

The Toxic Substances Control Act: A Proposal for Reform

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Introduction

America's regulation of toxic substances through the Toxic Substances Control Act ("TSCA") is deeply flawed. The societal costs of toxic substances are not reflected in the price firms and consumers pay. Therefore these substances are overproduced and cause severe negative health effects often borne by most vulnerable members of society.¹ Though TSCA has remained largely intact for over 30 years, there is currently interest in Congress,² the environmental and public health community,³ and the business

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¹ Philip J. Landrigan et. al., *Environmental Pollutants and Disease in American Children: Estimates of Morbidity, Mortality, and Costs for Lead Poisoning, Asthma, Cancer, and Developmental Disabilities*, 110 ENVTL. HEALTH PERSP. 721, 726 (2002) (estimating annual cost of childhood diseases caused by chemical exposure to be \$54.9 billion); JANE HOULIHAN ET AL., ENVTL. WORKING GRP., BODY BURDEN: THE POLLUTION IN NEWBORNS 5 (2005) ("[E]ven before birth, a child is exposed to hundreds of chemical compounds, many of which could harm that child's health and development."); *Oversight Hearing on the Federal Toxic Substances Control Act: Before the Full Comm. & Subcomm. on Superfund, Toxics and Envtl. Health of the S. Comm. on Env't and Pub. Works*, 111th Cong. (2009) (statement of Linda Birnbaum, Director, National Institute of Environmental Health Sciences), available at <http://www.niehs.nih.gov/about/congress/docs/environmental-health-committee-12-2-2009.pdf> ("Research has revealed the heightened vulnerability of fetal, infant and child developmental processes to disruption from relatively low doses of certain chemicals."); Lyndsey Layton, *U.S. Facing 'Grievous Harm' From Chemicals in Air, Food, Water, Panel Says*, WASH. POST, May 7, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/06/AR2010050603813.html>.

² Press Release, Senator Frank R. Lautenberg, Lautenberg Introduces "Safe Chemicals Act" to Protect Americans from Toxic Chemicals (April 15, 2010), <http://lautenberg.senate.gov/newsroom/record.cfm?id=323863&>; Media Advisory, H. Comm. on Energy & Commerce, Chairmen Rush, Waxman Release H.R. 5820, The Toxic Chemicals Safety Act (July 22, 2010). See also, Sara Goodman, *Experts Debate Ways to Reform 1976 Toxics Law*, GREENWIRE, Oct. 7, 2009, <http://www.eenews.net/Greenwire/2009/10/07/16/>.

³ SAFER CHEMICALS, HEALTHY FAMILIES COALITION, THE HEALTH CASE FOR REFORMING THE TOXIC SUBSTANCES CONTROL ACT (2010), available at <http://healthreport.saferchemicals.org>; Richard Denison, *More Than Weather Heating Up in DC: Rush-Waxman House Bill Puts TSCA Reform Back on Front Burner*, ENVTL. DEF. FUND CHEM. & NANO. BLOG (July 22, 2010), <http://blogs.edf.org/nanotechnology/>.

community⁴ for reform. This Field Report will provide an overview of the current regulatory regime and its problems, and advocate that (1) chemical producers be required to test and submit toxicity information about their products to EPA before placing them on the market; (2) information regarding chemicals be made available to the public; and (3) the burden EPA must meet before taking regulatory action be lowered.

Problems with the TSCA Regime

The primary problems with the TSCA regime I will discuss here are (1) EPA generally cannot meet the high burden of establishing a chemical is dangerous enough to warrant testing; (2) EPA – and the public – lack adequate information on potential health and environmental risks of toxic chemicals; and (3) the statutory requirements EPA must meet to regulate a substance are too strict.

The current TSCA regime places the burden on EPA to demonstrate a need for data on a chemical's toxicity rather than on a company to demonstrate that a chemical is safe. Specifically, firms need not test their substances or submit toxicity information unless EPA first demonstrates a chemical presents an “unreasonable” risk of injury or will be produced in substantial quantities and that either (a) there is or may be significant or substantial human exposure to the chemical or (b) the chemical enters the environment in substantial quantities.⁵ Promulgating rules sufficient to require testing is therefore too expensive for the EPA to do frequently.⁶ As a result, EPA is forced to rely on voluntary reporting which may not be complete or accurate.⁷ This

⁴ Press Release, American Sustainable Business Council, Investors Warn Congress: Obsolete Federal Chemicals Policy Threatens Business Recovery (September 27, 2010), http://www.asbcouncil.org/Investor_Press_Release.html; American Chemistry Council, *10 Principles for Modernizing TSCA*, http://www.americanchemistry.com/s_acc/sec_article_acc.asp?CID=2178&DID=9939 (last visited Oct. 21, 2010).

⁵ 15 U.S.C. § 2603 (2006).

⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-428T, CHEMICAL REGULATION: OPTIONS FOR ENHANCING THE EFFECTIVENESS OF THE TOXIC SUBSTANCES CONTROL ACT 5 (2009) [hereinafter GAO 2009 REPORT] (“EPA officials told us that finalizing rules can take from 2 to 10 years and require the expenditure of substantial resources. Given the time and resources required, the agency has issued rules requiring testing for only about 200 chemicals.”).

⁷ *Id.*; *Revisiting the Toxic Substances Control Act of 1976: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy & Commerce, 110th Cong. 3* (2009) (statement of Richard A. Denison, Senior Scientist, Environmental Defense Fund), http://energycommerce.house.gov/Press_111/20090226/testimony_denison.pdf.

asymmetrical information prohibits both EPA and the public from making informed decisions, particularly since EPA is prohibited from sharing even the information it does obtain under TSCA's confidentiality and trade secret provisions.⁸ The TSCA regime therefore fails in that EPA lacks information sufficient to regulate chemicals, and individual consumers cannot make informed choices about which chemicals they use.

Yet even if EPA had sufficient data, while TSCA authorizes EPA to promulgate rules to regulate chemicals (by banning, limiting use, etc.), the statutory requirements EPA must meet to do so present a legal burden that is difficult to overcome. Specifically, in order to regulate an existing chemical under section 6 of TSCA, EPA must find that there is a reasonable basis to conclude that the chemical presents or will present an "unreasonable risk" of injury to health or the environment.⁹ And further, TSCA and the courts interpreting it require that a final rule be supported by the fairly stringent "substantial evidence" standard.¹⁰ Meeting this burden has proven so difficult that since Congress passed TSCA, EPA has issued regulations to ban or restrict the production or use of only five existing chemicals or chemical classes.¹¹ Clearly the current TSCA regime would benefit from reform.

Proposed TSCA Reform

I propose that (1) producers be required to test their products and submit toxicity information to EPA before placing them on the market; (2) the information EPA collects regarding chemicals on the market be made available to the public; and (3) the burden EPA must meet to take regulatory action be lowered.

Chemical producers should be required to determine the properties of their products before selling them, which may require additional testing.¹² This is not an unreasonable requirement; producers of drugs or pesticides already have the

⁸ GAO 2009 REPORT, *supra* note 6, at 15; 40 C.F.R. § 2.306(c) (2009).

⁹ 15 U.S.C. § 2605(a) (2006); *See Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1215 (5th Cir. 1991).

¹⁰ TSCA provides that a reviewing court "shall hold unlawful and set aside" a final rule promulgated under section 2605(a) "if the court finds that the rule is not supported by substantial evidence in the rulemaking record . . . as a whole." 15 U.S.C. § 2618(c)(1)(B)(i); *Corrosion Proof Fittings*, 947 F.2d at 1213-14.

¹¹ GAO 2009 REPORT, *supra* note 6, at 12.

¹² *See* The Toxic Chemicals Safety Act of 2010, H.R. 5820, 111th Cong. § 4 (2010) (requiring submission of a minimum data set for all chemical substances, granting the Administrator the authority to use orders to compel testing).

burden of providing to the government information sufficient to demonstrate their products' safety.¹³ Further, American chemical producers wishing to sell products in Europe or Canada must abide by a similar regulatory framework.¹⁴ TSCA would be made more effective if it required companies to disclose information and possibly test their chemicals before the chemicals are put on the market—instead of only after EPA makes the necessary findings and promulgates a testing rule. Once EPA has this information, it should be required to share it with the public. Trade secrets will remain protected under existing law, and more information can allow consumers to make more informed choices.¹⁵ And finally, the burden EPA must meet before taking regulatory action should be lowered. Specifically, (1) the “unreasonable risk” standard that EPA must meet to regulate existing chemicals under section 6 of TSCA should be changed to a “potential significant risk” standard; and (2) the standard for judicial review that currently requires a court to reject a TSCA rule unless it is supported by “substantial evidence” in the record should be changed instead to the “arbitrary and capricious” standard otherwise applicable to agency decisions under the Administrative Procedure Act (“APA”).¹⁶ These changes would allow EPA to take the regulatory actions it needs to protect Americans from dangerous chemicals, and have these actions upheld by the judiciary.

Concerns

Given this new regulatory ability, EPA will be able to acquire

¹³ See, e.g., 21 U.S.C. § 355-1 (2008 supp.) (listing requirements for approval of a new drug under the Federal Food, Drug, and Cosmetic Act); 7 U.S.C § 136a (2006) (listing requirements for pesticides).

¹⁴ Under the European Union's chemical regulatory law (Registration, Evaluation, Authorisation and Restriction of Chemicals, or “REACH”), 2006 O.J. (L 396) 1, chemical companies must provide information on chemicals' properties and effects on health and the environment. REACH also gives regulators the ability to require chemical companies to do additional tests and provide other information when necessary to evaluate a chemical's risk. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-825, CHEMICAL REGULATION: COMPARISON OF U.S. AND RECENTLY ENACTED EUROPEAN UNION APPROACHES TO PROTECT AGAINST THE RISKS OF TOXIC CHEMICALS (2007) [hereinafter GAO 2007 REPORT].

¹⁵ See H.R. 5820 § 14 (requiring agency approval of confidentiality claims, promoting the sharing of confidential information among regulators and with states and affected workers); *id.* at § 8 (reporting requirement).

¹⁶ Compare APA, 5 U.S.C. § 706(2)(A) (2006) (the reviewing court shall hold unlawful and set aside a rule if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”), with TSCA, 15 U.S.C. § 2618(c)(1)(B)(i) (the reviewing court shall hold unlawful and set aside a rule if it is not supported by “substantial evidence in the rulemaking record . . . taken as a whole”).

information, and to ban or limit the use of the most dangerous chemicals—so long as it does not do so in an “arbitrary or capricious” way. While these changes will reduce the severe harms to public health the current regulatory regime permits, they also raise some concerns: increasing the costs of chemical production may have anticompetitive effects and may stifle innovation. However, these concerns can be addressed as follows.

The number of chemicals all firms bring to the market is likely to be inversely proportional to the cost of compliance with regulatory mandates such as increased testing. Further, smaller firms may be particularly disadvantaged—even pushed out of the market altogether—if they are unable to raise the capital needed for required testing. Therefore, to foster continued innovation in chemical production, the requirements for testing could be based on production volume and suspected negative health effects.¹⁷ For example, in Canada and the European Union, testing requirements for chemicals that are not widely used are less extensive and complex than for those for high-volume chemicals.¹⁸ And EPA already uses models to predict how risky a chemical will likely be based upon its structure and relation to other similar chemicals.¹⁹

Conclusion

America’s regulation of toxic substances through the Toxic Substances Control Act is failing to protect Americans from the negative health effects of toxic chemicals. However, through several straightforward reforms, Congress could empower EPA to collect and disseminate information regarding chemical toxicity, and use this information to force firms to internalize the significant costs associated with overproduction of toxic substances. If this is done in a way that is sensitive to the need to maintain an innovative chemicals industry, America can more effectively pursue the dual goals of health and chemical innovation.

¹⁷ See H.R. 5820 § 6 (establishing a prioritization system and requiring a safety standard determination for chemical substances and mixtures that are prioritized).

¹⁸ GAO 2009 REPORT, *supra* note 6, at 7.

¹⁹ GAO 2007 REPORT, *supra* note 14, at 8.