

# Toxic Substances Control Act (TSCA) Reform – Where Are We and Where Are We Going?

---

## The TSCA Story

In 1976, in response to escalating concern about the effects toxic chemicals were having on humans and the environment, Congress enacted the Toxic Substances Control Act (TSCA). The legislation was intended to give the Environmental Protection Agency (EPA) broad oversight over all aspects of chemical substance management, including manufacturing, importation, processing, distribution, use, and disposal.

The measure was progressive for its time in that it took a proactive approach to chemical management, seeking to prevent damage to humans and the environment rather than addressing the after-effects of chemical pollution -- which was more typical of environmental legislation in the 1970s.

TSCA was enacted with three main tenets in mind (American Bar Association, 2014):

- Develop adequate data regarding the hazards and risks posed to humans and the environment by specific chemicals
- Create the authority to regulate chemicals that posed an “unreasonable risk of injury to human health or the environment”
- Exercise this authority in a way that would not impede economic and technological progress.

While TSCA did succeed at establishing a framework, guidance, and authority for chemical risk management and has contributed to the elimination of some chemicals, right out of the gate it began to falter at achieving the broader chemical risk management many constituents sought.

The perceived failures of TSCA have led to several attempts over the past four decades to reform the legislation. However, these reform attempts have been as plagued with problems as the original legislation itself, often falling prey to congressional infighting, competing interests, and judicial over-involvement. Despite attempted reform and more recent efforts by the EPA to shore up its authority and overcome the legislation's many challenges, the US has been unable to make substantial progress in creating an effective and over-arching chemical risk management process.

Now, for the first time since TSCA's inception, truly comprehensive and promising reform is being sought in the form of the Chemical Safety and Improvement Act (CSIA).

#### Intent versus reality

While the original TSCA legislation was full of good intentions, the reality in the view of many has been quite a different story. And although the principles behind TSCA have continued to hold favor across a broad constituency – including industry, environmentalists, and legislators – many stakeholders have seen fundamental flaws in how the process has played out, most specifically TSCA's relative ineffectiveness at restricting or banning chemicals that may pose an unreasonable risk to health or to the environment. There are a number of contributing factors that have made TSCA, though well-intentioned, difficult to implement in an effective way.

For one, some 62,000 chemicals were “grandfathered” into the system, making them immune to the same scrutiny new chemicals or existing chemicals with new uses are subject to. Out of these existing chemicals, fewer than 200 have been evaluated for their effects on humans. A mere five have been banned (psr.org). In addition, industry has often chafed at requirements to provide detailed risk data and test results, claiming it is costly and time-consuming. Further, chemical risk legislation like TSCA has been accused of stifling innovation, both because of the time, attention, and resources compliance requires as well as the potential for industry to disclose trade secrets by sharing detailed chemical information.

In the meantime, a public concerned about their well-being and environmentalist eager to protect the environment, have clamored for more safety information and control over chemicals.

This has led to the proliferation of state and local chemical safety regulations. Complying with these numerous and varied regulations has created an additional level of complexity and resource burden that now has industry also championing broad reform (Coons 2013).

#### Legislation and lack of resources ties the EPA's hands

In its 2013 report, "CHEMICAL REGULATION: Observations on the Toxic Substances Control Act and EPA Implementation," the United States Government Accountability Office (USGAO) sums up some of the major issues with TSCA, placing a large amount of the responsibility for the legislation's failure on the EPA. However, even the legislation itself (along with the numerous court actions industry has instigated to protect its interests) is a major culprit.

Legislative loopholes combined with inadequate resources to fulfill its obligations have significantly contributed to the EPA's ineffectiveness in implementing meaningful and broad chemical risk control. In fact, by placing the "burden of proof" for chemical safety in the EPA's hands, the legislation has almost guaranteed the chemical industry unfettered operations (USGAO 2013). For example, when a risk is suspected the EPA is chartered with providing testing results and other evidence that the chemical actually poses a significant risk. This data is often costly to develop, difficult to discover (especially if companies withhold information – which the legislation gives them the right to do under its "confidential business information" protection), and can be very time-intensive to create – often requiring years to complete.

The EPA can require a manufacturer to test an existing chemical if there is evidence the chemical may present an unreasonable risk to humans or the environment, but such unreasonable risk can be difficult to demonstrate if the chemical has not previously been tested. This creates a catch-22 of sorts that renders the EPA essentially powerless in substantiating a chemical's risk to humans and the environment. The EPA typically does not have the resources to perform this testing on its own – and regardless of who performs the testing, it can take years to be completed.

When the EPA is able to take action, it frequently finds itself in a court battle – as was the case with asbestos. Manufacturers sought and won a judgment to overrule the EPA’s action in restricting asbestos based on the judicial opinion that the EPA had not considered “all necessary evidence and failed to show that the control action it chose was the least burdensome reasonable regulation required to adequately protect human health or the environment” (USGAO 2013). The failure of the EPA’s attempt to ban this substance despite a concerted effort and the overwhelming evidence of risk to human health substantiates how complicated it can be for the EPA to act in support of TSCA’s founding principles.

#### Worldwide reform -- Europe takes a lesson from the US, and takes the leading position

While the US has continued to struggle with meaningful chemical risk management reform, the rest of the world has moved forward. In fact, when Europe set out to revamp its cumbersome chemical risk management process and design a universal and overarching system, it took lessons in what not to do by examining TSCA -- benefitting from the many challenges and deficiencies the 40-year program has experienced (Applegate 2008). Ironically, in implementing TSCA reform, the US just might benefit by taking cues from the EU’s playbook.

In 2006, the EU implemented REACH (Registration, Evaluation, and Authorization of Chemicals), which sought to:

- Simplify the complexity of regulations governing chemical risk
- Identify and quantify risk without spending additional effort at information-gathering (in other words, “harvesting” information directly from the manufacturers at the outset)
- Take the “burden of proof” of risk off of the government and put it into industry’s hands
- Evaluate existing as well as new chemicals

There are some obvious fundamental differences between US regulation and REACH. While TSCA primarily addresses only the few thousand chemicals put into use since its inception (though there are approximately 67,000 chemicals inventoried) and relies on EPA-provided risk assessments, EU’s REACH seeks to examine and regulate tens of thousands of chemicals imported into or manufactured inside the EU based on information supplied by the manufacturers.

This information sourcing is a critical differentiator, enabling the EU to assess far more chemicals than the US could possibly manage. REACH also prioritizes chemicals and addresses the most critically impacting ones first. In addition, REACH promotes transparency in information-sharing, rather than endorsing the “trade secret protection” many US firms have often utilized. REACH also aggressively restricts and even eliminates chemicals considered as dangerous (Laczaz-Davis 2010).

Perhaps the most compelling feature of REACH is that the burden of proof and responsibility for chemical information is placed squarely on industry, not government. That feature has led to significant information-sharing between manufacturers and other stakeholders. In fact, there is a plethora of chemical risk-related information within REACH’s database that is available to any interested party.

REACH has world-wide implications because it requires not only local compliance but also any company that imports products into the EU must comply as well. This inspires other nations to create compatible chemical risk management processes. Not surprisingly, in seeking to improve its chemical risk management process China has adopted a similar program, dubbed “China REACH” (Chen 2012). There is an expectation that other countries will follow suit, particularly those that are required to comply with REACH as importers.

Just as the EU learned from the mistakes the US made with TSCA, REACH can inform other countries from its successes and failures. In any event, other countries, including the US, can benefit from the wealth of chemical information REACH makes available worldwide.

#### Meaningful US reform on the horizon

In the most promising attempt at revamping the beleaguered TSCA to-date, in April of 2013 Senator David Vitter (R-Louisiana) and the late Senator Frank Lautenberg (D-New Jersey) led a bipartisan attempt at long overdue meaningful reform by introducing the Chemical Safety and Improvement Act (CSIA). Apparently if there is one thing Democrats and Republicans can agree on it is that TSCA has many flaws. The proposed legislation quickly garnered a hearty number of cosponsors, igniting groundswell support that held optimism for reform.

The new bill allowed:

- The “first time” systematic evaluation of chemicals grandfathered into existing legislation
- Prioritization of chemicals for EPA review
- Additional testing mandate authority on the part of the EPA, including requests for additional data from chemical manufacturers
- Requirements for more transparency with public information

However, it wasn’t long before objections to components of the proposed legislation stalled the passage of this latest attempt at reform as well. In July 2013, Senate Environmental and Public Works (EPW) Committee Chairwoman Barbara Boxer (D-California) led a “states’ rights” resistance during a Committee hearing, sharing concern with other stakeholders over the bill’s potential to undercut existing state legislation.

That resistance spawned efforts towards clarifying the pre-emptive language in the bill so that states’ rights are not at risk, with an eye towards fulfilling the ultimate goal of the legislation and derailing the diversion of political power plays. In addition, though the chemical industry supported the bill, it also wanted to make sure there is still room for innovation and growth. Industry insisted that compliance requirements not be overly complex or so limiting that new business development avenues could not be explored safely. And while under the new bill industry still had the ability to protect proprietary information, it also had to take steps to prove information-sharing would truly jeopardize that protection.

Lastly, with the EPA still carrying the responsibility for chemical risk assessment and implementation, critics claimed the bill was too open-ended and pointed out that the EPA continues to lack the resources necessary to fulfill its commitments. The proposal eventually got lost among the budget disputes that escalated towards the end of the year (Collatz, 2014).

#### What the future holds

As debate over US chemical risk management reform continues in 2014, there is concern that trying to craft legislative wording to everyone’s satisfaction before election year activities get in the way of continued constructive efforts could forestall progress on the bill for another year.

In addition, proponents have struggled to keep reform in the forefront and capture additional congressional support, fearing simply the passage of time as the biggest threat to the legislation's success.

The dwindling momentum is particularly concerning because this is highly valued reform that appeals to a very diverse group of constituents, including grocery and toy manufacturers, machinists, aerospace workers, and plumbers, just to name a few. Far removed from a special interest group-driven piece of legislation, CSIA is considered by many to be very balanced legislation that both protects the public and supports business growth, seeking to create transparency in the screening of chemicals while protecting proprietary information. Yet despite its welcome introduction, there are fears that congressional infighting could once again indefinitely stall this important and broadly supported legislation (Collatz 2014). To prevent such an outcome, action will be needed by stakeholders to convince Congress to move forward with CSIA.

#### Sources

American Bar Association, Section of Environment, Energy and Resources (2014). ABA SEER Overview of the Toxic Substances Control Act (TSCA)

[http://www.americanbar.org/content/dam/aba/administrative/environment\\_energy\\_resources/whitepapers/tsca/TSCA\\_paper\\_overview.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/environment_energy_resources/whitepapers/tsca/TSCA_paper_overview.authcheckdam.pdf)

Applegate, J. S. (2008). Synthesizing TSCA and REACH: Practical Principles for Chemical Regulation Reform. *Ecology Law Quarterly*, 35(4), 721-770.

<http://search.ebscohost.com/login.aspx?direct=true&db=plh&AN=37296514&site=ehost-live>

Chen, Nathan (2012). Overview of Chemical Management in China.

<http://www.reach24h.com/en/download/workshop&webinarPPT/Praque2012/ChineseChemicalManagementOverview.pdf>

Collatz, M. (2014). TSCA Reform: Can the Senate Get There in 2014?. *Adhesives & Sealants Industry*, 21(5), 14-15.

<http://search.ebscohost.com/login.aspx?direct=true&db=plh&AN=95654209&site=ehost-live>

Coons, R. (2013). Chemical management: Industry presses for TSCA reform. *Chemical Week*, 175(31), 21-23.

<http://search.ebscohost.com/login.aspx?direct=true&db=plh&AN=93385025&site=ehost-live>

Laczaz-Davis, C. (2010). A new global chemical policy: Who is driving this train?. *Industrial Safety & Hygiene News*, 44(5), 54.

<http://search.ebscohost.com/login.aspx?direct=true&db=plh&AN=50843209&site=ehost-live>

Physicians for Social Responsibility, U.S. Chemical Management: The Toxic Substances Control Act. <http://www.psr.org/environment-and-health/confronting-toxics/chemical-management/>

United States Government Accountability Office (2013). CHEMICAL REGULATION: Observations on the Toxic Substances Control Act and EPA Implementation, <http://www.gao.gov/assets/660/655202.pdf>