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RIGHT TO KNOW

MANAGING RISK

Consumer and commercial product manufacturers face a unique and challenging regulatory environment in 2013, one in which the lines between regulatory compliance, corporate social responsibility, and product marketing have blurred. Domestically, manufacturers must monitor and comply with a growing list of federal, state, and local product content restrictions, product labeling requirements, and recordkeeping and reporting requirements. Internationally, manufacturers must monitor and comply with evolving chemical and product regulatory regimes in Europe, China, Korea, and elsewhere—regimes that impose their own testing, registration, classification, and labeling requirements on both new and existing products and substances.

From Risk Management to Risk Perception: The Evolution of Right-to-Know Policy

BY CHARLES FRANKLIN

In today's market, compliance with traditional product regulatory standards, while necessary for market access, is often insufficient to remain competitive. Manufacturers must look to a second level of perception-based market regulation, driven by nongovernmental organizations, manufacturing, retail and consumer thought leaders, and information-savvy bloggers and media outlets. Working under the rallying cry of "right-to-know," these quasi-regulators use data and labeling required under federal and state information disclosure and right-to-know laws to vilify some products and elevate the profile of others.

Unlike traditional risk-based regulatory standards, quasi-regulatory standards and product preferences often disregard the issue of actual health or environmental risk, relying instead on one-dimensional measures of theoretical hazard as a proxy for "greenness" or safety. The lower the hazard quotient of a product's ingredients, the better—regardless of whether there is any meaningful exposure concern and regardless of whether the lower-hazard product poses a greater net risk to human health or the environment.

This article reviews the evolution of right-to-know policy in the United States with an eye toward understanding when and how the public "right-to-know" be-

came so disconnected from principles of risk and risk management.

‘Right-to-Know’ as a Policy Driver

The growing focus on perception-based regulation has its roots in several influential policy developments of the 1970s and 1980s—policies that introduced the principles of right-to-know in the workplace, community, and marketplace.

A. Occupational Right-to-Know

In the year before the Occupational Safety and Health Administration (OSHA) was established, an estimated 14,000 workers died in job-related accidents, 300,000 workers developed new job-related illnesses, and 2.5 million workers suffered from a job-related disability in the United States.¹ The Occupational Safety and Health Act of 1970 (OSH Act), signed into law on December 28, 1970, declared as part of its larger purpose to “[provide] that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions.”² Section 6 of OSH Act directed OSHA to develop occupational health and safety standards for “toxic materials and harmful physical agents” that would ensure “to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.”³ In keeping with OSH Act’s concept of shared responsibility, Section 6 also admonished OSHA to “prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.”⁴ The focus on “shared responsibility” between employer and employee, and the recognition that informed workers are better able to protect themselves and their peers from workplace hazards, provided one of the first major applications of the “right-to-know” principle in contemporary health, safety, and environmental policy.

OSHA ultimately promulgated its first hazard communication standard in 1983, focusing on chemical manufacturers, chemical importers, and downstream employers in the manufacturing industry. This rule established the key components of OSHA’s HazCom Standard (HCS), including the duty of the chemical manufacturer, importer, and/or downstream employers to:

- a) evaluate the health hazards associated with chemicals imported, produced, or distributed, based on recognized authoritative standards and sources;
- b) ensure that hazardous chemicals stored or shipped from the workplace are properly labeled with appropriate hazard and safety information, and develop material safety data sheets (MSDS) providing technical information, hazard warnings, and risk man-

agement information for each hazardous chemical stored, used, or shipped on site; and

- c) provide employees with information and training on hazardous chemicals in their work environment and the measures they can take to protect themselves from such workplace hazards.⁵

These key components—hazard assessment, hazard labeling and disclosure, and worker training on hazard and risk management—have remained core components of OSHA’s HCS program ever since.⁶

But if the purpose and overall structure of OSHA’s HCS have not changed significantly, the specific standards and lexicon it uses to characterize and communicate hazards have. In March 2012, OSHA formally revised the HCS to align its hazard standard with the United Nations’ Globally Harmonized System of Classification and Labeling of Chemicals (GHS) (“OSHA GHS rule”).⁷ The new rule continues to use labeling, safety data sheets, and training as key tools, but adopts the GHS framework with respect to hazard classification, safety data sheet format, and warning terminology and graphics. The principle behind GHS is that by using more uniform and consistent safety and hazard messaging across jurisdictions, regulators will increase worker familiarity and, ultimately, “literacy” with respect to hazard communication and prevention messaging, improving their ability to use such information for personal protection.

In this context, occupational hazard communication represents one of the purest forms of “right-to-know” policy. When a work environment contains potential chemical or physical hazards, workers have a right to know what those hazards are and what concrete steps they must take (personal protective equipment, reentry times, etc.) to manage exposure, and hence, the risk, from these hazards. OSHA’s HCS focuses on ensuring worker access to that information, making the argument for occupational right-to-know so compelling.

B. Community Right-to-Know

Congress enacted the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA)⁸ in the wake of the tragic 1984 Union Carbide industrial accident which killed thousands and injured hundreds of thousands of people in Bhopal, India.⁹ While the exact causes of the Bhopal accident remained in dispute for years thereafter, critics correctly argued that the release’s impact had been exacerbated by a general lack of awareness at the company, community, and government level regarding the potential risks associated with a facility release and the appropriate emergency responses thereto. EPCRA addressed these concerns by

⁵ OSHA, *Hazard Communication; Final Rule*, 48 Fed. Reg. 53,444 (Nov. 25, 1983).

⁶ In subsequent actions, EPA expanded the HCS standard to cover other industries where employees are potentially exposed to hazardous chemicals, see 52 Fed. Reg. 31,852, Aug. 24, 1987, resolved litigation challenging its authority for such expansions, and to impose HCS requirements, 54 Fed. Reg. 6886, Feb. 15, 1989, and made changes and technical amendments (see 59 Fed. Reg. 6126, Feb. 9, 1994, but these are beyond the scope of this paper).

⁷ OSHA, *Hazard Communication; Final Rule*, 72 Fed. Reg. 17,574, March 26, 2012) [“2012 HCS”].

⁸ 42 U.S.C. § 11001 *et seq.* (1986).

⁹ See, e.g., EPA website, *25 Years of EPCRA*, available at <http://www.epa.gov/oem/content/epcra/epcra25.htm>.

¹ OSHA, *Reflections on OSHA’s History*, OSHA 3360 (January 2009).

² 29 U.S.C. § 651.

³ *Id.* § 655(b)(5).

⁴ *Id.* (emphasis added).

requiring companies storing, using, or manufacturing hazardous substances to work with state and local emergency responders to develop emergency response plans for unintended releases.¹⁰ The law also required such facilities to report unintended releases in a timely manner to key emergency personnel.¹¹ More importantly, the statute required companies that manufactured, processed, or used chemicals above certain thresholds to report on their total releases and transfers of toxic chemicals for inclusion in a publicly accessible electronic database.¹² That database, known as the Toxics Release Inventory (TRI), quickly demonstrated the profound power that information-based public disclosure laws could have in driving corporate behavior—drawing not on command-and-control mandates, but on corporate self-interest in protecting reputations from negative scrutiny. As the *Atlantic Monthly* reported in an article from 2000 entitled “Regulation by Shaming,” the mere thought of disclosure of toxic release data was enough to effect change in the minds of some companies:

The day it became clear that disclosure was a powerful regulatory tool was June 30, 1988, when Richard J. Mahoney, then the head of Monsanto, made a dramatic announcement on the eve of the first TRI reporting deadline. Mahoney said bluntly that he had been astounded by the magnitude of Monsanto’s annual release of 374 million pounds of toxins. He vowed to cut the release of air emissions by 90 percent worldwide by the end of 1992—news to the engineers at the company’s 35 plants.¹³

EPA released its first TRI results in 1989, reporting that covered manufacturers had released or disposed of roughly 22.5 billion pounds of hazardous substances in 1987, a volume EPA officials acknowledged was “far higher than what we thought was going to occur.”¹⁴ The media and nongovernmental organizations were quick to pick up the story, as noted by the *Atlantic Monthly* in a 2000 article:

Following the release of the report, USA Today ran a special report naming the worst polluters, and the National Wildlife Federation published a book entitled “The Toxic 500.” Such companies as DuPont and 3M vowed to reduce toxic pollution. Corporate shaming had produced results.¹⁵

The following year, EPA not only made raw data on company and facility-level emissions available in database form, it published a report identifying the top-releasing companies and facilities across the country, giving both a name and address to the largest industrial polluters.¹⁶ For stakeholders willing to analyze the underlying data files, the TRI program provided an even greater treasure trove of information on the companies, facilities, chemicals, and communities involved with and affected by toxic releases. Environmental nongov-

ernmental organizations (NGOs) quickly learned to use the self-reported data to help direct public campaigns intended to shame top polluters into reform.¹⁷ Product manufacturers, in turn, quickly realized that being named as a top emitter, whether nationally or locally, had both reputational and, ultimately, financial costs.¹⁸ Indeed, EPA’s 1995 brochure reflected the agency’s optimism about the potential for public information and right-to-know as a paradigm-shifting regulatory tool:

TRI has quickly become one of the most powerful tools in this country for environmental protection. The Inventory permits the public to track chemical releases at specific facilities and on a community-wide and state-wide basis. TRI is already being used widely by industry, the states, and environmental groups as a scorecard for efforts to reduce toxic releases. Many companies have already taken substantial public commitments to reduce their releases of TRI chemicals.¹⁹

TRI remains a symbol of the power of information and right-to-know principles to drive environmental improvements, and it is true that since the first release of TRI information in 1987, net industrial facility emissions of many toxic substances have declined significantly at a national level.²⁰ Since that time, EPA has significantly expanded both the scope and depth of information subject to reporting under TRI. The number of TRI-reportable chemicals has risen from 300 to more than 600, and EPA has reduced the reporting thresholds from 25,000 pounds per facility to as low as 2,500 pounds in the case of certain particularly hazardous substances.²¹ Not without controversy, EPA has also increased the level of detail facilities must provide regarding manufacturing processes and downstream markets, information traditionally considered proprietary, and confidential for most companies.²² It remains to be seen how EPA and the courts will approach these more de-

¹⁷ For an excellent review of early efforts to leverage TRI data to support advocacy campaigns, see Sidney Wolf’s journal article *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right to Know Act*, *Journal of Land Use & Environmental Law*, Vol. 11, No. 2, 217 (Spring 1996) (“Wolf, 1996”).

¹⁸ See, e.g., Hamilton, J.T., *Regulation through Revelation: The Origin, Politics, and Impacts of the Toxics Release Inventory Program*, Cambridge University Press (2005); Bartz, Sherry, *Toxic Release Inventory, Stockholder Reaction, and Restructuring of the Electric Utility Industry*, University of Miami (2007), available at http://shsu.edu/~eco/www/resources/documents/BARTZ_PWR_TRI_2007_1_31.pdf; Konar, S., *Information As Regulation: The Effect of Community Right to Know Laws on Toxic Emissions* (1996), available at <http://www.vanderbilt.edu/vcems/papers/tri.pdf>; Joshi, S. et al., *Investor Responses to Emission Information: Do Toxicity, Pollution Prevention, and Environmental Management Systems Matter?* USEPA STAR Research Grant # R830870 (Oct. 2005), available at http://cfpub.epa.gov/ncer/abstracts/index.cfm/fuseaction/display.pubFullText/publication_id/40742.

¹⁹ EPA, *Expanding Community Right-to-Know: Recent Changes in the Toxics Release Inventory*, EPA 745-F-95-001 (March 1995).

²⁰ See EPA, 2010 TRI National Analysis, Appendix B-7 (TRI On-site and Off-site Disposal or Other Releases, 1988, 1998, 2008 and 2009-2010), available at <http://www.epa.gov/tri/tridata/tri10/nationalanalysis/index.htm>.

²¹ EPA, *TSCA Inventory Update Reporting Modifications; Chemical Data Reporting; Final Rule*, 76 Fed. Reg. 50,816, Aug. 16, 2011.

²² 40 C.F.R. § 711.30.

¹⁰ 42 U.S.C. § 11003.

¹¹ *Id.* § 11004.

¹² *Id.* § 11023.

¹³ Mary Grayam, *Regulation by Shaming*, *Atlantic Monthly* (April 2000), available at <http://www.theatlantic.com/past/docs/issues/2000/04/graham.htm> (“Regulation by Shaming”).

¹⁴ Philip Shabecoff, *Industrial Pollution Called Startling*, *New York Times* (April 13, 1989).

¹⁵ Regulation by Shaming Report, Part 2.

¹⁶ EPA, *Toxics in the Community: National and Local Perspectives*, TS-779 (Sept. 1990).

tailed and sensitive reporting requirements in practice, and the inevitable claims of confidentiality that will follow.

Yet, even after 25 years of implementation, researchers have struggled to find a definitive link between the release of TRI emissions information and associated reductions at the facility level.²³ While anecdotal examples abound, the process of teasing out the impact of TRI-related “pressure” from other economic, political, and regulatory pressures driving industrial change has proven difficult.

There are numerous reasons why drawing a direct causal line between emissions disclosure and emissions reductions at the community level has been difficult. Community pressure is just one of many factors affecting a company’s decision in the operation of a facility and, unless the community is well-organized and politically sophisticated, it may be difficult to galvanize community concerns into a persuasive movement. The public and political pressure needed to change the facility’s behavior may be even more difficult to generate if the company or facility in question is perceived as an economic cornerstone in the community. Thus, two different communities may react to the same TRI information (say, having a top-10 emitter in the vicinity) very differently.

Moreover, even when reported TRI emissions do appear to decline within a community, it is not always clear whether TRI-fueled public pressure drove the change or some other factor. Some NGOs have argued that the TRI program tends to overstate actual emissions reductions due to changing reporting protocols and company-level emissions-inventory accounting practices that result in “paper” emissions reductions.²⁴ Finally, since TRI measures emissions for only 600 or so substances, since even those chemicals are subject to a variety of reporting thresholds, it is possible that even if TRI-reported emissions drop, companies may simply be shifting their emission profile toward substances not currently listed on the inventory—shifts that may or may not result in improved air quality within the surrounding community.²⁵

Even so, it is hard to argue that EPCRA’s TRI has not been valuable as an information and risk-management tool for communities hosting industrial operations. TRI reports provide information on the quantity, form, and fate of TRI chemicals released within a community, pro-

viding concrete information residents (and officials) can use in assessing potential exposure scenarios within their community and, hence, risks associated with local operations.²⁶ While consumers may not be able to control the actions of the facility directly, they can certainly exercise their voting powers to influence the regulatory environment the facility operates in and their economic power to influence the market environment the company must compete in.

C. Consumer Right-to-Know

While rarely perceived as a right-to-know statute, the Toxic Substances Control Act (TSCA) was one of the earliest examples of federal environmental legislation recognizing the use of information disclosure as a risk management tool.²⁷ Section 6 of TSCA, establishing federal authority to manage unreasonable risks from chemicals and chemical substances, identified a range of regulatory tools available to EPA in order to “protect adequately against such risk using the least burdensome requirements.”²⁸ Critics often cite EPA’s failure to ban more than a handful of substances during the 30 years of TSCA as evidence of the law’s inadequacy as a risk management tool.

Yet, such criticisms presume that chemical-wide, hazard-based bans are the only way to prevent unreasonable risk to human health and the environment, and the only way to measure the success or potential of a statute. This presumption is misguided. TSCA was designed as a risk management statute, not a hazard elimination statute. With the hindsight of 36 years of TSCA implementation, it remains unclear why federal policymakers should presume that regulatory bans should be the only, or even the primary tool for measuring the act’s potential. TSCA granted EPA a broader range of risk management tools. From a right-to-know perspective, TSCA allows EPA to:

- require that a substance, mixture, or article “be marked with or accompanied by clear and adequate warnings and instructions with respect to its use, distribution in commerce, or disposal or with respect to any combination of such activities”;
- require manufacturers or processors of substances or mixtures “to give notice of such unreasonable risk of injury to distributors in commerce [and] other persons in possession of such substance or mixture or exposed to such substance or mixture”; and
- require manufacturers or processors of substances or mixtures to “give public notice of such risk of injury.”²⁹

Unfortunately, EPA largely abandoned its Section 6(a) regulatory authority following the Fifth Circuit’s seminal *Corrosion Proof Fittings* decision vacating EPA’s sweeping asbestos ban in 1991.³⁰ The Court iden-

²³ See, e.g., Bui, L. et al., *The Impact of Voluntary Initiatives and Quasi-Regulatory Mechanisms on Polluting Behavior: Evidence from Pollution Prevention Programs and Toxic Releases* (July 2011) (“To date, there is little convincing evidence on the effectiveness of either voluntary environmental initiatives or ‘quasi-regulatory’ mechanisms”), available at <http://eccc.ubc.ca/2011/papers/EECC-2011-Bui.pdf>; Bui, L., *Public Disclosure of Private Information as a Tool for Regulating Environmental Emissions: Firm-Level Responses By Petroleum Refineries to the Toxics Release Inventory*, CES 05-13 (October 2005).

²⁴ See, e.g., Center for Public Integrity, *EPA’s Toxics Release Inventory doesn’t offer full picture of pollution*, (Jan. 9, 2010), available at <http://www.publicintegrity.org/2012/01/09/7836/epas-toxics-release-inventory-doesnt-offer-full-picture-pollution>.

²⁵ Lori Snyder Benneer, *The Effect of Reporting Thresholds on the Validity of TRI Data as Measures of Environmental Performance: Evidence from Massachusetts*, Duke University (2005).

²⁶ See EPA, *TRI Information*, available at <http://www.epa.gov/tri/tridata/index.html> (last visited August 24, 2012).

²⁷ In the food and drug context, information disclosure, in the form of mandatory product labeling for certain types of foods and drugs, had been in use for decades. Similarly, federal pesticide law had required product labeling and warning statements for toxic pesticides.

²⁸ 15 U.S.C. § 2605 (1976).

²⁹ *Id.*

³⁰ *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 33 ERC 1961 (5th Cir. 1991). Notably, the current Administration has

tified a variety of procedural and substantive reasons for its holding, ranging from EPA's failure to provide adequate notice of certain key data and analytical methodologies, EPA's failure to properly analyze the availability and safety of asbestos alternatives, EPA failure to consider risk management options short of bans, and failure to apply sufficiently rigorous cost benefit analysis to its various regulatory options.³¹ TSCA detractors argue that the case illustrated, or at least ensured, that TSCA's Section 6 authority would be a toothless tiger, insufficient to support bans to even the most notorious and dangerous substances.³²

If *Corrosion Proof Fittings* offered one lesson, it was that EPA needed to consider TSCA as more than just a vehicle for chemical and product bans. Indeed, in explaining its decision to vacate large portions of the asbestos ban, the Court specifically cited EPA's failure to consider less burdensome risk management options like labeling and workplace regulation—options that could have leveraged the same right-to-know principles commonly supported by consumer advocates critical of TSCA.³³

EPA took a different lesson from *Corrosion Proof Fittings* and, in the years following the decision, largely ignored its Section 6 existing chemical regulatory authority, relying instead on provisions of the act targeting new chemical and new use regulations and shifting the emphasis of its existing chemical program from rule-making to voluntary efforts. This change in strategy, adopted by subsequent administrations for reasons from political ideology to resource limitations, effec-

signaled its interest in revisiting its Section 6(a) authority, but it is too early to tell how, and how aggressively, EPA will do so in practice. See, e.g., Pat Rizutto, *Official Says EPA Prepared in 'Near Future to Use TSCA Authority to Restrict Chemicals* (110 DEN A-13, 6/8/12).

³¹ *Id.* at 1212.

³² See, e.g., *Testimony of Lisa Heinzerling, Professor of Law Georgetown University Law Center, Before the Subcommittee on Environment and Hazardous Materials of the Committee on Energy and Commerce, U.S. House of Representatives, Hearing on POPs, PIC, and LRTAP: The Role of the U.S. in Draft Legislation to Implement These International Conventions* (July 13, 2004) (“The first and only judicial interpretation of EPA’s authority to ban a substance under section 6(a) so limited EPA’s authority under this provision that Section 6 has not played a significant role in limiting toxic chemicals in this country.”); *Statement of Richard A. Denison, Ph.D., Senior Scientist, Environmental Defense Fund Before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection, Hearing on Revisiting the Toxic Substances Control Act of 1976* (Feb. 26, 2009) (noting that “EPA has managed to ban only one group of chemicals” under TSCA and to impose partial restrictions on four others).

³³ *Corrosion Proof Fittings* at 947 F.2d at 1215 (“In this case, the EPA banned, for all practical purposes, all present and future uses of asbestos—a position the petitioners characterize as the ‘death penalty alternative,’ as this is the most burdensome of all possible alternatives listed as open to the EPA under TSCA. TSCA not only provides the EPA with a list of alternative actions, but also provides those alternatives in order of how burdensome they are. The regulations thus provide for EPA regulation ranging from labeling the least toxic chemicals to limiting the total amount of chemicals an industry may use. Total bans head the list as the most burdensome regulatory option.”); *id.* at 1228 (citing “TSCA’s requirement that the EPA always choose the least burdensome alternative, whether it be workplace regulation, labeling, or only a partial ban”).

tively squelched any right-to-know legacy TSCA might have created.

While TSCA’s legacy as a consumer right-to-know tool has gone unfulfilled, state laws have stepped into the breach, with California serving as a leader in this effort. In 1986, California voters enacted a voter initiative known as Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986 (hereinafter, “Prop 65”).³⁴ Prop 65 requires state regulators to publish, maintain, and update a list of chemicals “known” to cause cancer or birth defects or other reproductive harm.³⁵ If a California business uses a listed chemical in the work or marketplace, or distribute products containing the listed chemical above a *de minimis* threshold, the business must take steps to provide “clear and reasonable warnings” for exposures to listed chemicals.³⁶

Although the trigger for a Prop 65 listing is devoid of risk consideration, the mandatory warning, placed prominently on labeling or at point of sale, leaves consumers with little room for doubt. A typical Prop 65 message, prominently displayed through product labeling, shelf labeling, signs, menus, or some combination thereof, will state: “WARNING: This product contains a chemical known to the State of California to cause [cancer/reproductive toxicity].”³⁷

California’s Prop 65 program contains a variety of enforcement mechanisms, including \$2,500 per day fines, injunctive authority, and a third-party civil suit provision, but an important non-regulatory impact of the program has been its ability to stigmatize large numbers of substances for use in consumer products nationwide.³⁸ While Prop 65 only applies to products and establishments within the State of California, the State’s immense market power in the national economy, combined with the difficulty manufacturers face in developing state-specific product labeling, has given Prop 65 a national footprint with respect to product labeling. The associated compliance burden, combined with the potential stigma and market impact of the required warning requirements creates a powerful incentive to manufacturers and businesses to eliminate Prop 65-listed substances from products and public establishments.³⁹

Prop 65 was the first, but hardly the last, state program to use public “chemical of concern” lists, product labeling requirements, and other disclosure requirements to incentivize deselection of disfavored substances. California is currently implementing a new “Safer Consumer Products” regulation that, as last proposed, would establish a list of 1200 “chemicals of concern,” and then identify more specific chemical/product combinations deemed to require more aggressive in-

³⁴ Cal. Health & Safety (“H & S”) Code § 25249.5 *et seq.*; 27 Cal. Code Reg. § 25102 *et seq.*

³⁵ *Id.*

³⁶ H&S Code at § 25249.6.

³⁷ See Cal Code Reg. § 25603 (Consumer Products Warnings); see also California EPA, Office of Environmental Health Hazard Assessment (OEHHA), *Proposition 65 in Plain Language!* (Oct. 2010), available at <http://oehha.ca.gov/prop65/background/p65plain.html>.

³⁸ H & S Code §§ 25249.7, 25249.12.

³⁹ See, e.g., Carl Cranor, *Information Generation and Use Under Proposition 65: Model Provisions for Other Postmarket Laws*, *Indiana Law Journal*: Vol. 83: Iss. 2, Article 7 (2008). Available at: <http://www.repository.law.indiana.edu/ilj/vol83/iss2/7>.

dustry efforts to develop alternatives.⁴⁰ States like Massachusetts, Washington, Maine, and Michigan have all developed their own lists of target chemicals, triggering the need for follow-up action ranging from labeling and disclosure to alternatives assessment. According to Safer States, a national NGO favoring TSCA reform, “[a]t least 13 states, including Alaska, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New York, New Jersey, Oregon, Vermont, and Washington will consider policies to identify and ultimately reduce exposures to chemicals of concern, including prioritizing chemicals for state action and requiring manufacturers of consumer products to disclose the chemicals in their products.”⁴¹

Right-to-Know’s Legacy Through 2012

The principle of right-to-know has flourished over the last 30 years, facilitated by technological advances like the Internet, World Wide Web, and online social networking, and fueled by aggressive efforts from environmental and consumer NGOs to raise public awareness about chemical hazards in contemporary society. Occupational right-to-know programs like OSHA’s GHS update provide businesses and workers with hazard, exposure prevention, and emergency response information that increases their ability to take health and safety precautions in the work place. Community right-to-know programs like the Federal TRI (and state analogues), provide centrally accessible data on facility-specific use, release, and disposal of hazardous materials, giving government officials, residents, voters, and consumers information they can use to assess potential exposure risks from day-to-day operations and emergency events, develop personal or community risk management strategies, and impose pressure on manufacturers to reduce potential risks from operations and end-use products. In these areas, increasing public access to chemical and environmental information is providing concrete improvements to the protection of public health and the environment.

The legacy for consumer right-to-know programs is less clear. While occupational and community right-to-know programs provide their audiences with information relevant to assessing and managing potential risks, consumer right-to-know programs like Prop 65 tend to encourage “risk perception” rather than “risk prevention.” Because of the inherent data limitations and the limited space available to regulators and businesses to communicate nuanced issues of risk in the marketplace, most consumer right-to-know programs focus on theoretical “hazards” associated with a product rather than any balanced assessment of exposure or risk. Prop 65 and other state disclosure requirements may be suc-

cessful at bringing attention and stigma to certain chemicals in products, but the actual health and environmental benefit of these programs is less clear.⁴²

When a program notifies the public about the potential presence of a substance in a product or establishment, but provides little context as to the nature of the hazard, the likelihood and magnitude of any potential exposure, or the resulting level of risk, what does the public do with that information? Having no way to actively “manage” or mitigate any perceived risk associated with a targeted product or store, the presumptive reaction is to boycott it. Yet, given the low threshold quantity of listed chemicals typically required to trigger mandatory warnings, there is little evidence that product substitution or store boycotts will provide any material health benefit to the consumer. Conversely, a consumer’s decision to select an alternative product may have very concrete negative impacts on the consumer’s welfare, in terms of higher product or service cost, reduced performance, greater inconvenience, or, in the worst case, substitution of one negligible (but disclosed) hazard for a more material (but undisclosed) one. See, e.g., *Corrosion Proof Fittings* at 947 F.2d 1221 (requiring, in the presence of evidence showing the toxicity of workplace substitutes, or the decreased effectiveness of safety alternatives, that EPA “consider whether its regulations are even increasing workplace safety, and whether the increased risk occasioned by dangerous substitutes makes the proposed regulation no longer reasonable.”) Preventing such “regrettable substitutions” should be a focal point of any chemical control regime.

Once again, the facts in the 1991 *Corrosion Proof Fittings* case illustrate of the complexities regulators (and consumers) face in making risk-based product selections. At the time of that decision, the automotive industry had successfully developed, tested, and commercialized modified brake system technologies allowing the use of non-asbestos brake pads and drums in new cars coming off of the assembly line.⁴³ For older cars originally built to accommodate asbestos-lined brakes, however, the materials and technology needed to retrofit asbestos-brake systems with non-asbestos alternatives were less developed, with some data suggesting that the alternatives merely traded one carcinogen for another, and that drivers using non-asbestos replacement brakes might face higher risks of accidents due to poorer braking performance.⁴⁴ When EPA ignored these differences and adopted an across-the-board phase out of asbestos in all braking systems, the Court objected, stating:

[O]nce interested parties introduce credible studies and evidence showing the toxicity of workplace substitutes, or the decreased effectiveness of safety alternatives such as non-asbestos brakes, [EPA had a duty to] consider whether its regulations are even increasing workplace safety, and whether the increased risk occasioned by dangerous substitutes makes the proposed regulation no longer reasonable. . . . In short, a death is a death, whether occasioned by asbestos or by a toxic

⁴⁰ California DTSC, Text of Proposed Regulations, Title 22, C.C.R. Sections 69501 through 69599, Chapter 55, Safer Consumer Products (April 10, 2013). While the stated goal of the regulatory scheme is to require alternative assessments substance/product combinations of concern, California has acknowledged that resource limitations will limit its scrutiny to just a handful of substance and use combinations, leaving most chemicals and uses under the ambiguous label of “candidate chemical.”

⁴¹ See Safer States, *28 States to Consider Toxic Chemicals Legislation in 2012* (Jan. 25, 2012), available at <http://www.saferstates.com/2012/01/safer-states-2012-legislation.html>. See also 17 DEN A-2, 1/25/13.

⁴² See, e.g., Daland R. Juberg, Ph.D., *California’s Proposition 65 and Its Impact on Public Health*, American Council on Science and Health (2000), available at <http://www.acsh.org/publications/californias-proposition-65-and-its-impact-on-public-health/>.

⁴³ *Corrosion Proof Fittings*, 947 F.2d 1201.

⁴⁴ *Id.* at 1220.

substitute product, and the EPA's decision not to evaluate the toxicity of known carcinogenic substitutes is not a reasonable action under TSCA.⁴⁵

Consumers have no less a need for contextual information when evaluating mandatory disclosure provisions on a product. State-mandated ingredient disclosure requirements and warnings offer consumers little context as to the nature or magnitude of a product's risk, the product's risk relative to the next best alternative, or the steps a consumer can take to manage any risk. The consumer is left with a false choice: trust the product manufacturer or trust the government. Since neither choice is tied to product risk, the net loser is consumer confidence in the system at large.

From Evolution to Revolution?

Such was the state of consumer right-to-know policy going through mid-May 2013. Who would have guessed that as this article went to print, a bipartisan group of senators would initiate what could be the most significant development in right-to-know policy in decades?

On May 22, 2013, Senator Frank Lautenberg (D-N.J.) and David Vitter (R-La.) introduced a bipartisan bill to modernize TSCA, breaking the policy and political impasse that had prevented meaningful bipartisan efforts to reform TSCA since its enactment in 1976.⁴⁶ While the details and the political prospects for the 127-page bill are beyond the scope of this article, several aspects of the new bill deserve note in the context of their potential impact on right-to-know policy.

First, the new bill retains but refines TSCA's long-held "unreasonable risk" safety standard, tying it directly to exposure under the intended conditions of use, and giving special consideration to vulnerable subpopulations.⁴⁷ By focusing the safety determination process on specific uses and specific exposure scenarios, the re-

⁴⁵ *Id.* at 1221.

⁴⁶ See, e.g., Press Release: Senators Lautenberg and Vitter Reach Groundbreaking Agreement to Reform Nation's Chemical Laws (May 22, 2013) (providing a link to the *Chemical Safety Improvement Act* bill ("May 22 CSIA"), available at: <http://www.lautenberg.senate.gov/newsroom/record.cfm?id=342861>). See also 100 DEN A-1, 5/23/13.

⁴⁷ See, e.g., May 22 CSIA bill at 9 ("The term 'safety determination' means a determination by the Administrator as to whether a chemical substance meets the safety standard under the intended conditions of use." (emphasis added)); *id.* ("The term 'safety standard' means a standard that ensures that no unreasonable risk of harm to human health or the environment will result from exposure to a chemical substance." (emphasis added)); *id.* at 62-63 (requiring a safety assessment to

vised statute could help redirect federal regulatory efforts toward more tailored risk management methods like use-specific labeling requirements intended to inform users of appropriate risk management efforts. Second, while the legislation identifies numerous regulatory tools available to EPA in managing the use-specific risks of a substance, the statute gives EPA's right-to-know authority the highest visibility, listing mandatory product warnings and instructions as the first, if not the preferred option.⁴⁸ Notably, the bill relegates unqualified "unreasonable risk" warnings—of the type common under state-level regulatory programs—to the end of the list.⁴⁹

Of course, even with bipartisan support in the Senate, there is no guarantee that the newly proposed Chemical Safety Improvement Act (CSIA) will gain traction in this Congress. The political division in the House is unprecedented, preventing even the most basic governmental functions like setting a budget. Still, the mere fact that policymakers in both parties appear to be moving back toward a "risk management" model of chemical control policy is encouraging, especially as applied in the right-to-know context.

In the meantime, states will continue to impose hazard-based "risk-perception" warnings under the mantle of consumer right-to-know, regardless of whether the information helps consumers make safer or smarter decisions. In turn, advocates for risk-based policies will continue to question what "right" and what "knowledge" such risk perception disclosure requirements are protecting.

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consider: "(I) exposures or significant subsets of exposures, (II) exposure duration intensity, frequency, and number; and (III) the vulnerability of exposed subpopulations").

⁴⁸ *Id.* at 68 ("A restriction . . . may include, as appropriate—(i) a requirement that a chemical substance be marked with, or accompanied by, clear and adequate warnings and instructions with respect to use, distribution in commerce, or disposal, or any combination of those activities.")

⁴⁹ *Id.* at 70.