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The Honorable Kirsten E. Gillibrand
United States Senate
478 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Charles E. Schumer
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Gillibrand and Schumer:

On the occasion of today's hearing on "Strengthening Public Health Protections by Addressing Toxic Chemical Threats," I would like to take the opportunity to contribute my thoughts regarding the proposed Chemical Safety Improvement Act (CSIA), S.1009, which would amend the Toxic Substances Control Act of 1976 (TSCA).

I would like to begin by thanking you both for your attention to this important issue. The goal of TSCA is to establish necessary and appropriate federal restrictions on the manufacture and use of chemicals that present an unreasonable risk of injury to human health or the environment. I strongly support this goal and recognize the critical 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. Out of the 84,000 chemicals registered for use in the United States, only a handful are regulated and over 60,000 chemicals have not even been subjected to mandated safety review.

This is why I applaud your efforts to advance TSCA reform legislation – the CSIA provides a valuable opportunity to remedy the well-recognized failures of TSCA. Moreover, the CSIA would make critically-needed improvements to TSCA. It would require the federal Environmental Protection Agency (EPA) to categorize all active TSCA chemicals as either "low priority" or "high priority" based on a range of factors including data about a chemical's risks and the extent to which human beings or the

environment will be exposed to it; make safety assessments and determinations regarding high-priority chemicals; and issue restrictions on high-priority chemicals that present an unreasonable risk to public health or the environment. It also allows safety determinations to be based “solely on considerations of risk to human health and the environment,” rather than on a cost-benefit analysis; requires a decision of “likely safety” before a new chemical enters the market; and broadens the range of tools that EPA may use to require testing of a chemical. Importantly, the CSIA removes the TSCA mandate that EPA impose only the “least burdensome restriction” on regulated chemicals – which has unduly restricted EPA’s efforts to regulate the manufacture and use of chemicals that it has deemed harmful to public health and/or the environment. All of these requirements are central to addressing chemicals that unreasonably threaten public or environmental health.

At the same time, I have several concerns about the CSIA – particularly with respect to its preemption of state restrictions on harmful chemicals – that I would like to bring to your attention in the spirit of assisting you and your colleagues in continuing to strengthen the legislation.

I. EPA’s Control of Chemicals Under TSCA and the CSIA

As mentioned above, TSCA authorizes EPA to regulate the manufacture and use of chemicals to protect human health and the environment. The primary requirements of TSCA are:

- Under § 8(b), EPA is required to maintain an inventory of chemicals currently manufactured or processed in the United States. 15 U.S.C. § 2607(b).
- Under § 5, manufacturers must notify EPA before using a chemical that is not on the inventory or creating a new use of a chemical that is on the inventory. 15 U.S.C. § 2604.
- Under § 6(a), if EPA finds that “there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal” of a chemical “presents an unreasonable risk of injury to health or the environment,” EPA shall protect against that risk using “the least burdensome requirement” with respect to the chemical’s manufacture, processing, distribution, use or disposal. 15 U.S.C. § 2605(a).

It is widely recognized, however, that these requirements have largely not been met. The CSIA addresses this problem, among others, by:

- Amending § 4 of TSCA to require EPA to classify every chemical on the inventory as either low or high priority;
- Amending § 6(a)-(c) to require EPA to make a safety assessment and safety determination about every high-priority chemical;

- Amending § 6(c) to provide that, if EPA finds as a result of the safety determination that a chemical will present an unreasonable risk of injury to health or the environment under its “intended conditions of use,” EPA is required to impose additional restrictions as “necessary”; and
- Further amending § 6(c) to remove the “least burdensome requirement” provision, which has acted as a barrier to regulation.

I believe these amendments represent critical improvements to TSCA.

Beyond these amendments, I believe that the CSIA could be further improved by imposing deadlines on EPA for designating chemicals as low priority or high priority, for conducting safety assessments and determinations, and for imposing additional restrictions on chemicals that are found to present an unreasonable risk to health or the environment. Currently, the American public and our environment are being exposed to potentially hazardous chemicals on an ongoing basis, even though their toxicity is not yet fully understood. It is essential that EPA increase its knowledge of these chemicals’ toxicity as quickly as possible and impose appropriate restrictions on their manufacture and use as necessary to adequately protect public and environmental health.

II. Preemption of State Laws Under TSCA and the CSIA

Historically and currently, New York and other States have been leaders in protecting public health and the environment from toxic chemicals. That exercise of state “police powers” has allowed States to protect their own 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 2010, EPA issued a proposed rule on fly ash and other coal combustion waste products although it has not yet finalized the rule.

These examples underscore the importance of maintaining the complementary, symbiotic relationship between federal and state chemical regulation in any TSCA reform.

Under § 18(a)(1), 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). Once EPA regulates a chemical because it has found that the chemical presents an unreasonable risk, § 18(a)(2)(B) 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, § 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.* In addition, § 18(b) provides that a State may seek a waiver from preemption if a state restriction: (1) would not create a violation of EPA’s regulation; (2) provides a significantly higher degree of protection than EPA’s regulation; and (3) would not unduly burden interstate commerce. *Id.* § 2617(b). Thus, under TSCA, a state regulation is not preempted unless and until EPA has regulated the chemical, and even then a State may seek a waiver from preemption.

The CSIA would significantly broaden the scope of preemption and would prohibit States from regulating a chemical before there is any EPA regulation of the chemical. This is of great concern.

The preemption provisions of the CSIA distinguish between new and existing state regulations and between low-priority and high-priority chemicals:

- Under § 18(b) as amended, States would be preempted from issuing new restrictions regarding a chemical that EPA has classified as low priority once EPA issues that classification, even though EPA is not required to take *any* further action to regulate low-priority chemicals.
- If EPA classifies a chemical as high priority, new state restrictions are preempted under § 18(b) as amended once EPA issues a schedule for conducting a safety assessment and determination regarding that chemical, even though it may take years for EPA to complete that safety assessment and determination. Even after EPA completes that process, it may take years for EPA to issue restrictions on a chemical that it has found to present an unreasonable risk to human health or the environment. During this lengthy period of time when there are *no* federal restrictions on a chemical, States are preempted from imposing any new restrictions on the chemical even if they find based on their research that the chemical presents ongoing harm to their citizens or the environment.

- Under § 18(a) as amended, States are also preempted from enforcing existing restrictions regarding a high-priority chemical once EPA has issued a safety determination regarding the chemical, even though EPA may not issue any federal restrictions regarding the chemical for years. Thus, during this period of time, a State may not protect its citizens and environment from a chemical that EPA itself has found to be harmful even though there are no federal restrictions on the chemical.

The CSIA would also significantly narrow both the current exceptions to preemption and the circumstances under which States can obtain waivers. Under § 18(c) as amended, state restrictions adopted under the authority of another federal law would continue to be exempt from preemption but state restrictions identical to restrictions issued by EPA under TSCA would no longer be exempt. Without that exemption, the only means for States to enforce EPA's restrictions would be a citizens' suit in federal court, which would deprive States of the critical tool of enforcement by state administrative agencies. In addition, the CSIA would remove the preemption exception for state bans on in-state use of chemicals.

While § 18(c) as amended would add an exception for state laws relating to air quality, water quality, or hazardous waste treatment or disposal, it would limit that exception to laws that "[do] not 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 certainly be controlled before they are emitted or discharged into the environment. However, other harmful pollutants can be effectively controlled only by banning or restricting their use, and such use restrictions would not fall under this exception to preemption.

In addition, § 18(d) as amended would allow a State to obtain a waiver from preemption only if the State shows that it cannot wait for the completion of a safety assessment and determination or that an assessment or determination has been unreasonably delayed. Thus, for example, if EPA issues restrictions on a chemical that are substantially more lenient than existing state restrictions, a State would not be able to seek a waiver from preemption, as it can under the current language of § 18(b) – even if the State's restrictions long preceded the federal regulation and have been shown to significantly benefit the State's citizens or environment. Further, even to obtain a waiver in the limited circumstances under which § 18(d) as amended would allow it, States would also need to present evidence that conditions in their States justify the waiver and provide other scientific support for their restriction.

III. Impact of the CSIA on New York's Authority to Restrict Harmful Chemicals

As discussed above, the CSIA would preempt New York from issuing any new restrictions on a chemical once EPA classifies it as low priority, or classifies it as high priority and issues a schedule for conducting a safety assessment and determination. That would, for example, preempt New York from issuing any new restrictions on the use of

perchloroethylene (perc) in dry cleaning, even though exposure to perc causes many harmful health effects, perc is a likely carcinogen and, as a result of the pervasive presence of perc in soils and groundwater, New York has spent millions of dollars cleaning up hazardous waste sites contaminated by it.

The CSIA also would preempt New York from enforcing existing restrictions on a high-priority chemical once EPA has completed a safety determination on the chemical. New York's existing restrictions on the sale or use of products containing harmful chemicals include:

- A ban on bisphenol A (BPA) in child care products, including pacifiers, baby bottles and sippy cups. N.Y. Evtl. Conserv. Law § 37-0501 *et seq.* BPA leaches into liquids 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-choloroethyl) phosphate (TRIS) in child care products, including toys, car seats, nursing pillows, crib mattresses, and strollers. N.Y. Evtl. 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. Evtl. Conserv. Law § 37-0111. 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. Evtl. 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.

- A ban on the import, sale, or distribution of gasoline containing methyl tertiary butyl ether (MTBE). N.Y. Agric. & Mkts. Law § 192-g. Studies of animals have shown that exposure to large amounts of MTBE had effects on their nervous systems, and people exposed to MTBE have reported headaches, nausea, dizziness, and irritation of the nose and throat. MTBE in drinking water may also adversely effect taste and odor.
- Restrictions on the phosphorus content of household cleaning products and on the sale and use of phosphorus lawn fertilizers. N.Y. Env'tl. Conserv. Law §§ 17-2103, 35-0105(2)(a). Phosphorus entering New York's waters has caused reductions in the oxygen that is necessary for fish to breathe and has contributed to algae that turns water green and degrades drinking water quality.

These laws and regulations play a critical role in protecting the health and welfare of the citizens and natural resources of New York State. In reforming TSCA, the chief objective must be to protect public health and the environment from the risks of toxic substances.

* * *

In conclusion, as 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, I would like to thank you both again for your attention to TSCA and its reform. While I have significant concerns about the CSIA, I strongly support your efforts and, for this reason, offer the full assistance of my office to you and your colleagues as you continue to strengthen and advance this important legislation.

Sincerely,

A handwritten signature in blue ink, appearing to read "Eric T. Schneiderman", with a long horizontal flourish extending to the right.

Eric T. Schneiderman
Attorney General of New York