STATE ATTORNEYS GENERAL

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

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

July 31, 2013

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

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

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

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

TSCA's current provisions recognize that Americans are better served when states work as partners with the federal government to enhance federal authority, and when states are allowed to identify emerging risks to health and the environment and drive innovations that reduce or eliminate those risks. Under existing law, the possibility of preemption does not arise until the federal government has acted to protect against a risk of injury to health or the environment. 15 U.S.C. § 2617(a)(2)(B). In contrast, S.1009 would preempt states from enforcing existing laws or from adopting new laws regulating chemicals that EPA designates as "high priority" months or even years before *any* federal regulations protecting health and the

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

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

Also, under existing law, once the Administrator has acted to regulate a chemical, states still may adopt new laws or continue to enforce existing laws regarding the same chemical and addressing the same risk – without a waiver – if the state requirement fits in one of three classes. 15 U.S.C. § 2617(a)(2)(B). S.1009, however, eliminates two of these classes. First, S.1009 eliminates the ability of states to adopt requirements identical to the federal standard, and therefore enforce federal standards under state law. Second, S.1009 revokes state authority to ban any in-state use of chemicals that the Administrator has regulated; under existing law, the states may ban in-state use other than use in manufacture or processing of other substances or mixes. S.1009, at §§ 15(a)(2), 15(b)(1), and 15(b)(2). Loss of this existing authority impairs the states' ability to maximize enforcement resources and protect their citizens from dangerous chemicals.

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

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

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

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

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

Very truly yours,

Kamala D. Harris
California Attorney General

George Jepsen
Connecticut Attorney General

Joseph R. Biden, III
Delaware Attorney General

David M. Louie
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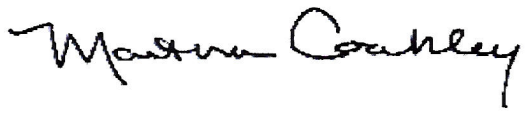

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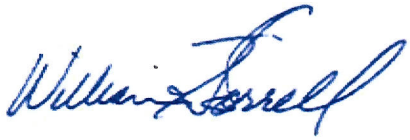

William H. Sorrell
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EXHIBIT A

EXAMPLES OF EXISTING STATE REGULATION OF CHEMICAL SUBSTANCES BY STATE

CALIFORNIA

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

MARYLAND

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

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

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

MASSACHUSETTS

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

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

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

prevention, implement management plans if practical, and annually measure and report the results (MA General Laws ch. 21I); and

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

OREGON

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

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

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

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

VERMONT

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

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

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

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

WASHINGTON

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

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

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