

CHEMICAL RISK REGULATION

Originally passed in 1976, the Toxic Substances Control Act (TSCA) grants authority to the U.S. Environmental Protection Agency (EPA) to regulate all chemicals in commerce except those regulated under other federal laws, such as pesticide and cosmetics laws. Members of Congress have debated revising TSCA for more than a decade without success. At the heart of the debate is the law's robust, science-based risk standard, which limits the EPA from imposing needlessly onerous regulations that could unintentionally undermine public health, the environment, and economic well-being. Environmental advocacy groups would like reform to empower the EPA to regulate more, whereas industry groups want reform that will preempt the emergence of myriad overlapping and conflicting state chemical laws.

Congress should:

- ◆ Maintain the Toxic Substances Control Act's reasonable risk standard and apply similarly robust, science-based risk standards to other chemical regulation programs.
- ◆ Demand that TSCA reform preempt states from passing additional, overlapping, and conflicting chemical laws and regulations.

The Toxic Substances Control Act's current risk standard allows the Environmental Protection Agency to regulate chemicals that pose an "unreasonable risk of injury to health or the environment." The EPA must also consider (a) the effects and exposure to humans and the environment, (b) the benefits of various uses of regulated chemicals and the availability of substitutes, and (c) the proposed regulation's potential economic consequences and impacts on small business, technological innovation, the environment, and public health (15 USC §2605[c][1]). It also requires that the agency apply restrictions only "to the extent necessary to protect adequately against such risk using the least burdensome requirements" (15 USC §2605[a]). Citizens should demand at least as much before any government body issues regulations that undermine the freedoms necessary for society to progress and innovate.

Nonetheless, environmentalists and Democrats have pushed for TSCA reform that replaces the law's science-based

standard with a political one based on the precautionary principle—a concept that calls on regulators to act *even in the absence of scientific justifications*. Once the precautionary principle is accepted as a matter of policy, it presses policy makers to make regulations as stringent as possible and encourages lawmakers to ban certain technologies because they *might* pose safety risks. But resulting policies, in fact, may prove more dangerous.

For example, environmental groups complain that TSCA did not allow the EPA to ban all asbestos uses, even though existing uses are safe, and a ban could have increased fatalities (see Safer Chemicals, Healthy Families website, <http://saferchemicals.org/>). That issue came to a head in 1989 when the EPA released a very ambitious TSCA rule banning most asbestos uses that affected dozens of businesses and applications, including uses for automotive brakes (54 *Federal Register*, vol. 29, no. 460, 1989; EPA Asbestos website, <http://www.epa.gov/asbestos/pubs/frl-3476-2.pdf>). But the Fifth Circuit Court of Appeals opinion in *Corrosion Proof Fittings v. EPA* stated not only that the EPA's rule failed to prove that the regulation was necessary to protect public health but also that the agency ignored the fact that "substitute products actually might increase fatalities," because of potential resulting brake failures. Moreover, the rule was unlikely to improve public health in other ways, because the type of asbestos and the limited human exposures related to current uses pose negligible risks.

Early draft legislation offered by Sen. Frank Lautenberg (D-N.J.) focused on changing TSCA's risk standard to make it more precautionary. Before passing away in 2013, Sen. Lautenberg cosponsored a compromise bill with Sen. David Vitter (R-La.), the Chemical Safety Improvement Act (S. 1009), that would have maintained some key features of the current law's reasonable risk standard but would eliminate the law's requirement that the EPA pursue the "least burdensome" regulations. It would have also expanded the EPA's power to collect data from industry and included a provision that would allow the agency to preempt state laws covering certain chemicals after it promulgated regulations covering them. In February 2014, Rep. John Shimkus (R-Ill.) began circulating a draft bill, the Chemicals in Commerce Act, which included some of the

same provisions of the Lautenberg-Vitter bill, including state preemption.

However, reform efforts fell apart at the end of the 113th Congress because of opposition from Senate Environment and Public Works Committee Chair Barbara Boxer (D-Calif.), who along with many environmental groups, strongly opposed state preemption provisions and the risk standard. Boxer offered her own draft legislation in September 2014, the Boxer Toxic Chemicals Control Act, which stripped out the preemption provisions and changed the risk standard to make it precautionary in nature. Refusing to negotiate, Sen. Vitter and his new Democratic cosponsor, Sen. Tom Udall (D-N.M.), indicated they would wait until the next Congress to advance their version of the legislation.

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For Further Reading

Angela Logomasini, “The Real Meaning of ‘TSCA Modernization’: The Shift from Science-Based Standards to Over-Precaution,” *Issue Analysis* 2012 No. 2, Competitive Enterprise Institute, March 2012, <http://cei.org/sites/default/files/Angela%20Logomasini%20-%20The%20Real%20Meaning%20of%20TSCA%20Modernization.pdf>.

———, *A Consumer’s Guide to Chemical Risk: Deciphering the “Science” behind Chemical Scares*, Washington, DC: Competitive Enterprise Institute, 2014, <https://cei.org/issue-analysis/consumers-guide-chemical-risk>.