TSCA reform versus replacement: Moving forward in the chemical control debate

Charles Franklin

Charles Franklin is a senior counsel at the international law firm of Akin Gump LLP, in Washington, D.C. and is a vice chair on the Section's Special Committee on Congressional Relations.

At a time when our national leaders cannot come together to prevent the massive, poison-pill cuts of the so-called budget "sequester," it seems fanciful to ponder let alone propose legislative strategies for updating the often maligned Toxic Substances Control Act (TSCA). Yet, after 37 years without material change, the nation's flawed but critical chemical control statute may offer one of the few opportunities for lawmakers to exercise environmental bipartisanship. To be successful, however, Democrats and Republicans, as well as stakeholders, need to move beyond visions of a legislative "Grand Bargain" that replaces TSCA with a new comprehensive scheme and instead consider some targeted opportunities to "reform" the current statute.

As implemented and interpreted by federal courts, TSCA has been a disappointment, if not an abject failure, to most stakeholders. Some criticize TSCA as a "toothless" tiger, unable to support meaningful action and unable to prevent a patchwork of state analogs. Other critics note that TSCA's provisions for confidential business information (CBI) offend the public's right to know. Still others comment that TSCA's disclosure and reporting requirements discourage innovation. Stakeholders may disagree on the diagnosis, but most agree that TSCA is sick.

How did we get here?

When President Ford signed TSCA into law in October 1976, he dubbed it "one of the most important pieces of environmental legislation that has been enacted." TSCA, he proclaimed, promised to "close a gap in our current array of laws to protect the health of our people and the environment." Congress had already enacted a framework of statutes regulating industrial, commercial, and agricultural releases of pollutants to air, water, and land. Where these prior statutes regulated chemicals as unwanted pollutants, TSCA gave the U.S Environmental Protection Agency (EPA) the authority to manage chemical substances *before* they reached the stack, pipe, or landfill.

But TSCA was not a regulatory blank check. While TSCA gave EPA a range of options to manage unreasonable risks, section 6(a) also directed EPA to select "the least burdensome means" when regulating against such risks. Congress admonished EPA "not to impede unduly or create unnecessary economic barriers to technological innovation." TSCA established an Interagency Testing Committee (ITC) to help EPA identify and prioritize substances for testing and reporting requirements, but the testing process was cumbersome. While the statute required companies to provide sensitive product or business data, companies could claim non-safety related information confidential where its release would

disclose legitimate trade secrets. TSCA's preemption provision precluded states from imposing additional testing or risk management requirements on substances where EPA had already acted. Finally, Congress bypassed the deferential "arbitrary and capricious" standard in favor of the more stringent "substantial evidence" requirement, raising the bar for sustaining governmental action on judicial review.

TSCA's focus on balanced regulation still resonates as a pragmatic approach to public policy, at least in theory. In practice, the carefully balanced wording of the statute prompted regulatory and judicial paralysis, not pragmatism. In 1980, the General Accounting Office (GAO) reported that "neither the public nor the environment are much better protected," citing budget, staffing, organizational, and planning weaknesses of the new EPA program. In 1990, GAO amplified its concerns, finding EPA had made little progress in identifying chemicals for priority testing.

For many in the environmental community, the final blow came in 1991, when the Fifth Circuit largely overturned EPA's Asbestos Ban and Phase-Out Rule. *Corrosion Proof Fittings v. EPA* (5th Cir. 1991). After initiating the rulemaking proceeding in 1979, EPA reviewed over 100 studies, and held numerous public meetings in the lead up to the 1989 final rule. Concluding that asbestos posed an unreasonable risk to human health at all levels of exposure, the rule called for a three-stage ban on all asbestos products over ten years.

The Fifth Circuit reversed, vacating the asbestos ban rule on substantive and procedural grounds. Procedurally, the court held that EPA erred by adopting a new methodology for assessing certain risks without seeking adequate public comment. Substantively, the court held that EPA failed to heed TSCA's admonishment to use the "least burdensome" approach to addressing unreasonable risks; to consider, on a use-by-use basis, the availability of less burdensome control strategies as alternatives to a complete ban; and to assess the risks associated with potential substitutes for the banned material. The court also found EPA deficient in quantifying long-term costs and benefits of the action, violating TSCA's mandate to consider "reasonably ascertainable economic consequences" of the action. These failures, viewed through the lens of the substantial evidence test required to uphold the action, convinced the court to vacate the 1989 rule, remanding it to EPA.

The *Corrosion Proof Fittings* case was a landmark event for TSCA. While its legal significance was debatable, the lesson for EPA was that if ten years and thousands of pages of documentation were inadequate to ban asbestos, TSCA's section 6 risk management provision was a dead letter. EPA essentially put regulation pursuant to section 6 on a shelf and spent most of the next two decades seeking voluntary action from industry. Congress, for its part, remained remarkably disinterested in fixing the core provisions of TSCA, adding discrete new titles for asbestos, radon, lead, formaldehyde, and school environments, but leaving the core chemical control provisions untouched.

Efforts at "Grand Bargain" reform

In 2009, the Obama administration breathed new life into TSCA. Then-EPA Administrator Lisa Jackson identified TSCA legislative reform as a long-term goal, going so far as to offer "Essential Principles for Reform of Chemicals Management Legislation." In the short term, EPA gave TSCA's current mandate a fresh look, reevaluating both the language of the act and options for reinterpreting its existing authority to strengthen the federal program.

Democratic legislators in the Senate and House quickly responded, brushing off proposals to revamp TSCA. Yet, despite repeated efforts to find common ground through multi-stakeholder dialogue meetings, congressional hearings, and shuttle diplomacy, Democrats and Republicans have been unable to bridge the environmental policy partisan gap that pervades Washington today. These differences are exacerbated by the sweeping nature of the TSCA reforms proposed to date. The bill introduced by Senator Frank Lautenberg would not "reform" TSCA—it would replace it with an entirely new legal framework.

But while a fresh start has an appeal, wholesale replacement is both politically cumbersome and exceedingly risky from policy and business standpoints, particularly given the difficulty in predicting how future administrations and courts will interpret a blank-slate framework. Would a comprehensive Lautenberg-style bill fix TSCA's prior flaws and reflect 37 years of lessons learned, or simply create a new blank canvas on which lawyers, judges, and activists can relitigate old issues afresh?

A more modest proposal

I would, respectfully, offer a more modest approach. Rather than start from scratch, why not conduct a targeted effort to clarify or eliminate the few specific provisions, words, and phrases that, through overbroad or overly narrow interpretation, knocked TSCA implementation out-of-kilter? Here are six suggestions, aimed at addressing issues of concern for both sides of the debate.

Keep, but clarify the "unreasonable risk" standard: Recent TSCA reform proposals have replaced the "unreasonable risk" safety standard with alternatives like "reasonable certainty of no harm"—the same standard applied to food-use pesticides, foods, and drugs—or "negligible risk," a term evoking something just north of zero risk. Such standards make sense in certain use scenarios, but for a standard applied across the entirety of TSCA's reach, we should think twice about eliminating the rule of reason. Rather than introduce an entirely new standard, why not work together to better define the meaning of "*unreasonable* risk"?

Eliminate the "least burdensome requirement": The court in *Corrosion Proof Fittings* relied heavily on TSCA's directive to use the "least burdensome requirement" in managing unreasonable risks, essentially converting TSCA's list of potential mitigation factors (notification, labeling, recordkeeping and reporting, testing and monitoring, use restrictions, use prohibitions, etc.) into a mandatory top-down analysis. This approach places too much discretion in the hands of judges, and should be unnecessary under a better-defined "unreasonable risk" standard.

Strengthen EPA's right to obtain exposure and use data, and simplify the test rule process: Early in TSCA's implementation process, stakeholders raised concerns that the statute's testing authority made it difficult for EPA to mandate health and exposure testing. EPA could require industry to conduct testing on the basis of substantial risk or exposure, but for many chemicals EPA lacked access to the use and exposure data needed to support a test rule finding. Congress fixed this problem, in part, when it passed the Emergency Planning and Community Right-to-Know Act of 1986—the basis for the Toxics Release Inventory and more recent chemical data reporting requirements. However, access to timely and comprehensive exposure data is arguably the most important component of ensuring a workable risk-based regulatory system. Congress should revise section 4 on testing or section 8 on reporting to give EPA more express authority to obtain chemical use information along the entire supply chain.

Adopt the arbitrary and capricious standard of review: For most environmental statutes, the judicial standard of review follows the Administrative Procedures Act standard of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This standard, which grants deference to EPA's administrative expertise, would provide EPA and regulated parties with a familiar and well-studied legal basis for reviewing "unreasonable risk" findings by EPA. In contrast, the substantial evidence standard has added yet another source of uncertainty to TSCA. Courts should apply the same standard for TSCA used for other statutes.

Strengthen, not weaken CBI provisions: If EPA is to receive the data it needs to make sound risk-management decisions industry will have to trust that it can provide confidential business information to the agency without fear of its release. EPA should strengthen, not weaken, TSCA's CBI provisions with respect to reported data and documentation that could reasonably be used by third parties for competitive advantage.

Tighten TSCA's preemption provision: TSCA's preemption provision was designed to "discourage state requirements which would put an undue burden" on companies engaged in interstate commerce. In practice, states have issued a wide range of state-specific mandates, from chemical bans and disclosure requirements to alternative assessment and substitution requirements, all without ever triggering the statute's preemption exemption process. A reformed TSCA needs to, at minimum, increase the coordination and oversight between state and federal regulators regarding state-specific requirements likely to affect interstate commerce.

To be sure, these modest changes will not resolve the lengthy list of complaints regarding TSCA, both as written and as implemented. But since the "Grand Bargain" approach keeps leading to "no sale," perhaps some small improvements are a good start.