCA reform legislation containing similar provisions.

Sincerely,



Marty Hayden  
Vice President  
Policy and Legislation  
Earthjustice



March 17, 2015

Dear Senators:

On behalf of our one million consumers, I am writing to express Seventh Generation's serious reservations about the current version of the Frank R. Lautenberg Chemical Safety for the 21st Century Act (FLCSA). Seventh Generation has been working passionately for over 25 years to eliminate exposure to toxic chemicals that harm human health and the environment by supporting sound federal and state legislation. We work with our supply chain partners to make cleaning, baby and feminine personal care products that are healthy and safe for the air, the surfaces, the fabrics, the pets and the people within the home—and for the community and environment outside it.

As makers of products that source ingredients from various manufacturers across the country, it is critical to us that we know that those component ingredients contain and that they are safe. Our consumers – and your constituents – deserve no less. That is why we work with our industry to promote ingredient disclosure and the use of safer chemicals, and why we won't use harmful chemicals and we disclose ingredients voluntarily on our packaging.

The Toxic Substances Control Act (TSCA) was passed in 1976, and unlike other major environmental laws, has never been updated. As it currently stands, TSCA is a broken law. As a result, since the 1970's, tens of thousands of potentially harmful chemicals continue to be used in the marketplace without proper testing and without disclosure by the companies that produce them. Consumers are justifiably frightened that chemical manufacturers have provided little or no information to the EPA regarding their potential health or environmental risks of tens of thousands of chemicals in the marketplace—and that the EPA does not evaluate them for their safety.

As you proceed with debate of FLCSA, Seventh Generation and our consumers strongly believe that Congress should put the health and safety of the population first. Seventh Generation stands with our business partners and our allies in the consumer protection and environmental health community to call for the following limited improvements to FLCSA:

#### **1. Preemption**

We are deeply concerned about the timing of preemption for "high priority" chemicals. We believe that states should be preempted from regulating a dangerous chemical until it acts on regulating that chemical. Experience has shown us that chemical manufacturers have shown no reluctance to pursue dilatory legal or legislative remedies to fight adverse safety determinations; and we are certain that they would continue to do so if the EPA designated a lucrative chemical "high priority." Waiting for years for those determinations to be litigated would leave a serious regulatory vacuum – one that states could be fill by acting to protect the public. Likewise, we see no reason that states should be prohibited from co-enforcing federal safety standards.

#### **2. "Low Priority" Loophole**

Under the bill, chemicals that are determined by the EPA to be "Low Priority" must be "likely to meet" a safety standard without a new assessment, and they are then considered safe ad infinitum. We believe that "likely to meet" is a needlessly ambiguous term that will lead to regulatory

confusion and, inevitably, litigation while the determination is being made. However, the bill notably prohibits legal challenges after the determination is made, meaning that chemical manufacturers have every incentive to use any means to pursue the "low priority" designation.

### **3. Burdens on EPA's Regulation of Consumer Products**

We are deeply concerned that, after EPA makes a determination that a chemical is unsafe, it would have to conduct a time-consuming and burdensome cost benefit analysis of the "quantifiable and nonquantifiable" of each proposed regulatory action and possible alternatives. As you know, single chemicals may be used in hundreds of products; the EPA should not have to conduct a separate assessment of each product containing that chemical. We strongly believe that, once EPA makes its unsafe determination, the EPA should have the flexibility to quickly act to protect consumers on all products containing that chemical.

Businesses would benefit from these improvements because: 1) it would reduce the costs and risks associated with managing chemicals in products and across supply chains; 2) it would lower expenses from chemically-induced illness and enhance productivity among our employees; 3) it would improve transparency and communication throughout the supply chain, leading to increased confidence for downstream users; 4) along those lines, it would help us identify chemicals of high concern to human health or the environment so we can remove them from our supply chain and avoid them in our products; and 5) perhaps most importantly, it would increase trust among consumers – and our employees, communities, and investors.

We look forward to working with you and members of the Senate Environment and Public Works Committee to address these changes to the current iteration of FLCSA so we can best protect the public from toxic chemicals.

Sincerely,



John Replogie  
Chief Executive Officer  
Seventh Generation



Center for Environmental Health

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The Honorable James Inhofe  
Chairman, U.S. Senate Committee on Environment & Public Works  
205 Russell Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member, U.S. Senate Committee on Environment & Public Works  
112 Hart Senate Office Building  
Washington, DC 20510

March 17, 2014

Dear Chairman Inhofe and Ranking Member Boxer:

The Center for Environmental Health applauds your interest in amending the long-outdated Toxic Substances Control Act. However, we write to oppose S. 697 the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act as drafted and instead encourage the Senate to pass legislation that would fix TSCA's most pressing problems.

Toxic chemicals, and our increased exposure to them, have been linked to a host of health problems including skyrocketing rates of cancer, asthma, early puberty, and developmental disabilities. Our nearly 20 years of work on chemical safety litigation, consumer education and policy development, and our analysis of S. 697, leads us to conclude that this bill fails to provide American children and families with basic and necessary protections from the effects of harmful toxic chemicals. A TSCA reform bill should easily enable the EPA to address chemicals hazards in products (as most Americans encounter those chemicals), enable the EPA to quickly address the most dangerous chemicals, and preserve states' rights to protect their residents from dangerous chemicals.

Since TSCA's original passage in 1976, the number of toxic chemicals present in U.S. consumer products has sky-rocketed. As the primary federal mechanism for ensuring that the chemicals we encounter everyday in things like children's toys, cleaning products, and electronics, are safe for all Americans, TSCA has been a dismal failure. In the four decades of federal inaction on this issue, the states have stepped in to implement safeguards. These actions have been proven effective at protecting us from toxic threats like BPA in children's sippy cups and pacifiers, lead and cadmium in children's jewelry, and phthalates in toys. Given the large number of chemicals in commerce, and the speed with which new chemicals are developed, both the federal government and the states need tools to thoroughly analyze toxic threats and the ability to properly enforce the laws designed to protect public health and the environment.

CEH is concerned that the following provisions in S. 697 will jeopardize the health and safety of American children and families. These concerns are shared by Safer Chemicals Healthy Families, a coalition of 450 diverse organizations and businesses. **The concerns are:**

**The Importance of State Laws.** More than 150 laws in 35 different states now restrict or regulate chemical use, with at least 28 states expected to consider further chemical legislation this year. Using these laws, states

and organizations like CEH have been able to hold companies accountable for exposing American families to disease-causing chemicals. While current state laws would be “grandfathered in” under S. 697, the landscape of chemical threats to human health is constantly changing (some estimate that 2000 new chemicals are introduced annually) and states would be prevented from enforcing laws protecting their residents from new chemical dangers as they emerge.

**“Regulatory Void” leaves Americans unprotected for up to 7 (or more) years.** As the California Attorney General noted in her letter to Senator Boxer dated March 5, 2015, S. 697 would establish a “regulatory void,” as it prohibits states from acting on high priority chemicals once the EPA “commences a safety assessment.” Since the EPA could take up to seven years to issue a rule—with no deadline for implementing that rule—it would leave Americans exposed to potentially harmful chemicals without any legal recourse during that period of time.

**Low priority chemical designation is cursory and not judicially reviewable.** The low priority chemical designation is based solely on the quick assessment that the chemical is “likely to meet” the safety determination. But it’s unclear how the EPA will make that determination. Worse, S. 697 includes a loophole that exempts that determination from being reviewed in court—further reducing the chemical industry’s accountability.

**In addition to these failures, the bill also:**

- Makes it much harder for the EPA to regulate consumer products, even when they contain chemicals known to be unsafe.
- Makes it harder for the EPA to implement safeguards for quality control, and stop toxic chemicals coming into the U.S. in products made in China and other countries.
- Does not allow the EPA to take quick action on the worst chemicals, particularly chemicals that persist in the environment and build up in the food chain.
- Puts a cap on the amount of fees collected to implement the program at a level that leaves the EPA without the resources to properly administer it’s new responsibilities.

In contrast, the recently introduced S. 725, Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act would address many of these problems and creates the protections that Americans deserve from harmful chemicals in our air, water, food and in thousands of every day products. CEH expects Senators who care about children’s health to offer strong support for S. 725 and/or for a combined approach that incorporate these and other urgently needed changes to S. 697.

Sincerely,

Michael Green  
Executive Director



Edmund G. Brown Jr.  
Governor

Matthew Rodriguez  
Secretary for Environmental Protection

March 17, 2015

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

Dear Senator Boxer:

My Agency, the California Environmental Protection Agency, enforces state and federal law and implements state programs for the control and regulation of toxic and hazardous chemicals and waste. California, and many other states, have a long and essential tradition in leading the nation's response to dangerous chemicals when science identifies the need to do so. As a result, I have been following closely Congress's effort to amend the federal Toxic Substances Control Act ("TSCA").

I am writing to you, because I have serious concerns about the "Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act," ("S. 697"). As proposed, this bill fails to provide an effective federal program to protect the public from dangerous chemicals. At the same time, the bill would undercut the ability of states to develop solutions to limit exposures to these chemicals and could eliminate existing protections. Unfortunately, rather than reforming TSCA to ensure that state and federal agencies can efficiently and effectively work together to protect the public, this legislation takes a step backward from what should be the common goal of achieving strong public health and safety protections under a reformed version of TSCA.

Three aspects of the current bill's preemption provisions are especially troubling. First, the bill eliminates state authority to maintain or develop protections against dangerous chemicals before compliance with new federal rules is required. Second, the bill would potentially preempt state chemical management laws, such as California's Safer Consumer Products program, as well as clean air and water laws. Third, the bill would eliminate state authority to implement and enforce standards identical to the federal Environmental Protection Agency's ("U.S. EPA") rules. This unnecessary retreat from the longstanding approach used in numerous other federal environmental laws would undercut the opportunity for federal and state agencies to collaborate and efficiently allocate resources when implementing and enforcing chemical health and safety laws.

Laws in California and other states have led to innovative and effective standards that demonstrate a clean environment and a strong economy can go hand in hand. TSCA reform legislation should build on this solid foundation of public health protections. The public, including pregnant women and children who are especially vulnerable to toxins, deserve no less.

Air Resources Board • Department of Pesticide Regulation • Department of Resources Recycling and Recovery • Department of Toxic Substances Control  
Office of Environmental Health Hazard Assessment • State Water Resources Control Board • Regional Water Quality Control Boards

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#### **State Action to Address Chemical Threats Spurs Federal and Other State Protections**

States have always played an important role as laboratories of experiment and reform, using their police powers to develop policy solutions that address threats to public health and safety. The State of California in particular has a long history of leading the way by developing innovative programs that address threats from toxic chemicals and benefit people across the nation.

California's regulatory and science-based departments work in concert to provide such protection. Our Office of Environmental Health Hazard Assessment (OEHHA) uses the most updated scientific methods to assess the health risks posed by environmental contaminants. California's regulatory agencies use OEHHA's risk assessments to create necessary and achievable standards. OEHHA also has a long history of working cooperatively with U.S. EPA to assess the health hazards associated with toxic chemicals.

Preserving the use of states' police powers is critically important because states are often in a better position to act quickly to protect their citizens from newly emerging threats. For instance, in 2006, California adopted the Lead Containing Jewelry Law. We were joined by at least five other states in 2007, which helped to spur Congressional passage of the Consumer Product Safety Improvement Act of 2008 regulating dangerous metals in children's jewelry.

In 2003, California enacted the nation's first ban on certain persistent, bioaccumulative, and highly toxic polybrominated diphenyl ethers (PBDEs) used as flame retardants. Subsequently, other states, such as Michigan, Maine, and Hawaii passed similar legislation. These important state actions led the sole U.S. manufacturer of these chemicals to voluntarily cease their production.

In 2007, California banned phthalates from toys and children's products and required replacement with less toxic alternatives, protecting children during sensitive stages of development from these dangerous chemicals. Vermont and Washington followed suit in 2008, and three more states have similar legislation pending.

Other states have also acted to address chemical threats. In 2009, Michigan passed the first ban of Bisphenol A in baby products and at least ten states have followed suit, including California. California, Illinois, Maine, Minnesota, and New York have also passed laws banning the use of lead in vehicle wheel weights.

Finally, states have shown leadership in working with industry and business leaders to pass laws that promote safer alternatives to the use of toxic chemicals. As an example, California and Washington have passed landmark laws phasing out the use of copper and heavy metals in automotive brake pads. Copper is an especially harmful toxin to fish and other aquatic life. The U.S. EPA, Environmental Council of the States, Motor and Equipment Manufacturers Association, Automobile Aftermarket Suppliers Association, Brake Manufacturers Council, Auto Care Association, Alliance of Automobile Manufacturers, and Association of Global Automakers, Inc. recently signed a Memorandum of Understanding to apply the California and Washington protections across the nation.

The Honorable Barbara Boxer  
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#### **S. 697's Sweeping Preemption Provisions Eliminate State Police Powers**

S. 697 discards the notion that states are laboratories of innovation and reform that create thoughtful and effective solutions to protect people within their borders and across the nation. In its place, S. 697 erects sweeping preemption provisions that would bar or at minimum impede new and existing state protections, and inappropriately eliminates states' authority to enforce federal safeguards. Some of the many problems presented by this legislation are briefly presented below.

##### *S. 697 Eliminates State Authority to Enact New Protections on the Most Dangerous Chemicals with No Required Timeline for Federal Protections*

S. 697 preempts new state protections on the date the U.S. EPA "commences a safety assessment." (§18(b).) Pursuant to S. 697's provisions, if EPA conducts a safety assessment on a "high priority" chemical, including chemicals that EPA has already determined "have the potential for high hazard and widespread exposure" (§ 4A(b)(3).), EPA would have 7 years to adopt a safety assessment and safety determination and issue a final regulation containing any restrictions. (§6(a).) During this time, any state action to protect the public – such as the important safeguards identified above – would be preempted. Additionally, S. 697 does not require immediate implementation, but instead allows EPA to set compliance timelines, which can "vary for different affected persons," with no prescribed end date. (§6(d)(2)(B).) This regulatory scheme could leave the public, including pregnant women and children, with neither state nor federal safeguards to protect them against the most dangerous types of chemicals for an indeterminate length of time.

S. 697 also provides the means to preempt state action even on "low priority" chemicals. S. 697 requires states to notify U.S. EPA if "a State proposes an administrative action or enacts a statute or takes an administrative action to prohibit or otherwise restrict" a "low priority" chemical, and authorizes EPA to demand onerous amounts of information after the notification. (§4A(b)(9)(A) and §4A(b)(9)(B).) Because of these provisions, S. 697 would effectively extinguish both the impetus for and health-protective result of any potential state action.

##### *S. 697 Eliminates the Traditional and Efficacious Co-Enforcement of Health Safeguards*

TSCA currently follows a traditional approach to environmental enforcement, which allows states to create and enforce protections that mirror federal law. This allows federal and state agencies to efficiently divide work needed to ensure compliance with these requirements. For instance, state agencies could conduct on-the-ground investigations and initiate enforcement actions in which federal agencies then intervene and collaborate, a common co-enforcement scenario. S. 697 abrogates states' authority to enact and enforce laws that mirror federal protections, eliminating a significant set of resources needed to ensure compliance. (§18(d)(1)(C)(ii)(I).) In the event that these provisions go into effect, U.S. EPA will need significant additional resources to take on the duties previously fulfilled by the states.

##### *S. 697's Contradictory Preemption Provisions Imperil Existing State Clean Air, Water Protections, and Hazardous Waste Treatment and Disposal Laws*

S. 697 contains a series of preemption rules, exceptions to those rules, and exceptions to the exceptions, which contradict each other and potentially imperil state protections for clean air and

The Honorable Barbara Boxer  
Page 4

water. For example, S. 697 purports to set up an exception to preemption for state laws "related to water quality, air quality, or waste treatment or disposal," but then limits the application of this exception according to broad criteria, which could result in the preemption of such laws. (See, e.g., §18(d)(2)(C)(i), barring states from in any way restricting "manufacture, processing, distribution in commerce or use of a chemical substance" in their endeavor to protect water quality or air quality, or to regulate waste treatment or disposal.)

Another subsection of S.697 contains language referring to preservation of certain state laws. (§18(e).) However, the general text in this section is in conflict with several other provisions that would have broad preemptive effect. (Compare §18(e) with §18(a), §18(d)(1)(C), and §18(d)(2)(C).) These conflicts would support the argument that state action is forbidden, even though certain sections clearly allow such action, causing confusion in states over what is allowed. At a minimum, the confusing interrelationship among these preemption provisions and purported savings provisions would guarantee years of litigation by those intent on maximizing regulatory delay at the expense of states' health-protective standards.

#### **Specific Impacts on California State Safeguards**

Using TSCA to preempt state clean air, clean water, and hazardous waste laws would have a far-reaching and harmful impact in California. The following describe some of the critical safeguards imperiled by S. 697:

- **Controls on Smog:** California experiences serious smog pollution, and needs the ability to control chemicals that create smog, such as volatile organic compounds ("VOCs"), to meet necessary federal health-based clean air standards. California has enacted controls on the use of VOCs in products in areas with unhealthy levels of smog pollution. Just last month, the New England Journal of Medicine reported that the lung function of children in Southern California has demonstrably improved as a direct result of in-state controls on smog-forming pollutants. (See [http://well.blogs.nytimes.com/2015/03/04/childrens-lung-health-improves-as-air-pollution-is-reduced-study-says/?\\_r=0](http://well.blogs.nytimes.com/2015/03/04/childrens-lung-health-improves-as-air-pollution-is-reduced-study-says/?_r=0).) S. 697's preemption of state restrictions on the "use" or "distribution in commerce" of chemicals threatens to reverse California's tremendous progress in controlling the use of VOCs, potentially putting millions of people in the Los Angeles area and San Joaquin Valley of California at increased risk of respiratory disease and death.
- **Air Toxics (Airborne Toxic Control Measures):** S. 697 may disrupt California's safeguards against Toxic Air Contaminants. California's Airborne Toxic Control Measures (ATCMs) place restrictions on the use of these chemicals, which protect public health from an increased risk of cancer and other serious health effects. Such toxins include diesel particulate matter, hexavalent chromium, benzene, perchloroethylene, heavy metals, formaldehyde, and 1,3 butadiene. California has used an ATCM to limit hexavalent chromium emissions from chrome plating facilities often found in environmental justice communities.

California's regulations in this area have provided a model for the rest of the country. California's identification of formaldehyde as a Toxic Air Contaminant led it to adopt an ATCM that limits toxic formaldehyde emissions from raw materials used in flooring, furniture

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and other household wood products. Later, federal legislation required U.S. EPA to adopt the California standard.

California also continues to evaluate new substances as candidate Toxic Air Contaminants and existing contaminants for their potential exposures. The state also analyzes the availability of control technologies and substitutes for such contaminants.

- **Global Warming/Greenhouse Gases (GHGs):** The current version of S. 697 appears to limit preemption of state laws regulating greenhouse gases, which likely would be captured in provisions that govern low-priority chemicals. That limit may prove illusory, however, if chemicals such as sulfur hexafluoride or methane are subject to the safety assessment process once a state initiates regulation. Additionally, S. 697 would establish an onerous reporting and screening process that could adversely affect new rules the states are currently developing to reduce greenhouse gas emissions, such as methane controls on oil and gas production related to well stimulation techniques. Thus, S. 697 poses a threat to California's economy-wide program to limit greenhouse gas emissions to levels that may avert the worst impacts of global warming.
- **Toxics in Fuels.** S. 697 also has the potential to disrupt California's comprehensive regulation of toxics and other air pollutants from fuels burned in the 30 million vehicles driven in our state. For example, if a tailpipe pollutant such as polyaromatic hydrocarbon, lead, or benzene is identified as a high priority pollutant, California's longstanding regulation of those pollutants in fuel – and their complex relationship to the multiple pollutants fuel producers must juggle as they formulate their fuels for our markets – would be at risk.
- **Safer Consumer Products:** S. 697 presents an immediate threat to California's Safer Consumer Products program. The program's goals are to reduce toxic chemicals in consumer products, create new business opportunities in the emerging safer consumer products economy, and reduce the burden on consumers and businesses struggling to identify the chemicals in the products they buy for their families and customers. This program works to achieve this goal by asking manufacturers to answer two basic questions: 1) Is this chemical necessary? 2) Is there a safer alternative? By shifting the question of an ingredient's toxicity to the product development stage, concerns can be addressed early on. This approach results in safer ingredients and designs, and provides an opportunity for California industry to once again demonstrate its innovative spirit by making "benign by design" products that meet consumer demand throughout the world.

California's Department of Toxic Substances Control has developed a Priority Product Work Plan that identifies product categories from which Priority Products will be selected over the next three years. Industry trade press makes abundantly clear that supply chains in multiple industries are working behind the scenes to develop and deploy safer product chemistries even in advance of product-specific regulation, showing the broad salutary effect on the marketplace of the state's program. However, S. 697's preemption provisions would prevent California from fully implementing this important law.

The Honorable Barbara Boxer  
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#### **S. 697's Illusory Waiver Provisions**

Equally problematic is the state waiver provision in S. 697. (§18(f).) This provision requires a state to show that "compelling State or local conditions warrant granting the waiver." (§18(f)(1).) Unlike other types of environmental and health hazards, this standard does not work well for chemicals because the risks from exposure rarely vary by location.

#### **S. 697 Retains the Standard of Review Used to Overturn EPA's Ban on Asbestos**

S. 697 fails to fix one of TSCA's core problems, the burdensome "substantial evidence" test applied to informal rulemakings under the statute. The court in *Corrosion Proof Fittings*, 947 F.2d 1201 (5<sup>th</sup> Cir., 1991), repeatedly referred to this standard of review in overturning EPA's phase out and ban of the deadly chemical, asbestos. Retaining this onerous standard provides a substantial obstacle to any potential restrictions that U.S. EPA may attempt to impose upon other deadly chemicals.

The solution to this problem is readily available and widely used in environmental law; it is the "arbitrary and capricious" standard of review that traditionally applies to informal rulemakings. This standard of review would help to sustain public health safeguards and create consistency with other federal environmental laws.

#### **S. 697 Makes the Adoption of Safeguards Needed to Protect People from the Most Dangerous Chemicals an Extremely Difficult Task**

S. 697 makes the adoption of strong public health protections against the most dangerous types of chemicals an extremely and unnecessarily difficult task. The bill requires U.S. EPA to conduct two cumbersome and complex cost-benefit analyses to justify a ban or phase out of a toxic chemical that EPA has determined is unsafe. (§6(d)(4)(A)-(B) and §6(d)(4)(D).) In addition to creating these unreasonable implementation obstacles, the bill includes a feasibility-based standard that prejudices EPA's analyses towards less-protective actions. These overly burdensome requirements could limit EPA's ability to create strong and effective protections in precisely the situations in which they are most needed.

#### **Underfunding the U.S. EPA While Preempting State Protections**

Finally, I am very concerned about the U.S. EPA's ability to do the work called for under S. 697. This legislation would create a need for EPA to reevaluate all of its current priority chemicals and establish timelines for other actions, paired with a limited allowance for fees. EPA will require substantial additional resources to accomplish the goal of protecting public health when there are 80,000 chemicals available for use in commerce. Yet, many of EPA's current initiatives are under attack. There is little evidence that Congress has a substantial appetite to sufficiently fund or support the EPA to accomplish the work called for in S. 697.

#### **The "Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act"**

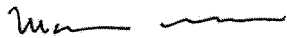
In contrast, the "Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act" (S. 725), recently introduced by Senators Boxer and Markey, addresses many of the concerns highlighted in this letter. It preserves states' rights to pass and enforce laws to protect their own residents, while

The Honorable Barbara Boxer  
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working cooperatively with U.S. EPA to effect meaningful improvements to chemical safety in our nation.

Thank you for the opportunity to comment on this important legislation. Please let me know if you have any questions about these comments. If it would be helpful, we stand ready to assist you in addressing the issues presented by this legislation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Matthew Rodriguez', with a stylized flourish at the end.

Matthew Rodriguez  
Secretary for Environmental Protection

cc: The Honorable Diane Feinstein

Senator INHOFE. We are adjourned.

[Whereupon, at 12:35 p.m., the committee was adjourned.]

[Additional material submitted for the record follows.]



March 31, 2015

The Honorable James Inhofe  
Chairman, Committee on Environment  
and Public Works  
United States Senate  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member, Committee on Environment  
and Public Works  
United States Senate  
Washington, DC 20510

RE: Correction to the Record for Hearing on S. 697 (March 18, 2015)

Dear Chairman Inhofe and Ranking Member Boxer:

On March 18, 2015, the Senate Environment and Public Works Committee held a hearing on S. 697, the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act. During the hearing, witnesses before the Committee addressed EPA's authority to regulate formaldehyde. Specifically, one witness stated that "EPA cannot under the law regulate even known dangers like...formaldehyde."<sup>1</sup> Another witness stated that "EPA has been trying to regulate formaldehyde at least since 1981...," and that, to date, "formaldehyde [is] not regulated by EPA."<sup>2</sup> We are writing to correct the record and clarify that not only does EPA have the authority to regulate formaldehyde, but it and other federal agencies have extensively reviewed and regulated formaldehyde for a number of years. This regulation, when combined with product stewardship efforts by the many industries that rely on formaldehyde as a key building block chemical for a host of applications, in fact represents a success story that protects U.S. consumers and workers.

#### A. EPA Regulation

EPA has authority under Title VI of Toxic Substances Control Act (TSCA) to regulate formaldehyde emissions from composite wood products. Since the Formaldehyde Standards for Composite Wood Products Act, which amended TSCA to add Title VI, was enacted by Congress in July 2010, EPA has been developing the implementing regulations for this law. Consistent with the ACC Formaldehyde Panel's commitment to continued safe use of formaldehyde, we have strongly advocated for completion of these regulations in accordance with the statutory authority granted by Congress, which calls for emissions standards to be set that are equivalent to the California Air Resources Board (CARB) regulations on formaldehyde emissions for composite wood. Implementing CARB's regulations on a national level will create

<sup>1</sup> Testimony from Dr. Richard Denison, Lead Senior Scientist, Environmental Defense Fund

<sup>2</sup> Testimony from Dr. Lynn Goldman, Dean, Milken Institute School of Public Health at the George Washington University



Chairman Inhofe and Ranking Member Boxer  
 March 31, 2015  
 Page: 2

consistent – and stringent – formaldehyde emissions standards for composite wood products sold in the U.S.

Historically, EPA has also considered the issue of formaldehyde in relation to manufactured homes and apparel. In 1984, EPA issued a determination under Section 4(f) of TSCA over concerns regarding the widespread use of formaldehyde in conventional and manufactured homes and apparel manufacturing. In the early 1990s, EPA initiated a study of formaldehyde in the home environment that ultimately determined formaldehyde exposures were at low levels.<sup>3</sup> In addition, EPA has conducted risk assessments on formaldehyde through the Integrated Risk Information System (IRIS) program, with the existing assessment dating to 1997. This IRIS assessment is in the process of being updated, in accordance with recommendations made by a National Academy of Sciences review panel report published in 2011.<sup>4</sup>

EPA also regulates a host of manufacturing operations that emit formaldehyde through Maximum Achievable Control Technology (MACT) Standards under the Clean Air Act. EPA has established formaldehyde emission limits for a diverse range of manufacturing sources, such as furniture and kitchen cabinets, pulp and paper, ferroalloys, mineral wool and wool fiberglass, and certain polymers and resins, among others.

#### B. Other Federal Regulation

Particular uses of formaldehyde are also extensively regulated through other federal agencies, suggesting that EPA oversight and regulation would likely be duplicative and unnecessary in these areas. In the 1980s, the Department of Housing and Urban Development set federal safety standards for manufactured home construction, which, among other things, established formaldehyde emissions standards and labeling requirements.<sup>5</sup> These regulations at the time impacted not just emissions in mobile homes, but emissions from wood products generally, resulting in lower emissions for all uses. Since these regulations were enacted, emissions reductions have continued through product stewardship efforts by resin producers and wood products manufacturers, as well as due to California's stringent emissions regulation. It is notable that formaldehyde-based resin technologies today are capable of achieving levels that are at or near background levels. The final EPA regulations implementing the CARB emissions regulations will ensure a regulation is in place to cement these advances on a national scale.

Other industries beyond the wood products industry have also been subjected to regulatory oversight. Since 2008, the toy and juvenile products industries have been required, under the Consumer Product Safety Improvement Act (CPSIA), Section 106, to follow the technical

<sup>3</sup> Hare et al, *Evaluating the Contribution of UF-Banded Building Materials to Indoor Formaldehyde Levels in a Newly Constructed House*, presented at Washington State University 30<sup>th</sup> Annual Particleboard/Composite Materials Symposium, Pullman, WA (Apr. 17, 1996).

<sup>4</sup> Available at: <http://www.nap.edu/catalog/13142/review-of-the-environmental-protection-agencys-draft-iris-assessment-of-formaldehyde>.

<sup>5</sup> 49 Fed. Reg. 31,998 (1984)



Chairman Inhofe and Ranking Member Boxer

March 31, 2015

Page: 3

requirements of national toy safety standard ASTM F963. Notably, this standard was first developed nearly 40 years ago and has been updated over the years to ensure that the US toy industry maintains high standards for toy safety. The standard incorporates the Federal Hazardous Substances Act (FHSA), which sets specific thresholds for formaldehyde content in products. This standard applies to a wide variety of children's products – from toys and games to car seats and strollers – all of which are under the regulatory oversight of the Consumer Product Safety Commission (CPSC) through the CPSIA.

In the textiles and apparel sector, the formaldehyde chemistry used in dyeing and finishing has been extensively studied by CPSC under the FHSA (15 U.S. Code 1261-1278). These studies, conducted at Oak Ridge National Laboratory and other locations, determined that formaldehyde content in textiles does not pose acute or chronic health problems for consumers. Based on this research and other work, CPSC has decided to date that no regulatory standard is necessary for formaldehyde in textiles and apparel.<sup>6</sup>

The cosmetic industry has also worked with the federal government to develop a national scientific organization, known as the Cosmetic Ingredient Review (CIR), which is sanctioned by the U.S. Food and Drug Administration (FDA) to review and assess the safety of ingredients used in cosmetics. Based on its reviews, the CIR classifies formaldehyde in beauty products as 'safe' as long as the substance is no greater than 0.2 percent measured as free formaldehyde, kept to a minimum, and not aerosolized. Formaldehyde was just recently reviewed by the CIR and their current assessment is up to date.

In the workplace, the Occupational Safety and Health Administration has had in place a formaldehyde standard since the early 1990s.<sup>7</sup> Today, formaldehyde producers and product manufacturers that use formaldehyde chemistry continue to make advances in technologies to protect their workers, ensuring that any potential exposures are strictly controlled.

### C. Conclusion

Over the last several decades, formaldehyde has been carefully studied, reviewed and regulated by numerous federal agencies, including EPA. In conjunction with the product stewardship efforts of formaldehyde producers and users, this has led to remarkable achievements in reducing exposures to manufactured sources of a chemical which also occurs naturally.<sup>8</sup> This should provide the American public with a significant level of comfort in knowing that the products they use are properly regulated.

<sup>6</sup> See, e.g., U.S. Government Accountability Office (GAO). (2010). Formaldehyde in Textiles (GAO-10-875), at 11. Available at <http://www.gao.gov/new.items/d10875.pdf>.

<sup>7</sup> 57 Fed. Reg. 22,290 (1992)

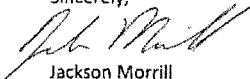
<sup>8</sup> For example, formaldehyde is found naturally in wood and in certain fruits and vegetables. It is also a natural product of human metabolic activity and is, therefore, created by the human body and exhaled with every breath we take.



Chairman Inhofe and Ranking Member Boxer  
March 31, 2015  
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Thank you for your attention, and we request that this letter be inserted into the official hearing record.

Sincerely,



Jackson Morrill  
Director, ACC Formaldehyde Panel



## American Chemical Society

## OFFICE OF THE PRESIDENT

Diane Grob Schmidt, Ph.D.  
 President-Elect, 2014  
 President, 2015  
 Immediate Past President, 2016

1155 SIXTEENTH STREET, N.W.  
 WASHINGTON, D.C. 20036  
 Phone 202-872-4461  
 Fax 202-872-6338

March 17, 2015

The Honorable David Vitter  
 United States Senate  
 516 Hart Senate Office Building  
 Washington, DC 20510-1805

The Honorable Tom Udall  
 United States Senate  
 531 Hart Senate Office Building  
 Washington, D.C. 20510-3103

Dear Senators Vitter and Udall:

On behalf of the American Chemical Society, I am writing to endorse S.697, *The Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act*. ACS, the world's largest scientific society, represents chemists and chemical engineers and was chartered by Congress in 1937 to provide guidance on science and policy matters.

ACS believes the time has arrived for all stakeholders to come together and work with Congress to update chemicals management and regulatory policy. S.697 represents a thoughtful and bipartisan approach to this complex issue, and ACS supports the approaches established in the legislation.

ACS is particularly excited about provisions to promote sustainability in Section 24. Sustainable chemistry continuously improves process safety and resource efficiency leading to reduced cost, waste, and environmental impact. It is the ultimate proof that environmental and economic benefit in chemistry can be optimized simultaneously.

The need to earn the public's confidence in chemical product safety is essential to both the health and safety of our nation's citizens and maintaining a robust domestic chemistry enterprise. Policy should be based on the concept that safety is a shared responsibility between government, industry, the value chain, and consumers. EPA should have the information and regulatory authority necessary to ensure chemical product safety, while working collaboratively with industry to drive innovation.

Thank you for your hard work on this legislation. ACS recognizes the lifelong interest of your late colleague, Senator Frank Lautenberg, in promoting safety in the chemistry enterprise. We look forward to working with you going forward. Should you have any questions, please do not hesitate to contact Glenn Ruskin, Director, ACS Office of Public Affairs at 202-872-4475 or [g\\_ruskin@acs.org](mailto:g_ruskin@acs.org).

Sincerely,

Diane Grob Schmidt, Ph.D.  
 2015 President  
 American Chemical Society

C: The Honorable James Inhofe  
 The Honorable Barbara Boxer



THE ADHESIVE AND SEALANT COUNCIL

SECURING THE FUTURE®

The Honorable James Inhofe  
Chairman  
Committee on Environment and Public Works  
United States Senate  
Washington, DC 20510

The Honorable Thomas Udall  
United States Senate  
Washington, DC 20510

The Honorable David Vitter  
United States Senate  
Washington, DC 20510

Dear Chairman Inhofe, Senator Udall, and Senator Vitter:

The Adhesive and Sealant Council (ASC) would like to take this opportunity to thank you for your leadership efforts and let you know we strongly support the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (S. 697). ASC is a North American trade association representing 131 manufacturers and distributors of adhesives, sealants and the suppliers of raw materials to the industry.

Our member companies are engaged throughout the chemical value chain. These companies produce chemicals, formulate adhesives and sealants, and distribute finished products to both the commercial and do-it-yourself markets. Because of this unique position, our members understand that it is imperative to maintain a strong federal chemical regulatory program that will allow them to conduct business operations throughout the United States.

Your determination to balance the interests of multiple stakeholders while making significant improvements to the current chemical management regime has resulted in a legislative proposal that will expedite chemical safety assessments and maintain an organized marketplace for all American consumers.

Again, ASC supports the bipartisan Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (S. 697). We look forward to working with you and your fellow cosponsors as the bill is considered in Committee and the full Senate.

Sincerely

A handwritten signature in black ink, appearing to read 'Matthew Croson'.

Matthew Croson  
President  
Adhesive and Sealant Council



## BIPARTISAN POLICY CENTER

March 17, 2015

The Honorable Tom Udall  
United States Senate  
531 Senate Hart Building  
Washington, DC 20510

The Honorable David Vitter  
United States Senate  
516 Senate Hart Building  
Washington, DC 20510

Dear Senators Udall and Vitter:

On behalf of the Bipartisan Policy Center, we are writing to commend your bipartisan efforts with the introduction of *The Frank R. Lautenberg Chemical Safety for the 21st Century Act*. We believe that the regulatory framework you propose will provide better public health protection than the existing statute and strongly endorse your effort to develop the legislation through a bipartisan process incorporating input from a diverse array of stakeholders.

The forty year-old TSCA law is in need of revisions to bring our nation's primary chemical regulatory framework into the twenty-first century. The current law is broadly considered ineffective failing to regulate many chemicals that have entered the marketplace in the last several decades. Since 1976, scientists' understanding of chemicals and their impacts have increased dramatically. This legislation will provide a clearer framework for regulating the safety of toxic chemicals in everyday products for the protection of consumers. Further, it will update and better define the EPA's authority and responsibilities under TSCA, and enhance cooperation between state and federal regulators.

During our time in the Senate, we each had many opportunities to work with the late Senator Frank Lautenberg who first proposed updates to TSCA. Frank devoted much of his career to protecting public health. His courage to spearhead improvements to this outdated law is the spirit of leadership that we both endorse.

We also applaud the bipartisan process that has brought this legislation together. As senior fellows at the Bipartisan Policy Center, we believe that principled collaboration is the only way to address real problems. Your efforts to bridge complex and at times impassioned differences is not easy and almost never popular, but it is the essence of legislating. When viewed against the current backdrop of partisan division, your success in garnering the support of 15 bipartisan co-sponsors on this challenging issue is important and commendable. We are also encouraged by your commitment to seek additional input to further strengthen the legislation as it moves forward. If successful, this bipartisan effort to update and strengthen one of our nation's most important environmental statutes will improve public health and set an example for future legislative accomplishment.

Sincerely,

Senator Trent Lott  
Senior Fellow, Bipartisan Policy Center

Senator Byron Dorgan  
Senior Fellow, Bipartisan Policy Center



March 17, 2015

The Honorable James Inhofe  
Chairman  
Committee on Environment and Public Works  
United States Senate  
Washington, DC 20510

The Honorable David Vitter  
United States Senate  
Washington, DC 20510

The Honorable Thomas Udall  
United States Senate  
Washington, DC 20510

Dear Chairman Inhofe, Senator Udall, and Senator Vitter:

I am writing today to thank you for your leadership and offer our support for the Frank Lautenberg Chemical Safety for the 21st Century Act (S. 697). The National Association of Chemical Distributors (NACD) and its nearly 440 member companies are vital to the chemical supply chain providing products to more than 750,000 end users. They make a delivery every six seconds while maintaining a safety record that is more than twice as good as all manufacturing combined. NACD members are leaders in health, safety, security, and environmental performance through implementation of Responsible Distribution.

The way chemicals are produced and regulated has a direct impact on our members, the products that we handle, and the services we provide. A strong, credible federal chemical regulatory program is important to our members, their customers, the 155,000 direct and indirect workers we represent, and all American consumers.

The Frank Lautenberg Chemical Safety for the 21st Century Act is a pragmatic compromise that balances the interests of multiple stakeholders while making significant improvements to chemicals management and facilitating a more cohesive federal approach to chemical regulation. NACD appreciates the thoughtful, bipartisan approach you have taken in crafting the legislation, and we look forward to working with you and your fellow co-sponsors as the bill is considered by the committee and the full Senate.

Sincerely,

Eric R. Byer  
President

cc: Members of the Committee on Environment and Public Works



International Fragrance Association  
North America

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ifra-na.org

The Honorable James Inhofe  
Chairman  
Committee on Environment and Public Works  
United States Senate  
Washington, DC 20510

The Honorable Thomas Udall  
United States Senate  
Washington, DC 20510

The Honorable David Vitter  
United States Senate  
Washington, DC 20510

March 17, 2015

Dear Chairman Inhofe, Senator Udall, and Senator Vitter:

On behalf of the International Fragrance Association, North America (IFRA North America) I am writing in support of The Frank R. Lautenberg Chemical Safety for the 21st Century Act (S697). We believe that S697 will make long-overdue improvements to the Toxic Substances Control Act (TSCA) to improve its effectiveness in protecting the public from unsafe chemicals.

IFRA North America is the principal trade association representing the interests of the U.S. fragrance industry. IFRA North America members create and manufacture fragrances for personal care, home care, industrial and institutional use as well as home design products. IFRA North America also represents companies that source and supply fragrance ingredients, such as essential oils and other raw materials, which are used in perfumes and fragrance mixtures.

One of the most critical issues for our industry is the safe use and management of fragrances and fragrance ingredients. S697 offers a pragmatic compromise that balances the interests of multiple stakeholders while making significant improvements to chemicals management and facilitating a more cohesive federal approach to chemical regulation. Upon our initial review, the proposal appears to reflect many of the principles that the fragrance industry believes are essential to achieving a modern chemicals management framework.

We appreciate the thoughtful, bipartisan approach you have taken in crafting the legislation and look forward to working with you and your fellow co-sponsors as the bill is considered by the Committee and the full Senate.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Jennifer Abril', is written over the typed name.

Jennifer Abril  
President

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Michigan State University

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Texas A&M University

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PhD, DABT

**EXECUTIVE DIRECTOR**

Clarissa Russell Wilson, MBA

March 18, 2015

The Honorable James Inhofe, Chairman  
The Honorable Barbara Boxer, Ranking Member  
Senate Environment and Public Works Committee  
SD-410 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Inhofe and Ranking Member Boxer:

The Society of Toxicology (SOT) is pleased to provide comments on the bipartisan bill, S. 697, The Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act. Please include this letter in the official record for your committee's March 18, 2015 hearing on S. 697.

As Congress considers revising the Toxic Substances Control Act of 1976 (TSCA; P.L. 94-469), the SOT, with more than 5,000 toxicology professionals in the United States and nearly 8,000 worldwide from 61 nations, strongly urges Congress to ensure the language used in TSCA reform legislation:

1. Affords flexibility in selection of the best available science for generating and evaluating information used in the safety and risk assessment process.
2. Protects the authority of the US Environmental Protection Agency, working with the scientific community, to judge when and how to apply new techniques and methods.
3. Ensures the terms and concepts used in the legislative language that apply to the science of toxicology are consistent, accurate, and unambiguous.

SOT, made up of the toxicology professionals who will implement TSCA reform on a day-to-day basis, remains committed to further scientific review of future drafts of TSCA reform legislation with the hope that a revised TSCA bill will have strong, objective, scientific underpinnings and will protect public health for years to come.

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**Specific Comments:**

The Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (FRL21 3-10-15)

**Section 2- Findings, Policy Intent**

The stated intent of the FRL21 draft is largely consistent with the SOT principle recommendations stated above and our comments on previous draft TSCA reform legislation that promote the concepts of broad-based public health protection and transparency in the data and processes used for chemical assessment.

**Section 3- Definitions**

We support the clear definition used to describe susceptible populations and the recognition that there are numerous factors, such as differences in potential exposure or increased susceptibility to adverse health consequences that can influence the evaluation of risk to those populations. It is important to reaffirm that the underlying factors, such as genetics, pre-existing health conditions, nutritional status, and others, can also influence the susceptibility of other populations as well, in addition to those listed—infants, children, pregnant women, workers, and the elderly. The law should enable this type of analysis as a necessary part of determining susceptibility.

We are pleased to see the continued evolution of the risk assessment language which incorporates hazard, use, and exposure data and information. Because the assessment process is focused on assessing risk as a factor to include in a determination of compliance with a “safety standard,” perhaps the definition included in Section 3 should be of “risk assessment” rather than “safety assessment.”

While the draft bill is clear that the “safety standard” of “... no unreasonable risk of harm...” would be applied without regard to cost or other non-risk factors, we continue to have concern for how “unreasonable risk” will be defined. While a “no unreasonable risk” determination can be scientifically-based and generally achievable (as opposed to a zero-risk or “no harm” standard), defining what “no unreasonable risk” means has been an issue with TSCA since its enactment and will require further guidance by the Administrator to support the standard. Perhaps this could be mentioned as a goal as part of the “minimum requirements” for policies and procedures which are specified in the bill.

**Section 4 Policies, Procedures and Guidance**

We continue to be encouraged to see the process by which “Use of Science” is portrayed here through the recognition and inclusion of methods, transparency, peer review, weight of evidence, standardized test design, and GLP where possible. All are important concepts that should be encouraged and periodically reviewed and updated as part of this, and any future or amended, version of TSCA reform.

We appreciate the acknowledgement and consideration of the National Academy of Sciences as a scientific body that provides advice on hazard, exposures, and advancements in risk assessment, among other contributions. We believe that it may also be important to consider the scientific contributions of other knowledgeable bodies (e.g., EPA Science Advisory Boards, WHO, OECD, etc.) in order to broaden potential scientific input.

We continue to be supportive of the approach proposed for conducting chemical testing and assessment, but reiterate the spirit of our previous comments on the draft legislation that these statements not be viewed as restrictive of the evolution of scientific methods. The legislation should explicitly allow for scientific community input on how and when new methods can and should augment or replace previous approaches to priority setting and risk assessment, including determinations for use of alternative test methods to vertebrate animals.

We fully recognize and support the flexibility in timing needed (“Differing Times”) for scientifically sound evaluations of chemicals. Timing estimates for evaluation of chemicals should be made by the Agency on a case-by-case basis that provides the best combination of scientific rigor and timeliness. The information necessary for evaluation of a chemical may involve considerable additional testing with long lead times necessary for completion of the work. Other chemicals, perhaps those with more extensive existing information, or less uncertainty regarding hazard and exposure, would likely require less time.

We think the minimum requirements for policies and procedures are well stated and clear. The authors of this bill clearly understand the complexity of the risk assessment process and recognize the need for flexibility to ensure resources are applied to generating the right information for each chemical assessed and not to assume *a priori* that there is a minimum data-set that can be predicted across all chemicals for evaluation. The inclusion of consideration of weight of evidence including mechanistic, animal toxicity, clinical, and epidemiologic studies are also important and widely used in analysis of risk.

The use of aggregate exposure, and at times, cumulative exposure to similarly acting chemicals, under conditions of use deserves special mention. We agree that aggregate and cumulative exposure is an important and necessary component of characterizing the potential for exposure and assessing risk. However, the information for assessing such exposures may not always be

available and the law should continue to enable the Agency to consider other approaches for characterizing exposure such as biomonitoring and other methods. The science of exposure assessment continues to evolve, just like the science of hazard assessment, and as new methods and approaches are developed, the EPA should be empowered to use them. We would encourage that language be developed around these points that give the EPA the authority to consider and apply the methods that are most appropriate and available at the time while maintaining the option for employing newer approaches and methods as they become available and accepted by the scientific community.

We support the development of the new Scientific Advisory Committee on Chemicals. It will be important to ensure that the reviews of this committee are completed in a timely manner to facilitate the schedules established in section 4 (1) (A-C) and that the establishment of this Committee does not exclude the use of other, topic-specific advisory panels convened by the EPA.

#### **Section 5 Testing of Chemical Substances and Mixtures**

We fully support this section including the encouragement of the use of integrated and tiered-testing strategies, and the use of non-vertebrate test methods or other alternative methods that eliminate or reduce the use of vertebrates for testing purposes.

We are also encouraged to note that this version of the bill also includes recognition that the science of toxicology continues to evolve and application of alternative methods would include appropriate safeguards to ensure the EPA has the flexibility to use information from new methods when it is scientifically justified to do so.

We continue to agree with the approach that testing for chemicals is determined on a case-by-case basis with no *a priori* assumptions about the necessary list of tests needed for appropriately assessing risk. The option for providing scientific justification for waiving tests requested by the Administrator further reinforces this concept.

#### **Section 6 Priority Screening**

We support the establishment of high and low priority chemical lists and, in principal support the plan to ensure a minimum number of materials on the list, but we recognize that this will be a resource intensive process for the Agency.

We acknowledge and support the restraint used by the authors to leave out specific reference to currently popular high-priority chemicals other than reference to those listed on the work plan published by the Administrator in October 2014.

We agree that the substances on the high and low priority lists should be placed there on the basis of clearly defined criteria and transparent logic that is current and not based solely on historical conditions that may no longer be applicable.

**Section 24 Development and Evaluation of Test Methods and Sustainable Chemistry**

We support the concept of encouraging sustainable chemistry approaches for collecting and sharing information on sustainable chemistry research, development, and technology transfer to the extent possible. We suggest, however, that the bill acknowledge that all chemicals, including those identified through sustainable chemistry initiatives, have a spectrum of hazards and risks associated with them that must be thoroughly tested and assessed to ensure the trade-offs appropriately reduce the risks for a particular use. While it is entirely possible that a hazard expressed by the original chemical may be absent or greatly reduced in the substitute, the substitute chemical may introduce another hazard that may be just as impactful to health or the environment.

Thank you for your consideration of our comments. We look forward to continuing to comment as the TSCA reform process proceeds and are available to respond to any comments or questions you may have.

For the Society of Toxicology TSCA Task Force.



William H. Farland, PhD, Fellow ATS      W. Mark Lafronconi, PhD, DABT

March 18, 2015

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The Honorable Barbara Boxer  
Ranking Member  
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Re: Response to Critique by Law Professors of the Frank R. Lautenberg Chemical Safety for the 21st Century Act

In a March 16, 2015, letter addressed to you, a group of 25 law professors and other lawyers expressed “serious reservations” with the “Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act,” S. 697. For the reasons set forth below, we believe that the reservations expressed in the March 15 letter are misplaced.

As former EPA and Justice Department officials who, during our tenures, were tasked with interpreting and implementing the current Toxic Substances Control Act (TSCA), we believe we bring a unique perspective in analyzing and commenting on S. 697 as proposed by Senators Udall and Vitter, and the important need for such legislation. We believe that S. 697 as a whole represents a substantial and necessary improvement over the current Toxic Substances Control Act, and, in particular, that S. 697’s amended safety standard will provide EPA with greater authority to address potentially risky chemical substances in commerce.

**1. The “Unreasonable Risk” Standard for Safety Determinations**

The March 16 letter focuses principally on the safety standard in S. 697 and asserts that S. 697 “essentially preserves the same inadequate ‘safety standard’ used in current law.” To support this claim, the letter references law review articles critical of the current TSCA. The letter, however, misreads S. 697. While S. 697 incorporates the words “unreasonable risk” as the new safety standard, it makes clear that “unreasonable risk” as included in S. 697 is not to be interpreted as it has been under the existing TSCA. S. 697 defines “safety standard” in pertinent part as “a standard that ensures, without taking into consideration cost or other nonrisk factors, that no unreasonable risk of harm to health or the environment will result from exposure to a

chemical substance under the conditions of use.”<sup>1</sup> Thus, the safety standard in S. 697 would require EPA to determine whether risk management measures are needed for a chemical substance solely on the basis of its evaluation of the risks to health and the environment. The language of S. 697 makes clear that its “unreasonable risk” standard has no role for cost-benefit analysis.

Many federal statutes call for regulation of “unreasonable risk.” Language in those statutes has generally been interpreted to combine into one step an assessment of the nature and magnitude of the risk and a risk management decision with respect to reducing that risk, by requiring a balancing of the benefits of regulating against the costs of doing so. For example, the Consumer Product Safety Act directs the Consumer Product Safety Commission to adopt consumer product safety standards, saying that “any requirement of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product.”<sup>2</sup> The Safe Drinking Water Act requires EPA, when proposing a national primary drinking water regulation, to “publish a determination as to whether the benefits of the maximum contaminant level justify, or do not justify, the costs.”<sup>3</sup>

Under TSCA today, in determining that a chemical substance presents an unreasonable risk of injury to health or the environment, EPA must consider the effects of the substance and the magnitude of exposure of human beings, the effects of the substance on the environment and the magnitude of exposure, the benefits of the substance for various uses and the availability of substitutes for those uses, and the reasonably ascertainable economic consequences of a rule regulating the substance.<sup>4</sup>

In contrast, S. 697 would separate a determination of whether or not a chemical substance presents an unreasonable risk from decisions about risk management measures to address a confirmed unreasonable risk. As noted above, in defining “safety standard” S. 697 mandates that there be no consideration of economic costs or benefits:

The term “safety standard” means a standard that ensures, **without taking into consideration cost or other nonrisk factors**, that no unreasonable risk of harm to health or the environment will result from exposure to a chemical substance under the conditions of use ....

<sup>1</sup> S. 697, section 3(4) (also specifying that the “no unreasonable risk of harm” standard shall apply to the general population and “any potentially exposed or susceptible population” identified by EPA).

<sup>2</sup> 15 U.S.C. § 2056(a). See, e.g., *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 511 n.30 (1981) (“In other statutes, Congress has used the phrase ‘unreasonable risk,’ accompanied by explanation in the legislative history, to signify a generalized balancing of costs and benefits. See, e.g., the Consumer Product Safety Act of 1972”).

<sup>3</sup> 42 U.S.C. § 300g-1(b)(4)(C).

<sup>4</sup> TSCA § 6(c), 15 U.S.C. § 2605(c).

(S. 697, section 3(4) (emphasis added)). Explicit language foreclosing the consideration of costs and other nonrisk factors is not found in other “unreasonable risk” statutes, such as the Consumer Product Safety Act or current TSCA. This provision would compel EPA, and any reviewing court, to interpret the S. 697 safety standard very differently from the way unreasonable risk is interpreted under current TSCA.

We note also that the March 16 letter asserts that “courts would be likely to interpret Congress’ intent, as it has been previously construed in case law, as still requiring a cost benefit analysis ([referencing Corrosion Proof Fittings]).” This assertion is incorrect. It is black letter law that statutory language is to be interpreted consistent with the clearly expressed intent of Congress as reflected in the plain language of the statute.<sup>5</sup> Where, as here, the statute would clearly state that the safety standard is to be implemented “without taking into consideration cost or other nonrisk factors,” a reviewing court would certainly not be likely to interpret this definition as requiring a cost-benefit analysis because the statute expressly precludes the consideration of cost or other nonrisk factors.

Moreover, S. 697 defines “safety assessment” as “an assessment of the risk posed by a chemical substance under the conditions of use, integrating hazard, use, and exposure information regarding the chemical substance.” (S. 697, section 3(4)). “Safety determination” is defined as “a determination by the Administrator of whether a chemical substance meets the safety standard under the conditions of use.” (*Id.*) Safety assessments and safety determinations are to be “based on information, procedures, methods, and models employed in a manner consistent with the best available science” and “the weight of the scientific evidence (S. 697, section 4). S. 697 clearly would not allow for consideration of costs and benefits under the safety standard, notwithstanding what may at first blush appear to be similarity in wording to the current “unreasonable risk” standard.

## **2. Consideration of Costs and Benefits for Risk Management**

The March 16 letter also incorrectly describes the provisions of S. 697 as they relate to consideration of costs and benefits in EPA’s rulemaking procedures. Rather than imposing a

<sup>5</sup> *United States v. Amer. Trucking Assns.*, 310 U.S. 534, 543 (1940) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”); *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (it is a “familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”).

heavy burden on EPA by mandating a formal cost-benefit analysis, the bill simply would require EPA to conduct an alternatives analysis during the risk management rulemaking process, using readily available information, which is a requirement applicable to federal rulemaking that has been in effect through executive orders for over 33 years. We believe that this provision is key to rational decision-making and would not be a fundamental obstacle to rulemaking.

Under S. 697, where EPA determines that a chemical substance does not meet the safety standard, the Agency would be required to adopt a rule establishing risk management measures sufficient for the chemical substance to meet the safety standard. (S. 697, section 8(3)). In selecting those measures, EPA would have to consider costs and benefits:

In deciding which restrictions to impose ... as part of developing a rule ... , the Administrator shall take into consideration, to the extent practicable based on reasonably available information, the quantifiable and nonquantifiable costs and benefits of the proposed regulatory action and of the 1 or more primary alternative regulatory actions considered by the Administrator.

(*Id.*) A similar provision would apply to consideration of whether to adopt a public interest exemption to a ban or phase-out. (*Id.* p. 74.) S. 697 does not require that EPA select the least costly or least burdensome alternative, but that EPA be aware of and consider the relative costs and benefits of a key regulatory alternative. This provision would simply call on EPA to “consider” costs and benefits so as to develop a rational response to an unreasonable risk.

Consideration of costs and benefits is reasonable and common in regulation of safety and environmental risks. For example, as the Supreme Court concluded in 2009, the Clean Water Act permits EPA to use cost-benefit analysis in determining the content of regulations.<sup>6</sup> There, Justice Breyer noted in his concurrence that consideration of costs and benefits is critical to rational decisionmaking:

[A]n absolute prohibition [on consideration of costs and benefits] would bring about irrational results. As the respondents themselves say, it would make no sense to require plants to “spend billions to save one more fish or plankton.” That is so even if the industry might somehow afford those billions. And it is particularly so in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.<sup>7</sup>

<sup>6</sup> *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009) (“EPA’s current practice is a reasonable and hence legitimate exercise of its discretion to weigh benefits against costs that the agency has been proceeding in essentially this fashion for over 30 years.”).

<sup>7</sup> 556 U.S. at 232 (citation omitted).

Moreover, EPA and other agencies have been required by executive order to consider costs and benefits, to the extent permitted by law, ever since President Reagan issued Executive Order 12991 in 1981. Executive Order 12991 directed, “Regulatory action shall not be undertaken unless potential benefits to society for the regulation outweigh the potential costs to society.”<sup>8</sup> President Clinton issued Executive Order 12866 in 1993, which provides, “Each agency shall identify and assess available alternatives to direct regulation” and “Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”<sup>9</sup> Most recently, President Obama issued Executive Order 13563 in 2011, which states that the regulatory system “must take into account benefits and costs, both quantitative and qualitative .... In applying these principles, each agency is directed to use the best available techniques to quantify present and future benefits as accurately as possible.”<sup>10</sup> The Office of Management and Budget has issued clarifications to this requirement to consider costs and benefits in Circular A-4, which includes extensive guidance on how to evaluate public health and safety rulemakings.<sup>11</sup>

In other words, S. 697’s requirement for EPA to consider costs and benefits is an obligation shared by all Executive Branch agencies in the interest of good government. It is not intended to be an insuperable or even a heavy burden, but rather is consistent with longstanding Agency practice, can be met within existing Agency capacity, and is necessary to ensure that EPA makes rational decisions.

Thus, we conclude that the views asserted by the March 16 letter, with regard to interpretation of the unreasonable risk standard, the likelihood that the statutory definition of unreasonable risk will be ignored or misinterpreted by a reviewing court, and regarding alternatives analysis in rulemaking, are incorrect.

Sincerely,

*E. Donald Elliott*

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<sup>8</sup> 46 Fed. Reg. 13193 (Mar. 8, 1981).

<sup>9</sup> 58 Fed. Reg. 51735 (Oct. 4, 1993).

<sup>10</sup> 76 Fed. Reg. 3821 (Jan. 21, 2011).

<sup>11</sup> Office of Management and Budget, Circular A-4 (2003).

<http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>.

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March 16, 2015

The Honorable James Inhofe  
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410 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member  
Committee on Environment & Public Works  
456 Dirksen Senate Office Building  
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Dear Chairman Inhofe and Ranking Member Boxer:

The undersigned are 25 law professors, legal scholars, and public interest lawyers from across the country who have years of collective experience in the fields of administrative, public health, and environmental law, with particular focus on state and federal toxics policy. We write to express serious reservations with a proposal before your committee to reform the Toxic Substances Control Act (TSCA), which essentially preserves the same inadequate “safety standard” used in current law. There is widespread agreement that TSCA is broken, and reform is due. The more important discussion is the discussion around why and how it is broken.

In order to truly reform TSCA, Congress must focus on the “safety standard.” Since the passage of TSCA in 1976, the Environmental Protection Agency (EPA) has only been able to regulate or ban five chemicals under TSCA’s section 6 authority to protect against unreasonable risk. To insure that chemicals pose no harm to the health and safety of the people and the environment, it is imperative that any reform legislation include a “reasonable certainty of no harm” health-protective safety standard — the same standard that EPA and FDA apply to chemicals in food and pesticides on produce, respectively.

The Frank R. Lautenberg Chemical Safety for the 21st Century Act, a proposal to reform TSCA introduced March 10, 2015 (the Vitter-Udall Proposal), defines “safety standard” as a standard that “ensures, without taking into consideration cost or other non-risk factors, that no *unreasonable* risk of injury to health or the environment will result from exposure to a chemical substance under the conditions of use . . .” Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, 114th Cong. § 3(16) (2015) (emphasis added).

As interpreted by the courts, TSCA’s current safety standard gives EPA the power to regulate “unreasonable risk” posed by a substance only if the severity and likelihood of injury from the substance are determined to be greater than the economic burden the regulation would cause industry and consumers. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1222 (5th Cir. 1991). TSCA’s safety standard has thus been read to impose onerous cost-benefit analysis hurdles on the EPA before determining a chemical is unsafe. *E.g.*, John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 Colum. L. Rev. 261 (1991); John S. Applegate, *Synthesizing TSCA and REACH: Practical Principles for Chemical Regulation Reform*, 35 Ecology L.Q. 721 (2008); *see also* Noah M. Sachs, *Jumping the Pond: Transnational Law and the Future of Chemical Regulation*, 62 Vand. L. Rev. 1817 (2009).

Although the Vitter-Udall Proposal incorporates into its safety standard definition a prohibition against considering cost and non-risk factors, the definition remains ambiguous and — notably — completely contradictory to other sections of the Vitter-Udall Proposal.

The weakness of the prohibition on considering cost and non-risk factors raises **serious** concerns. By retaining the term “unreasonable risk,” the Vitter-Udall Proposal’s safety standard fails to send a clear signal that Congress intends to address the problems arising out of the *Corrosion Proof Fittings* decision. The Vitter-Udall Proposal defines what the safety standard is not, but it fails to define what the safety standard actually is. Because the Vitter-Udall Proposal’s safety standard retains the term “unreasonable risk” but leaves the “unreasonable risk” undefined, courts would be likely to interpret Congress’ intent, as it has been previously construed in case law, as still requiring a cost-benefit analysis (i.e., according to *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201). The ambiguity in this definition will likely result in costly and extensive litigation, delaying further EPA action to protect people and the environment from hazardous chemicals.

Preserving the term “unreasonable risk” also is deeply problematic from a public health perspective. It requires some balancing of risks to distinguish between those the public must live with and those worthy of regulation. Risks that the public may be compelled to live with may prove to be greater than those that are merely *de minimis*. Without a definition of “unreasonable risk,” therefore, the Vitter-Udall Proposal is too ambiguous to be an improvement on the existing statute and interpretive case law. Using a “reasonable certainty of no harm” health-protective safety standard would better protect the public health and eliminate any confusion as to whether EPA must weigh the health benefits of determining that a chemical is unsafe against the costs.

Furthermore, the Vitter-Udall Proposal, in its entirety, has not completely excluded the consideration of cost and non-risk factors when determining chemical harm. While the definition of “safety standard” seems to exclude consideration of costs and benefits, the Vitter-Udall Proposal’s requirements regarding EPA’s rulemaking analysis explicitly mandate consideration of costs (new Sec. 6(d)(4)(A)). The Vitter-Udall Proposal also explicitly requires a cost-benefit analysis for any exemption to a ban or phase-out (new Sec. 6(d)(5)(D)). Since the purpose of EPA rulemaking under the Vitter-Udall Proposal is to establish “restrictions necessary to ensure that [a] chemical substance meets the safety standard” (new Sec. 6(d)(1)), the contradiction between these sections and the definition of “safety standard” adds another layer of confusion to the Vitter-Udall Proposal.

Given the contradictions around consideration of costs and benefits throughout the Vitter-Udall Proposal and the ambiguity of the safety standard, it is deeply problematic from a public health perspective. To ensure that this Congress’s TSCA reform efforts produce a statute that is better than the status quo, any legislative fix must use the truly health-protective safety standard, a “reasonable certainty of no harm.”

We are available to provide substantive recommendations as needed.

Sincerely,

*Note: Institutions listed for identification purposes only. The signators do not purport to represent the views of their institutions.*

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March 18, 2015

**VIA MAIL**

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The Honorable Barbara Boxer  
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**Re: S. 697, the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act**

Dear Chairman Inhofe and Ranking Member Boxer,

Last year I wrote to the Committee leadership and expressed my support for the Chemical Safety Improvement Act pending before Committee on Environment & Public Works, which served to amend the Toxic Substances Control Act (TSCA). Today, I write to renew my call for reforms and improvements to the TSCA and to express my support for S. 697, the Frank R. Lautenberg Chemical Safety for the 21st Century Act. I believe this bipartisan bill is a significant step in the right direction toward protecting the American public from unsafe chemicals and I urge you to continue your consideration of it.

One of the flaws in the TSCA is that it allows approximately 62,000 pre-existing chemicals to be "grandfathered" without any tests to indicate what, if any, threat these substances may pose the public. You will recall that last year the State of West Virginia had the misfortune of experiencing the consequences of this regulatory gap firsthand, when 75,000 gallons of 4-methylcyclohexanemethanol (MCHM) contaminated the water supply in nine West Virginia counties. We were alarmed to learn that very little information existed about the health risks of exposure to this chemical. This is unacceptable and must never happen.

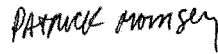
S. 697 takes steps to ensure that no other community will have to experience the same angst that my constituents felt in the aftermath of the chemical spill. This bill establishes a framework for the systematic evaluation of *all* active chemicals and requires additional safety reviews of high-priority substances. It also streamlines the process of gathering the information necessary to determine whether a chemical is safe for its intended use, identifies and acts on

State Capitol Building 1, Room E-26, 1900 Kanawha Boulevard East, Charleston, WV 25305

chemicals that may pose safety concerns, and ensures that necessary information concerning a chemical be shared with public officials and first responders in the event of an emergency.

In short, S. 697 is a needed improvement to the current chemical regulatory framework. I strongly support your continued consideration of this important reform.

Sincerely,

A handwritten signature in black ink that reads "Patrick Morrissey". The signature is written in a cursive, slightly slanted style.

Patrick Morrissey  
West Virginia Attorney General

March 9, 2015

Dear Senator:

EWG strongly opposes the new chemical safety legislation developed by Sens. Vitter and Udall. Simply put, this draft would fail to ensure that chemicals are safe, fail to set meaningful deadlines for reviews, fail to provide EPA with adequate resources and would deny states the ability to protect public health and the environment.

In particular:

- 1) **Chemicals Still Not Safe** – Toxic industrial chemicals that end up in people's bodies, and even contaminate babies before they are born, should be at least as safe as pesticides. However, the chemical industry bill would retain the far weaker "no unreasonable risk of harm" health standard, rather than the "reasonable certainty of no harm" standard applied to pesticides on produce and food additives.
- 2) **Chemical Company Costs Will Still Trump Health** – The bill is, at best, ambiguous about whether the EPA must consider costs and benefits when determining if a chemical poses no unreasonable risk of harm. While the definition of "safety standard" seems to exclude consideration of costs and benefits, the section that defines how the safety of chemicals will be assessed requires consideration of costs (Sec. 6(d)(4)). What's more, the bill *explicitly* requires a cost-benefit analysis upon industry request for any chemical ban or phase-out (Sec. 6(d)(5)(D)).
- 3) **Chemical Spills, Fence-line Communities Are Not Addressed** – The industry bill requires consideration of "reasonably foreseeable" chemical exposures, but there is no requirement for safety assessments of the exposures and risks that might result from spills. About 10,000 tons of chemicals are spilled every year in the U.S. The bill also lacks explicit environmental justice protections for fence-line communities that bear the brunt of the harm from routine toxic emissions from chemical plants and accidents such as last year's West Virginia spill.
- 4) **Deadlines** – The EPA estimates that roughly 1,000 chemicals need immediate health and safety review. Under the industry bill, that process would take hundreds of years. It would require only that EPA *start* reviews of 25 chemicals within five years and would allow the agency at least seven years to review each substance and impose any necessary restrictions to protect the public. As under current law, the EPA would deal with only a tiny fraction of the thousands of chemicals to which the public is exposed. There is no deadline for implementing restrictions, phase-outs or bans of even the most toxic chemicals, which in many cases have contaminated Americans' blood for decades.
- 5) **Pay to Play for Safety Reviews** – The industry bill would allow manufacturers to receive expedited review of their favored chemicals if they are willing to pay a fee, but it

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 MIDWEST OFFICE 103 E. 6th Street, Suite 201 Ames, IA 50010 | P: 515.598.2221

would not require expedited review for asbestos or extremely dangerous chemicals that persist in the environment and build up in people..

- 6) **Regulates The Chemical, Not the Couch** – If the EPA determines that a toxic flame retardant in furniture or other chemical is unsafe, the agency would have limited authority to regulate products containing the chemical and would have to clear the additional hurdle of showing that the public has “significant exposure” to the product. This would significantly impair EPA’s ability to act to protect public health.
- 7) **Judicial Review** – The bill would retain the “substantial evidence” standard for judicial review – which confers an enormous advantage to industry in regulatory and judicial proceedings – rather than the “arbitrary and capricious” standard that strengthens EPA’s authority in nearly all other agency actions. What’s more, the bill fails to provide for judicial review of EPA decisions to classify chemicals as “low priority,” even though these chemicals would then be considered “safe” and would not be subject to meaningful EPA review.
- 8) **Blocks State Action** – Under the industry bill, states would be preempted from taking new actions to regulate any chemicals that the EPA designates “high priority.” This designation would block state action for seven years or more. What’s more, states would be blocked from adopting and co-enforcing EPA restrictions on chemicals. More importantly, states could be blocked from using their own clean air and water laws to control chemicals if their actions are deemed “inconsistent” with EPA’s. The industry proposal would make it effectively impossible for states to be granted a waiver to set more protective standards than EPA. Indeed, even where there is no preemption, states would have to notify the EPA of proposed chemical restrictions.
- 9) **Imported Chemicals Get Looser Regulation** – The industry bill would weaken the EPA’s ability to intercept imported chemicals containing unsafe chemicals.
- 10) **Minimal Fees On Industry, Continued Taxpayer Subsidies** – Under the bill, industry would pay only minimal fees for new chemical reviews and chemical inventory reporting. Industry would be required to generate only \$18 million in revenue or 25 percent of total program costs. In combination with the absence of meaningful deadlines, EPA could take a century to review the 1,000 chemicals that need immediate attention.

Although TSCA is badly broken, the legislation developed by Sens. Vitter and Udall is worse than current law and should be rejected.

Groups Join Voices Against Industry Chemicals Bill | Environmental Working Group


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## Groups Join Voices Against Industry Chemicals Bill

By Robert Coleman, Administrative Assistant

TUESDAY, MARCH 17, 2015 A growing chorus is speaking out against legislation to update federal chemical safety law that was introduced last week by Sens. Tom Udall, D-N.M., and David Vitter, R-La. The industry-backed bill would retain the existing weak safety standard for toxic chemicals and limit the ability of states to enact and enforce their own rules to protect public health.

Environmental Working Group characterized the bill as being "worse than the existing Toxic Substances Control Act, or TSCA – a law so broken that the U.S. Environmental Protection Agency has been powerless even to ban asbestos."

Dozens of other organizations, companies and well-known health advocates and consumer activists have also denounced the Udall-Vitter bill.

### Here is what they are saying:

Erin Brockovich, consumer advocate, told *The Hill* newspaper:

*If we take away states' rights and dump this back on the EPA, which is already overburdened, understaffed and without state funds, to me that's insanity...*

Linda Reinstein, president and co-founder of the Asbestos Disease Awareness Organization:

*The fact that the Udall-Vitter bill will not even restrict, much less ban, the deadly substance that claims 39 lives a day is nothing short of a national travesty...*

Daniel Rosenberg, Senior Attorney in the Health Program at the Natural Resources Defense Council, said:

*The proposal still contains rollbacks and loopholes that make it worse than current law. For example, a lax Environmental Protection Agency could use the bill to give a green light to deregulate hundreds of controversial chemicals with minimal review...*

Andy Igrejas, director of Safer Chemicals, Healthy Families:



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- News Release: Leading Legal
- Scholars, Public Interest Lawyers
- Call Johnson's Chemical Bill
- "Deeply Problematic" for Human
- Health

Groups Join Voices Against Industry Chemicals Bill | Environmental Working Group

*In its current form it would not make a big dent in the problem of toxic chemical exposure and would even do some harm by restraining state governments...*

Nancy Buermeyer, senior policy strategist at the **Breast Cancer Fund**:

*Congress negotiated with our health and the American public lost out to chemical industry profits...*

Michael Green, Executive Director of the **Center for Environmental Health**, said:

*We are terribly disappointed that this long-awaited proposal still retains provisions that put children and families at risk...*

Shaney Jo Darden, Founder of **Keep a Breast Foundation**, said:

*We need to demand a shift in focus from the welfare of industry to the welfare of humans...*

Sabru Keiser, program manager at **Breast Cancer Action**:

*The burden of proof still lies with us (and regulatory agencies) to prove chemicals are harmful, rather than requiring corporations to prove chemicals are safe...*

Catherine Thomasson MD, Executive Director, **Physicians for Social Responsibility** said:

*It's time to put health first. The public wants their children protected from dangerous chemicals. The Udall-Vitter bill is still a step backwards...*

Click [here](#) to see a full list of statements from leading groups and individuals who advocate real TSCA reform, not the industry's bill.

KEY ISSUES:  TOXICS  CHEMICAL POLICY (TSCA)

1  
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Naomi Dagen Bloom · 11 hours ago

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<http://www.ewg.org/enviroblog/2015/03/groups-join-voices-against-industry-chemicals-bill/>[3/18/2015 9:02:26 AM]

Groups Join Voices Against Industry Chemicals Bill | Environmental Working Group

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STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

March 13, 2015

The Honorable Charles E. Schumer  
United States Senate  
322 Hart Senate Office Building  
Washington, D.C. 20510

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

Dear Senators Schumer and Gillibrand:

I am writing to express my opposition to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, as presently drafted. S. 697 was introduced this week as an amendment to the Toxic Substances Control Act of 1976 ("TSCA"), our national law to protect our citizens and the environment from the risks posed by chemicals and chemical mixtures. In particular, I oppose S. 697's broadly expanded limitations on the ability of New York and other states to take appropriate action under state laws to protect against these risks.

In contrast to the existing law, S. 697 would prevent states from adopting new laws or regulations, or taking other administrative action, "prohibiting or restricting the manufacture, processing, distribution in commerce or use" of a chemical substance deemed by the U.S. Environmental Protection Agency ("EPA") to be a "high-priority" for federal review even before any federal restrictions have been established. As a result, a void would be created where states would be prevented from acting to protect their citizens and the environment from those chemicals even though federal restrictions may not be in place for many years. S. 697 also eliminates two key provisions in the existing law that preserve state authority to protect against dangerous chemicals. One is the provision that provides for "co-enforcement" – allowing states to adopt and enforce state restrictions that are identical to federal restrictions in order to provide for additional enforcement of the law. The second is the provision that allows states to ban in-state use of dangerous chemicals.

The goal of TSCA is vitally important: to establish necessary and appropriate restrictions on the manufacture and use of chemicals that present an unreasonable risk of injury to human

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health or the environment. I strongly support this goal, and recognize the essential contribution that TSCA could make in ensuring the adequate protection of public health and the environment from toxic chemicals. Unfortunately, in practice, TSCA has largely failed to live up to its goal and, as a result, I welcome efforts to reform this important statute.

However, I cannot support S. 697's broad expansion of limitations on the authority of states to protect our citizens from the health and environmental risks posed by toxic chemicals within our states in the name of "reform." In fact, as detailed below, I believe that, rather than bringing TSCA closer to attaining its goal, the draft legislation's greatly expanded limitations on state action would move that goal further out of reach.

#### **I. Preemption of State Action Under TSCA**

Historically and currently, New York and other states have been leaders in protecting public health and the environment from toxic chemicals. That exercise of traditional state "police powers" has allowed states to protect their citizens and natural resources, and serve as laboratories for nationwide solutions for threats to human health and the environment.

For example, in 1970 New York banned use of the insecticide DDT, which was devastating many bird populations, including American bald eagles, peregrine falcons, brown pelicans, and ospreys. Two years later, EPA followed New York's lead. Twenty years later, the American bald eagle was up-listed from an endangered species to a threatened species.

More recently, in 2009, New York banned the purchase and incineration of coal "fly ash," a waste product of burning coal to produce electricity. Fly ash is rich in mercury, a highly toxic compound that causes nervous system damage, neurological problems, birth defects, and developmental delays. In 2014, EPA promulgated a final rule on fly ash and other coal combustion waste products under the Resource Conservation and Recovery Act.

Additionally, New York has adopted laws and regulations restricting the sale or use of products containing harmful chemicals. Those laws and regulations play a critical role in protecting the health and welfare of our citizens and the natural resources of New York State. These laws and regulations include:

- A prohibition under General Business Law, § 396-k, on the import, manufacture, sale or distribution of toxic children's products, and authorization under Executive Law § 63(12) for my office to conduct investigations into violations of that and other laws, and then prosecute and to resolve such violations by agreement. My office has taken recent action under these laws to ensure that retailers in New York do not sell toys and other articles for children that contain dangerous levels of toxic chemicals.
- A ban on bisphenol A ("BPA") in child care products, including pacifiers, baby bottles, and sippy cups. N.Y. Env'tl. Conserv. Law § 37-0501 et seq. BPA leaches into liquids

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and foods and has been shown to mimic the behavior of estrogens in the human body, causing changes in the onset of puberty and reproductive functioning.

- A ban on flame retardant tris(2-chloroethyl) phosphate (“TRIS”) in child care products, including toys, car seats, nursing pillows, crib mattresses, and strollers. N.Y. Env’tl. Conserv. Law § 37-0701 et seq. The Consumer Products Safety Commission classifies TRIS as a probable human carcinogen. Studies have shown that young children are often the group most highly exposed to TRIS, and estimate that children can ingest up to ten times as much of this chemical as adults do because of their tendency to put their hands and other objects into their mouths.
- Restrictions on the concentration of brominated flame retardants (pentabrominated and octabrominated diphenyl ethers) in products manufactured, processed or distributed in New York. N.Y. Env’tl. Conserv. Law § 37-0111. Pentabrominated diphenyl ether (“PDBE”) has been correlated with lower birth weight in newborns. Animal studies indicate that pre- and post-natal exposures to PBDE may cause long-lasting behavioral alterations and can affect motor activity and cognitive behavior.
- Restrictions on the use of lead, cadmium, mercury, and hexavalent chromium in inks, dyes, pigments, adhesives, stabilizers, or other additives in product packaging. N.Y. Env’tl. Conserv. Law § 37-0205 et seq. EPA has determined that lead and mercury are probable human carcinogens, while cadmium and chromium are known human carcinogens. Exposure to high levels of any of these heavy metals can permanently damage the brain, kidneys, and other vital organs.
- A de facto ban on the use of n-propyl bromide in dry cleaning. See “Approved Alternative Solvents for Dry Cleaning” at <http://www.dec.ny.gov/chemical/72273.html>. N-propyl bromide has been found to cause sterility in both male and female test animals, and harms developing fetuses. It can also damage nerves, causing weakness, pain, numbness, and paralysis. As a result, New York will not issue an Air Facility Registration to any facility proposing to use n-propyl bromide as an alternative dry cleaning solvent as it is not an approved alternative solvent. New York City also bans n-propyl bromide under its fire code because of its flammability. N.Y.C. Admin. Code §§ 27-426, 27-427.

These examples underscore the importance of maintaining the complementary, symbiotic relationship between federal and state chemical regulation in any TSCA reform. TSCA currently provides that a state may regulate any chemical unless and until EPA regulates the chemical under § 6. 15 U.S.C. §§ 2617(a)(1) and (a)(2)(B). Once EPA regulates a chemical because it has found that the chemical presents an unreasonable risk, TSCA provides that a state may not enforce an existing regulation or establish a new regulation “which is designed to protect against such risk” after the effective date of that federal regulation. *Id.* § 2617(a)(2)(B). However, existing § 18(a)(2)(B) exempts a state restriction on a chemical from preemption if the state

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restriction is: (1) identical to EPA's restriction; (2) enacted pursuant to another federal law; or (3) a complete ban on in-state use of the chemical. *Id.* Thus, by allowing states to enact restrictions identical to EPA's, TSCA allows states to "co-enforce" the federal restrictions on toxic chemicals. In addition, subject to EPA approval, existing § 18(b) allows states to establish requirements to protect public health or the environment for a chemical if a state requirement provides a "significantly higher degree of protection" than the EPA requirement. *Id.* § 2617(b)(2).

## **II. Preemption of State Action Under S. 697**

### **a. High-Priority Chemicals**

S. 697 would greatly expand TSCA's scope of state preemption. Substantively, § 4A of the act as proposed would require EPA to categorize all existing chemicals as either "low priority" or "high priority." § 6 as proposed would require EPA to make safety assessments and determinations regarding high-priority chemicals and issue restrictions on high-priority chemicals that do not meet the safety standard because they present an unreasonable risk of injury to health or the environment.

§ 18(a) as proposed in S. 697 would not preempt existing state restrictions on high-priority chemicals until EPA has either found that the chemical meets the safety standard or imposed restrictions on a chemical that does not meet the safety standard. It would also allow states to maintain existing restrictions or impose new restrictions on low-priority chemicals.<sup>1</sup>

However, under § 18(b) as proposed in S. 697, states would be preempted from imposing any new restrictions on a high-priority chemical once EPA starts its safety assessment. Thus, even though EPA has designated a chemical as high-priority under proposed § 4A(b)(3) because it has the "potential for high hazard or widespread exposure," states would not be able to protect their citizens and environment from that chemical even though any federal restrictions on it are likely years away. Under proposed § 6(a), EPA may take up to three years after a chemical is

<sup>1</sup> Specifically, § 18(a) would provide that a state may not establish a new restriction or enforce an existing restriction on a chemical "found to meet the safety standard and consistent with the scope of the determination made under section 6." Section 6 applies only to high-priority chemicals. When a chemical is categorized as low-priority under § 4A(b) because it is "likely to meet the applicable safety standard," no finding whether it meets the standard is required. I note, however, that low-priority status is not necessarily permanent. Under proposed § 4A(b)(9)(A), states must notify EPA of proposed administrative actions, enacted legislation and final administrative action regarding low-priority chemicals, and under proposed §§ 4A(b)(8)(A) and 4A(a)(3)(A)(iii)(III), EPA could respond to such notification by redesignating a low-priority substance as a high-priority one.

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categorized as high-priority to conduct a safety assessment and up to two years after a safety assessment is completed to issue restrictions on a chemical. Those deadlines may also be extended by an aggregate length of no more than two years.

Thus, assuming no additional unauthorized delays, S. 697 itself allows up to seven years between a chemical's high-priority designation and its federal restriction – a period during which states are denied the ability to restrict the chemical in order to protect the health of their citizens and the environment. And history suggests that additional, unauthorized delays will indeed occur.<sup>2</sup>

**b. Additional Forms of Preemption**

S. 697 also would eliminate two provisions of the existing law that preserve the ability of states to take action under their own laws. Under § 18(d)(1)(C)(ii)(I) as proposed, state restrictions identical to restrictions issued by EPA under TSCA would no longer be exempt from preemption. Without this exemption, the only means for states to enforce EPA's restrictions on toxic chemicals in their states would be through a citizens' suit in federal court. That would eliminate critical state enforcement tools – state administrative proceedings and judicial actions in state courts – that work in tandem with federal enforcement in states all across the nation to protect our air, water, lands, and citizens from toxic pollutants. Additionally, S. 697 would remove TSCA's current preemption exception for state bans on the in-state use of chemicals, which – as discussed above – has been an important part of New York's approach to safeguarding its citizens and natural resources from dangerous chemicals.

While § 18(d)(1)(C) as proposed would add an exception for state restrictions on chemicals relating to air quality, water quality, or waste treatment or disposal, that exception would not cover restrictions that “impose a restriction on the manufacture, processing, distribution in commerce, or use of a chemical substance.” Some chemicals that cause air or water pollution can be controlled before they are emitted or discharged into the environment, and would arguably fit within this exception. However, the risks of many other harmful chemicals – particularly those that are highly toxic, or difficult to control or treat as pollutants – can be effectively reduced only by restricting their use, and such use restrictions by states would be preempted under S. 697.

<sup>2</sup> I note, for example, that Congress amended TSCA in July 2010 by adding Subchapter VI that sets forth specific formaldehyde standards for composite wood products. Congress directed EPA, “[n]ot later than January 1, 2013,” to promulgate regulations to implement the standards. 15 U.S.C § 2697(d)(1). Presently, EPA anticipates promulgating the regulations by December 2015. See <http://www2.epa.gov/formaldehyde/formaldehyde-emission-standards-composite-wood-products#proposedrule>

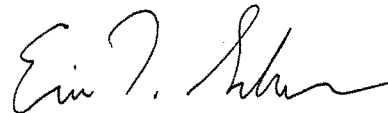
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March 13, 2015  
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\* \* \*

In conclusion, I believe that achieving TSCA's goal of ensuring the adequate protection of public health and the environment from toxic chemicals is as important as ever. However, I oppose the provisions in S. 697 that would greatly expand the limits on state action under state law to provide protections against dangerous chemicals.

I offer the full assistance of my office to you and your colleagues to craft TSCA reform legislation that would improve federal regulation of toxic chemicals while preserving the traditional and critical role of states in protecting the health and welfare of their citizens and natural resources.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric T. Schneiderman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Eric T. Schneiderman  
Attorney General of New York

**WILLIAM H. SORRELL**  
ATTORNEY GENERAL

**SUSANNE R. YOUNG**  
DEPUTY ATTORNEY GENERAL

**WILLIAM E. GRIFFIN**  
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March 18, 2015

Honorable James M. Inhofe, Chairman  
Senate Committee on Environment and Public Works  
410 Dirksen Senate Office Building  
Washington, DC 20510-6175

Honorable Barbara Boxer, Ranking Member  
Senate Committee on Environment and Public Works  
456 Dirksen Senate Office Building  
Washington, DC 20510-6175

Dear Chairman Inhofe and Ranking Member Boxer:

I write to express my deep concern regarding the Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, as presently drafted. While I strongly support efforts to modernize the Toxic Substances Control Act (TSCA) of 1967 and to address many of its shortcomings, the bill as presently drafted contains revisions that are problematic.

First, the proposed framework to preempt state laws could create a significant void in the regulation of toxic chemicals. Second, the proposed prohibition on state enforcement of federal rules unnecessarily limits the states' ability to complement and assist the federal government's work in protecting the public and the environment. Last, the proposed revisions jeopardize the states' ability to address toxic chemicals, an ability that the current TSCA regulatory system has afforded.

#### **I. Preemption of State Requirements**

S. 697 as presently drafted dramatically alters the process by which federal action would preempt state requirements concerning toxic chemicals. Under the existing TSCA system, states may act to protect the public from risk of injury to health or the environment due to a toxic chemical unless and until the United States Environmental Protection Agency (EPA) has put into effect its own requirements for the toxic chemical.

The bill as presently drafted would significantly change the preemptive effect of federal action with respect to regulation of toxic substances in a way that could result in substantial time

frames during which potentially dangerous chemicals would go unregulated. Under Section 18(b) of the bill, all new state restrictions on high-priority chemicals would be preempted once EPA starts its safety assessment. The bill allows EPA to take up to three years to complete such an assessment, to take two more years to promulgate a final regulation, and to extend the rule-making process by an additional two years. This process creates a period of nearly a decade during which states cannot restrict a chemical in order to protect the public and the environment.

In contrast, the existing TSCA system permits states to take the lead on newly identified threats and to establish innovative rules and requirements to protect the public and the environment, all in advance of any action by the federal government. Under the current system, the federal government has often benefitted from early action by the states, as those forward-looking state initiatives have gone on to serve as potential templates for national standards.

The proposed new process for preempting state requirements under S. 697 should not displace such innovative state action. Moreover, the process should not create a broad regulatory void that could extend for nearly a decade and during which states could not regulate a dangerous chemical merely because the EPA has begun the lengthy process of assessing the chemical on its own. States must be allowed to set requirements regarding dangerous chemicals until the federal government has completed an action that would replace those requirements.

## **II. Restriction of Enforcement Activities**

S. 697 as presently drafted would significantly interfere with the states' ability to carry out their responsibility to protect the public and the environment from the dangers of toxic chemicals. Currently under TSCA, the states and the federal government share this responsibility. States have traditionally supplemented federal enforcement capacity and supported federal environmental and consumer protection statutes by passing state laws that mirror those federal standards. This allows the states to act when the federal government does not take action to enforce its own requirements.

The bill, however, would alter this structure to the states' detriment. For example, under subsection 18(d)(1)(C)(ii)(I), states would be precluded from adopting a chemical regulation that is "already required" by a decision by the Administrator, thereby preventing state action even when the state action would be entirely consistent with regulation supported by the federal government. Removing the states' enforcement authority for federal requirements does not appear to be solving any identified problem in the system, and it results in a dramatic reduction of government authority to enforce the substance of federal regulations. Revisions to TSCA must leave in place the authority of state governments to act in support of federal requirements.

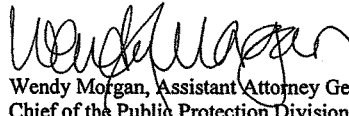
## **III. States' Ability to Address Toxic Chemicals under the Current TSCA System**

Revisions to TSCA should not jeopardize the states' ability to address toxic chemicals, an ability that the current TSCA regulatory system affords. For example, under the existing system, the State of Vermont has taken action to the great benefit of the health and safety of Vermonters, including adopting statutes that regulate mercury, lead, phthalates, bisphenol A, the gasoline additive MTBE, and various classes of flame retardants. Vermont has further protected children,

a particularly vulnerable population, by enacting a statute that requires manufacturers and retailers to disclose the presence of toxic chemicals used in a children's product. The statute also enables the Commissioner of the Vermont Department of Health to designate certain chemicals as "chemicals of high concern" to children when particular risks have been identified, and to either regulate or ban those chemicals. Additionally, the Vermont Attorney General's Office has used its state statutory authority to take action to remove from store shelves dangerous products designed for children that contain lead. By establishing a system wherein the states are able to regulate toxic chemicals before the federal government has acted and are able to enforce federal requirements when the federal government has yet to act, TSCA has been vital to the State of Vermont's efforts to protect Vermonters.

In conclusion, I welcome an effort to reform TSCA to help it meet its goal of restricting the manufacture and use of chemicals that present an unacceptable risk of injury to public health and the environment, but any such effort must preserve the attributes of the existing system. Because of my deep concern, I respectfully ask that you explore all possible avenues to improve S. 697 so that we may move forward with a stronger framework for protecting people from the effects of toxic chemicals without losing any of the important tools already available to the federal and state governments.

Sincerely,

A handwritten signature in black ink, appearing to read "Wendy Morgan".

Wendy Morgan, Assistant Attorney General  
Chief of the Public Protection Division  
Office of the Vermont Attorney General

cc: The Honorable Patrick Leahy  
The Honorable Bernie Sanders

**A growing chorus is speaking out against legislation to update federal chemical safety law that was introduced by Sens. Tom Udall, D-N.M., and David Vitter, R-La.**

**Here's what critics of the industry's bill are saying:**

**Ken Cook, President and Co-Founder, Environmental Working Group, said:**

*"This chemical industry proposal is worse than the current law. It fails to meet even basic criteria for effective reform that protects our children's health. There is a mounting body of evidence that links chemical exposures to adverse health effects. And this is the best we can do?"*

**Erin Brockovich, Consumer advocate, told The Hill newspaper:**

*"This bill does not make chemicals safer. I wouldn't even consider it in my opinion a [Toxic Chemicals Control Act, or TSCA] bill. It's an industry bill... If we take away states rights and dump this back on the EPA, which is already overburdened, understaffed and without state funds, to me that's insanity."*

**Linda Reinstein, President and Co-Founder of Asbestos Disease Awareness Organization, said:**

*"Any 'chemical safety' bill that does not ban asbestos isn't worth the paper it's printed on. No other toxic chemical claims more lives and leaves more families without mothers, fathers, sons and daughters than asbestos. And the legislation offered by Mr. Udall and Mr. Vitter will only expose future generations to asbestos and many other highly toxic chemicals."*

**Daniel Rosenberg, Senior Attorney in the Health Program at the Natural Resources Defense Council, said:**

*"This important chemical safety law needs to be updated, and the bill has improved notably since the original version introduced two years ago. But the proposal still contains rollbacks and loopholes that make it worse than current law. For example, a lax Environmental Protection Agency could use the bill to give a green light to deregulate hundreds of controversial chemicals with minimal review. The bill also would block state action even when EPA has done nothing to protect the public. The bill's failings would be easy to remedy, and we continue to work to get this bill to a point where it would be acceptable."*

**Andy Igrejas, Director of Safer Chemicals, Healthy Families, said:**

*"Firefighters, nurses, parents of kids with learning disabilities and cancer survivors all still oppose this legislation. In its current form it would not make a big dent in the problem of toxic chemical exposure and would even do some harm by restraining state governments. While Senators Vitter and Udall have made some positive changes, the bill is not up to the important task of protecting public health. We plan to work with Senators from both parties to make the needed improvements."*

**Nancy Buermeier, Senior Policy Strategist at the Breast Cancer Fund, said:**

*"There is an urgent need to protect Americans from the dangerous chemicals we are exposed to everyday – unfortunately this bill doesn't hit the mark on protecting public health. Congress negotiated with our health and the American public lost out to chemical industry profits. We're calling on senators from both sides of the aisle to support amendments that transform this bill into a robust defense for people to live free from contamination by toxic chemicals."*

**Michael Green, Executive Director of the Center for Environmental Health, said:**

*"We are terribly disappointed that this long-awaited proposal still retains provisions that put children and families at risk. The Senate bill would leave EPA unable to adequately address chemical health threats, and at the same time, undermine state actions that, in the absence of federal rules, are the only protections our children have. We expect Senators who care about children's health to make significant changes to this dangerous approach."*

**Shaney Jo Darden, Founder of Keep a Breast Foundation, said:**

*"The Vitter-Udall bill fails to protect people, instead it protects the chemical industry. We need to demand a shift in focus from the welfare of industry to the welfare of humans. This should be an opportunity for real change, to protect people of all ages and backgrounds. Everyday we're exposed to thousands of harmful chemicals in our environment, food supply, and body care products: each instance of exposure is negligible, but cumulatively these exposures add up and in time can lead to cancer initiation. Only 10% of cancer diagnosis is related to family history, the other 90% is environmentally related. Protect not defect."*

**Sahru Keiser, Program Manager at Breast Cancer Action, said:**

*"Fundamentally, this bill does not embrace the precautionary principle, which would require lawmakers and regulators to act on existing evidence to protect public health before harm occurs. The burden of proof still lies with us (and regulatory agencies) to prove chemicals are harmful, rather than requiring corporations to prove chemicals are safe."*

**Catherine Thomasson MD, Executive Director, Physicians for Social Responsibility said:**

*"It's time to put health first. The public wants their children protected from dangerous chemicals. The Udall-Vitter bill is still a step backwards. It must allow states to act to protect its citizens."*

**Dorothy Felix of Mossville Environmental Action Now (MEAN) said:**

*"Because of the failure of TSCA, our community is faced with extensive toxic pollution that is causing us to consider relocating. Senator Vitter and other legislators are well aware of these toxic impacts yet they are proposing a bill that would be even worse than current law. Let's be clear: Senator Vitter's bill is good for the chemical industry, not for the people who live daily with the consequences of toxic chemical exposures."*

**Martha Arguello, Director of Physicians for Social Responsibility – Los Angeles, said:**

*"Chemical industry influence over the Vitter-Udall bill is unacceptable and the authors need to come back to the table and listen to the huge community of environmental and health groups that have been working on TSCA reform for decades"*

**Kathy Curtis, Executive Director of Clean and Healthy New York, said:**

*"The regulatory framework for chemicals must protect health, especially the most vulnerable members of our society, and also must allow states to regulate toxic chemicals in order to protect their communities. State actions to protect their own residents are the only thing prompting federal action, and states should not lose that right."*

**John Replogle, President and CEO of Seventh Generation, said:**

*"Federal legislation should not tie the hands of states which have shown leadership in protecting their citizens, restricting the worst chemicals and ultimately driving the marketplace towards safer alternatives."*

**Erin Switalski, Executive Director of Women's Voices for the Earth, said:**

*"Congress can and should do better to protect us from chemicals found in everyday consumer products that cause cancer, birth defects, infertility, and a whole host of other chronic diseases. We don't need a bill written by the chemical industry. What we need is real reform that will give the public peace of mind that the products they are bringing into their home and using on a daily basis will not harm their health. Women's Voices for the Earth is urging senators not to sign on to the bill until some of these serious flaws are addressed."*

**Mike Belliveau, Executive Director of the Environmental Health Strategy Center, said:**

*"American families deserve to know that the products they buy are free from dangerous chemicals that threaten the health of a developing child or pregnant woman. Unfortunately, the Udall-Vitter bill strikes the wrong balance in reforming the Toxic Substances Control Act, which everyone agrees is badly broken."*

**David Levine, President and CEO of the American Sustainable Business Council, said:**

*"The Vitter-Udall bill as introduced falls short in delivering meaningful reform that benefits downstream businesses and innovative entrepreneurs. The Boxer-Markey bill goes much further. We look forward to working with the Senate to make improvements to the bills that encourage safer alternatives and promote transparency"*

**Kelly Vlahakis-Hanks, CEO of Earth Friendly Products, said:**

*"Getting the worst chemicals out of commerce should be the highest priority for legislators. Meaningful reform should not impose additional roadblocks on the EPA from taking action on chemicals that are widely known to be unsafe."*

**Barry Cik, Founder of Naturepedic, said:**

*"Consumers are demanding cleaner and safer products. Legislation should make transparency of the safety information about ingredients in products readily available and easy to access"*

**Richard Moore of Los Jardins Institute and Environmental Health Alliance said:**

*"The chemical industry should not be allowed to draft the very laws meant to regulate them. We need serious chemical reform that protects the health of all people including those who are living in 'hot spots' or 'sacrifice zones' -- typically communities of color -- that are highly impacted by chemical factories. It seems that my own Senator, Senator Udall, has forgotten the needs of his constituents in favor of meeting the needs of his industry friends."*

**Jose Bravo, Executive Director of the Just Transition Alliance, said:**

*"We need 21st century, solution-based laws that empower agencies and people to live in a society that safeguards our health and environment. This bill falls short of that goal. The bill is called the 'Frank R. Lautenberg Chemical Safety for the 21st Century Act' but unfortunately it is a horrible reminder of what industry special interests can do to undermine our personal and environmental health."*

**Kathleen Schuler, Co-Director of the Health Legacy in Minnesota, said:**

*"I'd love to say that Vitter-Udall is the ticket to reforming Toxic Substances Control Act (TSCA). Unfortunately, it's not. While it improves on current law in a few areas, it is worse in other areas. The glacial pace of chemical review and preemption of timely state actions to protect citizens are key weaknesses in the bill. This bill falls short of meaningful reform that truly protects public health."*

**Katie Huffling RN, Director of the Alliance of Nurses for Healthy Environments, said:**

*"New research links toxic chemicals with a range of illnesses and billions of dollars in health care costs, yet Senators Udall and Vitter are proposing a bill that doesn't address major problems with current policies and would give the chemical industry a free pass to keep exposing Americans to harmful chemicals for decades to come."*



March 17, 2015

The Honorable Jim Inhofe  
Chairman  
Committee on Environment and Public Works  
410 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member  
Committee on Environment and Public Works  
456 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Inhofe and Ranking Member Boxer:

RE: TSCA Reform; S.697, the *Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act* and S.725, the *Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act*

The American Association for Justice (AAJ) commends Chairman Inhofe, Ranking Member Boxer, and the members of the Committee on Environment & Public Works for continuing the discussion of how to achieve meaningful reform of the Toxic Substance Control Act ("TSCA"). AAJ submits this letter for the committee's consideration regarding the March 18, 2015 hearing on S. 697, the "Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act."

As an association of advocates for the people harmed by toxic chemicals, AAJ strongly supports efforts to reform TSCA to better protect American families from harmful chemicals that pose significant and often deadly risks, especially to America's children, pregnant women, and workers.

Currently, AAJ does not oppose S.697, the "Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act" as it is written, but we do not believe it goes far enough to protect American families from the dangerous chemicals in our drinking water, children's toys, and consumer products. Additional changes to the bill must ensure that public health and safety are better protected and should include: restoring the power of states to enforce chemical safety laws; allowing states to regulate hazardous chemicals at least until there is an enforceable federal rule in place that adequately protects the public; and, ensuring expedited action on known, deadly substances such as asbestos.

S. 697 should allow states to equally enforce the regulations or restrictions enacted pursuant to S.697. The public health can only benefit from having additional enforcers of sound toxic chemical policy and there exists no rational basis for denying states the opportunity to police conduct impacting their citizens.

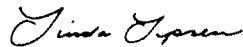
Similarly, S. 697 would also better protect the public health if it didn't freeze state actions long *before* any enforceable federal regulations are in place for the "high priority" substances

(otherwise known as the most hazardous of the known chemicals in the queue for EPA review). Under current law, no state is deprived of the ability to take action on a chemical—and preemption does not occur—until the EPA actually takes action to protect the public health.

Also, S. 697 should prioritize and expedite action on known, deadly toxins. Toxic substances such as asbestos and PBTs that have for decades wreaked havoc on American families should be among the first to be considered for regulation by the EPA, and at an accelerated timetable.

Notably, these issues are addressed in S.725, the “Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act,” a bill that will ensure that federal law regulating toxic chemicals in our country is focused on protecting the public health and ensuring accountability. AAJ looks forward to continuing to work with committee members toward the goal of enacting TSCA reform that ensures a robust federal regulatory agency working in concert with state enforcement entities and the civil justice system to promote and effectively protect the public health.

Sincerely,



Linda A. Lipsen  
CEO  
American Association for Justice

cc: The Honorable Harry Reid  
Senate Minority Leader  
S-230 Capitol Building  
Washington, DC 20510

The Honorable Mitch McConnell  
Senate Majority Leader  
S-221 Capitol Building  
Washington, DC 20510

**For Immediate Release: March 10, 2015**

**Statement from Asbestos Disease Awareness Organization (ADAO) Opposing Senate  
"Chemical Safety" Bill which Lets Asbestos off the Hook**

**Asbestos Would Remain Legal Under Udall-Vitter Proposal**

*Washington DC, USA – March 10, 2015.* The Asbestos Disease Awareness Organization (ADAO), which combines education, advocacy, and community to help ensure justice for asbestos victims, today issued this statement from ADAO President and Co-Founder Linda Reinstein, in opposition to the legislation introduced today by U.S. Sens. David Vitter (R-LA) and Tom Udall (D-N.M.) inappropriately named the "Chemical Safety for the 21st Century Act". The bill purportedly designed to protect the public from toxic substances would allow asbestos to remain legal and widely used in the U.S.

"Asbestos exposure in the U.S. alone is responsible for at least 10,000 Americans dying each year from asbestos-related diseases," said Linda Reinstein, president and co-founder of the Asbestos Disease Awareness Organization. "The fact that the Vitter-Udall bill will not even restrict, much less ban, the deadly substance that claims 30 lives a day is nothing short of a national travesty. Any Senator who supports this industry proposal is in essence supporting the continuation of the toll asbestos has already had on millions of American families."

The bill, embraced by the chemical industry, is widely considered **to be worse than the current federal chemicals law**, the Toxic Substances Control Act, or TSCA – a law so broken that EPA was unable to ban asbestos back in 1989.

"Any 'chemical safety' bill that does not ban asbestos isn't worth the paper it's printed on," added Reinstein. "No other toxic chemical claims more lives and leaves more families without mothers, fathers, sons and daughters than asbestos. And the legislation offered by Mr. Udall and Mr. Vitter will only expose future generations to asbestos and many other highly toxic chemicals."

**###**

**About the Asbestos Disease Awareness Organization** The Asbestos Disease Awareness Organization (ADAO) was founded by asbestos victims and their families in 2004. ADAO is the largest non-profit in the U.S. dedicated to providing asbestos victims and concerned citizens with a united voice through our education, advocacy, and community initiatives. ADAO seeks to raise public awareness about the dangers of asbestos exposure, advocate for an asbestos ban, and protect asbestos victims' civil rights. For more information, visit [www.asbestosdiseaseawareness.org](http://www.asbestosdiseaseawareness.org).

# **Chemical Industry Bill Protects Polluters, Profits – Not Kids’ Health**

## **Contact:**

**Monica Amarello**

(202) 939-9140

[monica@ewg.org](mailto:monica@ewg.org)

**FOR IMMEDIATE RELEASE:**

**TUESDAY, MARCH 10, 2015**

WASHINGTON – Americans expect the chemicals used in everyday products to be safe. But a chemical industry-supported bill introduced today by Sens. Tom Udall, D-N.M., and David Vitter, R-La., falls far short of what’s needed to protect us from toxic and poorly regulated chemicals.

This bill fails to ensure that chemicals are safe, to set meaningful deadlines and to provide the U.S. Environmental Protection Agency with adequate resources to do the job. It would rob the states of the ability to protect public health.

In particular, the industry bill fails to offer a strong safety standard that would require chemical manufacturers to prove their chemicals are safe before they hit the market. Instead, the bill would allow companies to show only that their substances pose “no unreasonable risk of harm.”

“This chemical industry proposal is **worse than the current law**,” said Ken Cook, EWG president and cofounder. “It fails to meet even basic criteria for effective reform that protects our children’s health. There is a mounting body of evidence that links chemical exposures to adverse health effects. And this is the best we can do?”

In the absence of a strong federal chemical safety law, states have taken steps to protect the public from dangerous chemicals. But the industry bill would block states from taking new actions to regulate any “high priority” chemical for which the EPA has initiated a safety review.

Under the industry bill, the EPA would have seven years to conduct its reviews for “high priority” chemicals and would not face deadlines for new chemical restrictions.

“It is clear the chemical industry’s bill is designed to protect polluters, chemical companies and profits – not children,” said Cook. “I can’t say this comes as a surprise.”

“Americans deserve real reform of the Toxic Substances Control Act that protects public health and the environment for future generations from unnecessary exposures to toxic chemicals,” Cook added.

Congress needs to protect families and children from unnecessary exposures to toxic chemicals. The proposal released today would not fix major public health and safety concerns, instead it would make things worse than under current law.

*EWG is a non-profit, non-partisan organization dedicated to protecting human health and the environment. Our mission is to empower people to live healthier lives in a healthier environment. Learn more at [www.ewg.org](http://www.ewg.org).*

## EARTHJUSTICE: STOP A DANGEROUS CHEMICAL LAW

Yesterday the chemical industry got exactly what it wanted—again. A new Senate bill was introduced that would not only fail to protect us from dangerous chemicals but also restrain state governments from taking action.

Together, we can fight back against business as usual. We must reject the chemical industry's reprehensible approach and strengthen protections against toxic chemicals.

Chemical companies have spent millions lobbying for a free pass to continue putting Americans at risk from chemicals like flame retardants, formaldehyde in flooring, asbestos in dozens of products, and thousands of other chemicals that contaminate our air, water, food, and everyday products.

We need you to voice your opposition now to a proposed chemical policy bill introduced yesterday by Senators David Vitter and Tom Udall that would leave dangerous holes in our toxic chemical laws.

It's been nearly 40 years since we passed the Toxic Substances Control Act (TSCA), the country's main chemical safety law. Not only is it outdated, it's extremely weak.

TSCA doesn't even require that chemicals be tested for health effects prior to their release. Over time, many states have enacted their own chemical regulations to fill the void.

And now, the bill just proposed in the Senate—deceitfully guised as “reform”—would undercut state laws that have proven effective in protecting American families from toxic chemicals.

[https://secure.earthjustice.org/site/Advocacy.jsessionid=77B41BA8D1049CD29645A35D1E0AD044.app322b?cmd=display&page=UserAction&id=1683&utm\\_source=crm&utm\\_content=FooterLink&autologin=true#start](https://secure.earthjustice.org/site/Advocacy.jsessionid=77B41BA8D1049CD29645A35D1E0AD044.app322b?cmd=display&page=UserAction&id=1683&utm_source=crm&utm_content=FooterLink&autologin=true#start)

## Safer Chemicals, Safer Families Vitter-Udall chemical bill draws broad opposition

Posted Mar 10, 2015 by **Tony Iallorardo** in **Policy & Regulation**

Today, Senators David Vitter and Tom Udall formally introduced their legislation to reform federal chemical policy. The bill, however, is sufficiently flawed that it has drawn the opposition of the several hundred organizations that make up Safer Chemicals, Healthy Families.

Andy Igrejas, director of Safer Chemicals, Healthy Families issued the following statement:

“Firefighters, nurses, parents of kids with learning disabilities and cancer survivors all still oppose this legislation. In its current form it would not make a big dent in the problem of toxic chemical exposure and would even do some harm by restraining state governments. While Senators Vitter and Udall have made some positive changes, the bill is not up to the important task of protecting public health. We plan to work with Senators from both parties to make the needed improvements.”

For more detail, a letter this week from the coalition to senators can be viewed [here](#).

END

<http://saferchemicals.org/newsroom/vitter-udall-chemical-bill-draws-broad-opposition/>

# HEALTHY CHILD, HEALTHY WORLD: CHEMICAL INDUSTRY BILL PROTECTS, POLLUTERS, PROFITS- NOT KIDS' HEALTH!

*March 11, 2015*

Congress passed a chemical reform bill 39 years ago in 1976 called the Toxic Substance Control Act. Since then, thousands of chemicals have been introduced without being tested for safety. Many of these chemicals end up in products that we use everyday in our homes and on our children. What's more is that these chemical manufacturers can keep these toxic ingredients hidden from consumers.

Yesterday Senators Udall and Vitter's proposed a "reform" bill that would not require chemicals to be evaluated and proven safe before being sold. Instead of an honest "reform" to the inadequate safety standards it would make our chemical safety system even weaker.

Healthy Child Healthy World is asking our supporters to take action with the Environmental Working Group and oppose the Udall-Vitter bill.

## TAKE ACTION

Learn more from Environmental Working Group.

Share this action link: <http://goo.gl/4Migz4>

## Breast Cancer Fund: Urge your Senators to Oppose a TSCA Reform Bill that Would Endanger Public Health

Most Americans assume that the industrial chemicals used in the United States have been tested for safety. Sadly, this is not the case. Under current law, the Toxic Substances Control Act (TSCA), the Environmental Protection Agency (EPA) has only been able to require safety testing for 200 of the over 85,000 chemicals in commerce today. Even worse, the EPA has banned or restricted only 5 chemicals! The chemical industry has virtual free rein to put untested and unsafe chemicals into consumer products and our air, water and soil.

The Frank R. Lautenberg Chemical Safety for the 21st Century Act, recently introduced by Senators Tom Udall, D-N.M., and David Vitter, R-La., further erodes what few health protections from toxic chemicals now exist.

**Join us and tell your senators that you want them to oppose the Vitter-Udall bill until the authors prioritize the health of the American public over the profits of the chemical industry.**

*"It's vital that we take action to reduce our daughters, sisters, and mothers' exposure to chemicals that increase the chances that they'll hear the same words I heard on February 1, 2007: You have cancer."*

Marika Holmgren, a breast cancer survivor from Half Moon Bay, Calif.

Learn more about why [we oppose the bill here](#):

The Honorable James Inhofe  
Chairman, U.S. Senate Committee on Environment & Public Works  
205 Russell Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member, U.S. Senate Committee on Environment & Public Works  
112 Hart Senate Office Building  
Washington, DC 20510

March 18, 2015

Dear Senators Inhofe and Boxer:

As organizations dedicated to protecting and improving the reproductive health and wellness of women and their families, we urge you to make important changes to the “Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act” sponsored by Senators Vitter (R-LA) and Udall (D-NM) (“Vitter-Udall”). In its current form the bill does not sufficiently protect public health -- including reproductive health, fetal development, and fertility -- particularly for the most vulnerable communities.

A steadily growing body of science indicates that toxic chemicals negatively impact the reproductive health and fertility of women and men through increased rates of early puberty, infertility, uterine fibroids, birth defects, and declining quality and quantity of sperm. Moreover, unregulated chemicals can have significant adverse outcomes on maternal health and fetal development.

While we are all exposed to toxic chemicals, low-income communities and communities of color are more likely to be directly exposed to toxic chemicals at work, at home, and through consumer products. As a result, they endure the consequences to a disproportionate extent. Compounding the problem, these same communities are less likely to have access to health insurance or quality, affordable care to prevent and address health problems that may have environmental causes.

This unfortunate reality underscores the need for meaningful comprehensive chemical policy reform. Legislation must give the Environmental Protection Agency (EPA) and the states the necessary tools and resources to quickly review and regulate harmful chemicals so that exposure to chemicals that endanger reproductive health -- of both women and men -- is minimized. Unfortunately, the Vitter-Udall bill falls short of what is needed to provide protection from dangerous chemicals. In contrast, the bill introduced by Senators Boxer (D-CA) and Markey (D-MA), the “Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act,” would require that chemicals are safe, require rapid review of the most dangerous chemicals, and allow states to continue to protect their citizens from harmful chemicals.

We urge any Senator who cares about reproductive health, fetal development, and infertility to oppose the Vitter-Udall bill unless and until much-needed changes are made.

Sincerely,

Advocates for Youth  
 Black Women's Health Imperative  
 Center for Reproductive Rights  
 Forward Together  
 Institute for Science and Human Values, Inc.  
 National Asian Pacific American Women's Forum  
 National Center for Lesbian Rights  
 National Latina Institute for Reproductive Health  
 National Women's Health Network  
 National Women's Law Center  
 Physicians for Reproductive Health  
 Planned Parenthood Federation of America  
 Reproductive Health Technologies Project  
 RESOLVE: The National Infertility Association  
 Sexuality Information and Education Council of the U.S. (SIECUS)  
 Women's Voices for the Earth

CC:

The Honorable John Barrasso  
 The Honorable Cory A. Booker  
 The Honorable John Boozman  
 The Honorable Shelley Moore Capito  
 The Honorable Benjamin L. Cardin  
 The Honorable Thomas R. Carper  
 The Honorable Mike Crapo  
 The Honorable Deb Fischer  
 The Honorable Kirsten Gillibrand  
 The Honorable Edward Markey  
 The Honorable Jeff Merkley  
 The Honorable Mike Rounds  
 The Honorable Bernard Sanders  
 The Honorable Jeff Sessions  
 The Honorable Dan Sullivan  
 The Honorable David Vitter  
 The Honorable Sheldon Whitehouse  
 The Honorable Roger F. Wicker



The Honorable James Inhofe  
Chairman, Senate Environment and Public Works Committee

The Honorable Barbara Boxer  
Ranking Member, Senate Environment and Public Works Committee

March 17, 2015

Dear Chairman Inhofe and Ranking Member Boxer,

On behalf of Safer States, a national network of state-based environmental health coalitions composed of health professionals, parents, advocates, and labor interests working around the country to protect citizens from toxic chemicals, I am writing to express our opposition to the "Chemical Safety for the 21<sup>st</sup> Century Act". Our state partners have introduced and passed groundbreaking state and local legislation around the country that protects public health and the environment from harmful chemicals. While we appreciate the efforts made to try to modernize the Toxic Substances Control Act, our analysis of the bill leads us to conclude if the bill were to pass, Americans would not be adequately protected from toxic chemicals.

Specifically, we are concerned that the bill would undermine the right of states to protect public health from hazardous chemicals.

Over decades, state authorities have proven their mettle as innovators of public and environmental health solutions in the absence of an adequate federal system. State laws have catalyzed both market innovation and federal action. For example, state authorities were first to respond to emerging science and adopt bans on PBDE flame retardant chemicals. These actions spurred a voluntary phase-out by U. S. companies, and an Environmental Protection Agency (EPA) rulemaking on significant new uses. Authorities in a number of states have cultivated expertise in addressing harmful chemicals in consumer products, introducing innovative approaches to regulation including prioritization, disclosure and tracking, alternatives assessment, and action on chemicals of greatest concern.

As proposed, the bill would eliminate a role for state-level experts, even during significant gaps between determination and action. If state action is to be pre-empted at the moment EPA determines a chemical to be high priority, as proposed, states would be unable to address health burdens and risks for as long as a decade, as EPA deliberates action. In addition, the current bill precludes states from co-enforcing any restrictions that EPA puts in place. This protocol is counter to decades of precedent and current proven practices of state-federal cooperation, which is well established as a means to ensure compliance and protection.



Safer States partners urge you to ensure a continued role for states, honoring the significant contributions that states have made in chemical management, as well as the responsibility of states to protect the health of their citizens and environmental resources.

In addition to ensuring a role for states, we urge you to address three additional significant flaws:

- 1) The bill fails to expedite action on Persistent Bioaccumulative Toxic (PBT) chemicals and remove these worst-of-the-worst chemicals from commerce. The consequences of inaction are enormous. Continued use of PBT chemicals creates an enduring environmental challenge to manage their disposal and prevent their release. Furthermore, exposure to these chemicals raises the risk of our nation's most expensive and burdensome health challenges, including cancer, learning disabilities, and reproductive disorders.
- 2) Low Priority chemical determinations cannot be challenged in court. If we rely solely on EPA to deem a chemical "likely to meet" the safety standard in order to treat it as safe for any and all uses, the law will act contrary to our experience of contemporary science. Without a mechanism to challenge EPA determinations in court, we hamstring our ability to accommodate improved scientific protocols, emerging research, and other future innovations in toxicology and human health.
- 3) The bill introduces substantial additional process for EPA to regulate unsafe chemicals in products. Consumers expect products on the shelves to be safe; if EPA cannot easily regulate chemicals in products to eliminate exposures, the law will not effectively meet public expectations or protect public health.

Safer States believes that effective federal reform is essential to protecting public health and the environment. But as introduced, the flaws in the bill threaten to negate state power, even as it leaves states burdened with the social, economic, and environmental costs of ineffective chemical controls.

As you continue to work on reform of TSCA, we urge you to address the concerns outlined above. Thank you for your attention to this matter.

Sincerely,

Sarah Doll, National Director  
Safer States



Safer State Partners:

Alliance for a Clean and Healthy  
Vermont  
Taylor Johnson

Coalition for a Safe and Healthy  
Connecticut  
Anne Hulick

Alliance for a Healthy Tomorrow  
(Massachusetts)  
Elizabeth Saunders

Healthy Legacy of Minnesota  
Kathleen Schuler

Oregon Environmental Council  
Colin Price

Michigan Children's Environmental  
Health Network  
Rebecca Meuninck

Ecology Center  
Alexis Blizman

Washington Toxics Coalition  
Laurie Valeriano

Maryland Public Interest Research  
Group  
Emily Scarr

cc:  
The Honorable David Vitter  
The Honorable John Barrasso  
The Honorable Shelley Moore Capito  
The Honorable Mike Crapo  
The Honorable John Boozman  
The Honorable Jeff Sessions  
The Honorable Roger F. Wicker  
The Honorable Deb Fischer  
The Honorable Mike Rounds

Alliance for Clean & Health Maine  
Emma Hales O'Conner

Environmental Health Strategy Center  
Mike Belliveau

Alaska Community Action on Toxics  
Pamela Miller

Clean Water Action Florida  
Kathleen Aterno

Vermont Conservation Voters  
Lauren Hierl

Toxic-Free Legacy Coalition  
Randi Abrams-Caras

Clean and Healthy New York  
Kathleen Curtis

WE ACT For Environmental Justice  
Cecil Corbin-Mark

Clean Water Action Rhode Island  
Meg Kerr

North Carolina Conservation Network  
Brian Buzby

The Honorable Dan Sullivan  
The Honorable Thomas R. Carper  
The Honorable Benjamin L. Cardin  
The Honorable Bernard Sanders  
The Honorable Sheldon Whitehouse  
The Honorable Jeff Merkley  
The Honorable Kirsten Gillibrand  
The Honorable Cory A. Booker  
The Honorable Edward Markey

## Attention: Chief of Staff

**Board of Directors**

March 14, 2015

Linda Reinstein  
**President**

The Honorable Jim Inhofe, Chairman, U.S. Senate Committee on Environment and Public Works  
The Honorable Barbara Boxer, Ranking Member, U.S. Senate Committee on Environment and Public Works

Doug Larkin  
**Member at Large**

RE: **OPPOSITION** to the "Frank R. Lautenberg Chemical Safety for the 21st Century Act"

Laurie Rice  
**Member at Large**

Dear Chairman Inhofe and Ranking Member Boxer,

Freddi Segal – Gidan  
**Secretary**

On behalf of the Asbestos Disease Awareness Organization (ADAO), the largest independent asbestos victims' organization in the U.S., I am writing to express our opposition to Senators Tom Udall (D-NM) and David Vitter (R-LA) "Frank R. Lautenberg Chemical Safety for the 21st Century Act." (S. 697). As drafted, S. 697 is dangerously flawed and will not meaningfully reform the Toxic Substances Control Act of 1976 (TSCA), nor protect Americans from toxic chemicals like asbestos.

Ellen Tunkelrott  
**Treasurer**

Exposure to asbestos, a known human carcinogen, can cause mesothelioma; lung, gastrointestinal, laryngeal, and ovarian cancers; asbestosis; and pleural diseases. The World Health Organization (WHO) estimates that 107,000 workers around the world will die every year of an asbestos-related disease. Every day, 30 Americans die from asbestos-related diseases. The Rear Admiral Boris Lushchik, Acting U.S. Surgeon General, issued a statement about the dangers of asbestos, yet the U.S. continues to import this known carcinogen.

**National Spokesperson**

Jordan Zevon

Americans have lost confidence in the chemical industries' ability to protect the public from hazardous toxins, and asbestos is a powerful example of how TSCA has failed to protect American public health to date. Any TSCA reform legislation must ensure that the Environmental Protection Agency (EPA) can expeditiously ban asbestos and Persistent Bioaccumulative and Toxic (PBT) chemicals; and to evaluate and regulate over 80,000 toxic chemicals that have been grandfathered into commerce.

**Science Advisory Board**

Arthur L. Frank, MD,  
PhD  
**Co-Chair**

ADAO and hundreds of public health, occupational and safety, and environmental groups applaud bipartisan efforts to reform the outdated TSCA, but S. 697 is dangerous flawed and represents a TSCA rollback for public health.

Richard Lemen, PhD,  
MSPH  
**Co-Chair**

The time is now for true chemical reform. As Congress works to reform TSCA, ADAO urges you to pass legislation that protects Americans from preventable toxic diseases and deaths.

Dr. Brad Black

We look forward to remaining a stakeholder in future discussions and serving as a resource for Congress.

Dr. Barry Castleman

Sincerely,

Dr. Raja Flores

Dr. Michael Harbut

Linda Reinstein, President and Co-Founder  
Asbestos Disease Awareness Organization (ADAO)




Dr. Hedy Kindler

CC: U.S. Senate

Dr. Christine Oliver

Asbestos Disease Awareness Organization is a registered 501(c) (3) nonprofit organization  
"United for Asbestos Disease Awareness, Education, Advocacy, and Community Support"  
1525 Aviation Boulevard, Suite 318 · Redondo Beach · California · 90278 · (310) 251-7477  
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## Press Release: Statement from Asbestos Disease Awareness Organization (ADAO) Opposing Senate "Chemical Safety" Bill which Lets Asbestos off the Hook

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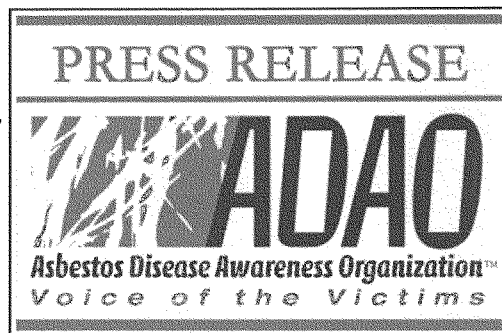
**For Immediate Release: March 10, 2015**

**Statement from Asbestos Disease Awareness Organization (ADAO) Opposing Senate "Chemical Safety" Bill which Lets Asbestos off the Hook**

**Asbestos Would Remain Legal Under Udall-Vitter Proposal**

**Washington DC, USA – March 10, 2015. The Asbestos Disease**

**Awareness Organization (ADAO),** which combines education, advocacy, and community to help ensure justice for asbestos victims, today issued this statement from ADAO President and Co-Founder Linda Reinstein, in opposition to the legislation introduced today by U.S. Sens. David Vitter (R-LA) and Tom Udall (D-N.M.) inappropriately named the The Frank R. Lautenberg 21st Century Chemical Safety Act (S. 697). The bill purportedly designed to protect the public from toxic substances would allow asbestos to remain legal and widely used in the U.S.



"Asbestos exposure in the U.S. alone is responsible for at least 10,000 Americans dying each year from asbestos-related diseases," said Linda Reinstein, president and co-founder of the Asbestos Disease Awareness Organization. "The fact that the Vitter-Udall bill will not even restrict, much less ban, the deadly substance that claims 30 lives a day is nothing short of a national travesty. Any Senator who supports this industry proposal is in essence supporting the continuation of the toll asbestos has already had on millions of American families."

The bill, embraced by the chemical industry, is widely considered to be worse than the current federal chemicals law, the Toxic Substances Control Act, or TSCA – a law so broken that EPA was unable to ban asbestos back in 1989.

"Any 'chemical safety' bill that does not ban asbestos isn't worth the paper it's printed on," added Reinstein. "No other toxic chemical claims more lives and leaves more families without mothers, fathers, sons and daughters than asbestos. And the legislation offered by Mr. Udall and Mr. Vitter will only expose future generations to asbestos and many other highly toxic chemicals."

Kim@asbestosdiseaseawareness.org



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17 March 2015

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The Honorable James Inhofe  
Chairman, U.S. Senate Committee on Environment and Public Works  
205 Russell Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member, U.S. Senate Committee on Environment and Public Works  
112 Hart Senate Office Building  
Washington, DC 20510

**Re: Federal Legislation to Fix Our Broken Chemical Safety System**

Dear Chairman Inhofe and Ranking Member Boxer,

Thank you for this opportunity to share with you our concerns about proposed legislation to update the Toxic Substances Control Act of 1976 (TSCA). I have a unique perspective, having worked on state-based chemical policy over the last 35 years, including on California's Proposition 65 and Maine's Kid Safe Products Act. I've also been deeply immersed in TSCA reform during the last decade.

Meaningful TSCA reform can only be measured by the extent to which it significantly improves protection of the health of American families from exposure to toxic chemicals in everyday life.

Therefore, we **OPPOSE** S.697 (Udall-Vitter), The Frank R Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act, unless it's fixed to eliminate its proposed rollbacks in current law. The Udall-Vitter bill would significantly weaken state authority to regulate chemicals, and diminish EPA authority to regulate unsafe chemicals in consumer products, including imported articles, among many other problems with the bill.

By the same measure, we **SUPPORT** S.725 (Boxer-Markey), The Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act. The Boxer-Markey bill provides for stronger state authority than current law, and improves EPA's ability to protect public health from dangerous chemicals compared to S.697.

As an overarching concern, S.697 would radically weaken State authority to regulate dangerous chemicals compared to current law. I have attached a chart that details this gross federal infringement on States' rights embodied in the bill.



## ENVIRONMENTAL HEALTH STRATEGY CENTER

Among the major specific problems with the S.697 that remain to be fixed include:

1. The Udall-Vitter bill blocks States from taking action on "high priority" chemicals *even without any action* by the U.S. EPA on the same chemical;
2. The Udall-Vitter bill gives a free pass to toxic products that illegally cross the U.S. border, by weakening EPA's import certification authority;
3. The Udall-Vitter bill creates a new high hurdle before EPA can regulate a proven unsafe chemical in a consumer product, making it harder to restore consumer confidence in product safety.

We appreciate your work to fix America's broken chemical safety system. We urge you to make further changes in the proposed legislation to address our outstanding concerns. With the health of future generations at stake, the EPW Committee should not just accept any reform; instead wait to support only the right reform.

Thank you for your consideration.

Respectfully,

Michael Belliveau  
Executive Director

cc: Members, U.S. Senate Committee on Environment and Public Works  
The Honorable Tom Udall

### Udall-Vitter Bill (S.697) Would Seriously Weaken State Authority to Regulate Toxic Chemicals

Proposed legislation would significantly expand federal preemption of the States in the Toxic Substances Control Act (TSCA)

Policy	Current Law	Udall-Vitter	Impact on the States
<b>Savings Clause</b>	Allows a State to freely regulate chemicals <i>unless</i> explicitly preempted by TSCA	Preempts a State from regulating chemicals <i>unless</i> explicitly allowed by TSCA	Any uncertainty in State authority would be interpreted in favor of federal preemption
<b>Timing of Preemption</b>	Preempts a State from restricting a chemical <b>upon the final effective date</b> of an EPA rule to restrict that chemical	Preempts a State from restricting a chemical <b>upon naming the chemical a "high priority."</b> That's 7 years <i>before</i> the final deadline for EPA action on unsafe chemicals.	Creates a "regulatory void" where States can't act and EPA hasn't acted. Unsafe chemicals can escape any action for more than 10 years, after missed deadlines and lawsuits
<b>Co-Enforcement</b>	Allows a State to adopt a rule identical to an EPA rule adopted under TSCA, enabling States to co-enforce the federal law	<b>Eliminates co-enforcement authority for all States</b>	Seriously undermines TSCA enforcement capacity across the country, resulting in less compliance and protection
<b>State Waste Disposal Laws</b>	Always allows a State to restrict the disposal of products containing chemicals, <i>without</i> ever being federally preempted	Preempts a State from restricting a chemical under waste authority if it conflicts or is inconsistent with an EPA rule to restrict that chemical	States have used waste authority to ban the use & disposal of mercury-added products. Similar actions could be preempted in the future
<b>State Phase-Outs</b>	Always allows a State to prohibit the use of a chemical (other than for use in chemical manufacturing)	Only use restrictions adopted <b>prior to Jan. 1, 2015</b> are grandfathered in. Future bans can be preempted.	Now-pending state bans should be grandfathered in if adopted <b>prior to date of enactment</b> of reform
<b>State Waivers</b>	States may apply to EPA for a waiver from preemption if the state restriction doesn't violate the federal rule, provides a significantly higher degree of protection, <i>and</i> doesn't unduly burden interstate commerce	States may apply to EPA for a waiver from preemption if <b>there's compelling State or local conditions</b> , the state restriction does not unduly burden interstate commerce or violate any federal rule, <i>and</i> is based on sound science	Creates a nearly impossible hurdle for States to waive preemption. Toxic chemicals in consumer products affect states uniformly, without creating compelling local conditions like in the case of regional air or water pollution

March 2015

Environmental Health Strategy Center

[www.ourhealthyfuture.org](http://www.ourhealthyfuture.org)

Posted Mar 11, 2015 by **Andy Igrejas** in **Policy & Regulation**

Instead, we have a bill that takes a step or two forward, but 2 and a half or 3 steps back. I'm a pragmatist, so in these difficult political times I'm more than prepared to call a step forward "good enough for government work," as the saying goes. But we're not there yet. Let's hope we get there.

The central claim of the bill's proponents is that right now, the EPA can't do "anything." And under the bill at least they could do "something." It sounds very pragmatic. But when you read the fine print, you see that some of what they'll now be able to do is a little sketchy. And that states – *currently* doing quite a bit – will be scaled back significantly.

To their credit, the senators fixed some of the major flaws in their original bill and addressed a core problem in TSCA. The two key legal problems in the original law – that prevented EPA from even regulating asbestos – have been removed. The EPA will now be able to evaluate chemicals against a health-based safety standard. The standard requires that they protect vulnerable populations that may be more exposed to a chemical (like the community near a factory) or more susceptible to a chemical, like a pregnant woman or child. So far, so good.

They didn't require the EPA to follow the guidelines of the American Academy of Pediatrics and National Academy of Sciences on the issue of "aggregate exposure." That's not so good. In plain English "aggregate exposure" means that the EPA would have to add up the different sources of exposure to a toxic chemical that a person experiences in the real world. However, in the bill at least they require EPA to describe on the record, with opportunity for public input, exactly how they deal with the exposures for each chemical.

At the end of these assessments – which take three years – EPA will decide whether the chemical is safe as currently used or not. If not, the EPA has two years to devise appropriate restrictions to ensure safety. (Either deadline can be extended for a combined two years.)

Great! So how many of these assessments will EPA do?

**Cue the sad trombones.**

The bill says EPA must list 10 chemicals in the first year, 10 more three years later, and 5 more two years after that, creating a review pipeline of 25 chemicals. New chemicals would be added to the pipeline only when the work on those was finished. Under the deadlines imposed by the bill that means EPA would have evaluated – and potentially restricted – 10 chemicals at the end of five years (or 7 years with the extensions). This represents only a slight increase in the pace of EPA assessments compared to right now.

**But wait! These are just minimums, right? EPA can do a lot more if it wants to, right?**

3/15/2015

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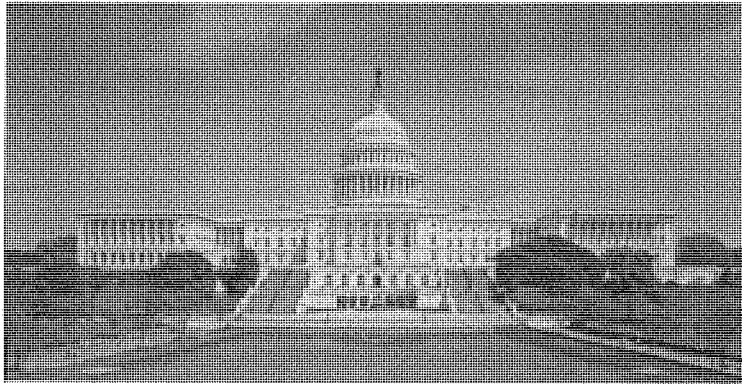
Not really. The way EPA budgeting works in practice, minimums become maximums. When EPA goes before the Office of Management and Budget or Congressional appropriators, especially in a time of scarcity, it only gets money for things it is *required* to do. This slow pace is likely to be all we get.

**But wait! The bill authorizes fees, doesn't it? That's "something," right?**

True, the bill authorizes EPA to collect fees from the chemical industry for the program, but the overall fees are capped at \$18 million or 25% of the program. It's an increase, sure, but a small one. In agency budget terms, it's the equivalent of your grandmother putting \$5 in your birthday card. But Gina McCarthy won't even be able to go out and buy an ice cream cone with this extra money, let alone assess many more chemicals. That's because the bill also puts new work on the agency that isn't about getting started on chemicals. For example, they will have to re-justify prioritizing the 90 chemicals they've already prioritized and develop new policies on testing. That will eat up some staff hours and money.

Keep in mind there are 84,000 chemicals on the TSCA "inventory." Likely half of them are actually "in commerce" and an uncertain number, but certainly thousands, have risks associated with them that make a safety assessment urgent and necessary.

So that's the "Weak Tea" part. If we stopped there, the bill would just be *Meh*. It would be better, arguably, because EPA could at least restrict *some* chemicals, but very few and not very soon. Still, you could ask, how is it actually *bad*? What are the chips in the cup?



**This is where it gets interesting.**

Politically, it is taken as a truism in Washington that in exchange for even “meh” reform, the chemical industry has to “get something” in return. That was OK by me as long as the something was the imprimatur of safety for a chemical that was actually reviewed for safety and restricted accordingly.

A major innovation of the Vitter-Udall legislation from the beginning was that reform should be as much about the chemicals that EPA decides *not* to assess as it is about the ones they do. These chemicals don’t get the treatment I described earlier. Instead, EPA declares them “low-priority” based on a finding that the chemical is “likely to meet” the safety standard. What does that mean? Nobody knows.

A low-priority designation is a new form of pro-active non-assessment. It is effectively a hall pass for the chemical; a declaration that EPA will *not* review the chemical so it is therefore free to roam the economy and potentially your home without any restrictions. All on the back of “likely to.” This distinction, which confers many of the benefits of being declared “safe” but without a thorough safety evaluation, is likely to be coveted by chemical companies. Once they get it, they can tell other companies like Walmart and Target – who are increasingly demanding safety information about chemicals in products – to back off. *EPA says it’s a “low priority” and they’re the experts.*

Unlike last year’s version of Vitter-Udall, this year’s requires EPA to designate as many low-priority chemicals upfront as it does high priority ones (the ones that get the safety evaluation). The goal of providing the chemical industry with a hall pass to the marketplace now shares equal billing with the goal of identifying and restricting the chemicals that cause cancer and birth defects.

Public health groups have made the modest proposal that since industry will be able to sue over EPA decisions to declare a chemical unsafe, or over EPA’s choice of restrictions, the public should be able to get a court to review the quality of these hall passes. Make sure nothing dangerous gets a free ride. The response has been “no.” It’s a “deal-killer” for industry. Apparently, whoever it is that knows what “likely to” means must have big plans for this part of the bill. Sounds sketchy to me.

Also in the sketchy department are two provisions that make it harder for EPA to regulate chemicals in products. One of these is new to this year’s bill: once a chemical flunked a safety assessment, the EPA could *not* go ahead and impose limitations on the chemical in a product, like a toy or couch cushion, without an additional burden of proof. They would

have to make a second legal finding that the product presented a “significant source of exposure.” That may sound reasonable, but when you think about how a single chemical may be used in dozens of products, you’re talking about a significant new legal hurdle EPA will have to clear to get at the problem – a bad chemical in a product you use- that most people are worried about.

Also, if that toy or baby bottle is made in China – as most are – the EPA will now have a harder time intercepting it when it contains a toxic chemical, because the bill weakens EPA’s authority over imported products. Again, *sketchy*.

But the biggest “get” for the chemical industry by far is the bill’s restriction on state governments, called “preemption” in legal terms. In response to criticism, Senators Vitter and Udall have now “grandfathered” – or protected from preemption – state actions on chemicals that took place before January 1 of this year. In fairness, that is a meaningful concession as those state actions are a big part of what’s driven the chemical industry to the table for federal reform.

### But what about the future?

Under current law, no state is preempted until and unless EPA actually imposes its own restrictions on the chemical. The bill moves that date up to the point where EPA puts the chemical on its “to do” list for a safety review and specifies the scope of the review. As you now know, that process could take up to 7 years before any restrictions are imposed by the EPA. The new gap in time presents what the California Attorney General has called a “regulatory void” where the public is protected by no one. Furthermore, with state action frozen, the affected chemical company or trade association will have every incentive to obstruct the EPA review with all the tools at their disposal: lawsuits, getting the White House political people to pressure EPA, or slipping “riders” into the appropriations bill prohibiting EPA from finalizing a particular restriction. This well-thumbed playbook has been used quite a bit in recent years.

The modest proposal of public health groups is that preemption should only occur when and if EPA actually *imposes restrictions* on a chemical. That would keep everyone honest and create a disincentive for obstruction.

The bill also takes the bold step of *prohibiting* states from enforcing restrictions that are *identical* to federal restrictions. This is a concept known as co-enforcement and it is explicitly allowed in current law. It plays a big role in environmental and consumer protection policy generally, and for some laws, *most* of the enforcement occurs at the state

3/15/2015

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level. EPA just doesn't have a lot of resources (see above). I have not heard anyone offer up a persuasive argument for this weakening of current law. It's just a blatant attempt to reduce enforcement under the new program. The prohibition has to go.

I've not done an exhaustive review of the entire bill in this blog, but these are the highlights as I see them. You could point to a few more positive things, but also a few more negative things too. The overall point is: the limited good this bill does right now does not justify or outweigh the bad.

Senators need to *at least* excise the sketchy bits from the bill and restore states' existing authority under TSCA to bring the Vitter-Udall legislation to the point where it does no harm and maybe some good. After that, consider increasing the fees, jacking up the schedule, and expediting action on the known worst chemicals, like those that build up in the food chain. Then we'd be getting into genuine moderate achievement territory.

But we're not there yet. If senators don't take the substance of this debate seriously going forward we may not get there at all.



STATE OF CALIFORNIA  
OFFICE OF THE ATTORNEY GENERAL  
BRIAN E. NELSON  
GENERAL COUNSEL

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 21<sup>st</sup> 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 21<sup>st</sup> 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.



STATE OF CALIFORNIA  
OFFICE OF THE ATTORNEY GENERAL

BRIAN E. NELSON  
GENERAL COUNSEL

**1. Premature preemption of state authority to enact new protections with respect to high priority chemicals**

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 existing 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 new 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.)<sup>1</sup>

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 more than a seven-year gap 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

<sup>1</sup> 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).



STATE OF CALIFORNIA  
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BRIAN E. NELSON  
GENERAL COUNSEL

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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