

REGULATION OF EXISTING CHEMICALS AND THE
ROLE OF PREEMPTION UNDER SECTIONS 6
AND 18 OF THE TOXIC SUBSTANCES CONTROL
ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON ENVIRONMENT AND THE
ECONOMY
OF THE
COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES
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REGULATION OF EXISTING CHEMICALS AND THE ROLE OF PREEMPTION UNDER SEC- TIONS 6 AND 18 OF THE TOXIC SUB- STANCES CONTROL ACT

WEDNESDAY, SEPTEMBER 18, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 2:05 p.m., in room 2123 of the Rayburn House Office Building, Hon. John Shimkus (chairman of the subcommittee) presiding.

Members present: Representatives Shimkus, Murphy, Latta, Harper, McKinley, Bilirakis, Johnson, Tonko, Pallone, Green, DeGette, McNerney, Schakowsky, Barrow, and Waxman (ex officio).

Staff present: Nick Abraham, Legislative Clerk; Jerry Couri, Senior Environmental Policy Advisor; David McCarthy, Chief Counsel, Environment and the Economy; Andrew Powaleny, Deputy Press Secretary; Chris Sarley, Policy Coordinator, Environment and the Economy; Jacqueline Cohen, Democratic Senior Counsel; Greg Dotson, Democratic Staff Director, Energy and Environment; and Kara van Stralen, Democratic Policy Analyst.

OPENING STATEMENT OF HON. JOHN SHIMKUS, A REP- RESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. SHIMKUS. I call this subcommittee hearing to order, and I want to thank you all for coming. I ask unanimous consent that all members of the subcommittee have 5 days to submit their opening statements for the record, and I recognize myself for 5 minutes.

Today's hearing continues the subcommittee's examination of the Toxic Substances Control Act, including statutory provisions, regulatory implementation, and practical outcomes. On June 13, our subcommittee held a hearing on the history and impact of Title I of TSCA. On July 11, the subcommittee explored regulation of chemicals before they enter commerce, under TSCA Section 5, and protection of sensitive business information, under TSCA Section 14. I believe these hearings have helped us understand a law as complex as it is broad.

Our focus now is on regulation of chemicals once they are in commerce, under TSCA Section 6, and the role of Federal pre-emption, under TSCA Section 18.

These two sections of TSCA have been subject to a great deal of discussion. Notwithstanding the testimony of three of our witnesses

at the July 11 hearing that TSCA Section 5 is doing a fine job reviewing and, if necessary, limiting the use of new chemicals, some argue that TSCA is broken and because TSCA Section 6 has not produced more bans or other limits on chemicals. Others, including some on our panel today, suggest that concern is overstated.

EPA has been more active issuing regulations on TSCA Section 5 new chemicals than it has been on TSCA Section 6 ones, but it has issued regulations under Section 6. Charlie Auer, who testified in our June 13 hearing stated that TSCA Section 6 “had surprising early success in efforts between 1978 and 1980.” The question is, What has changed?

Today we explore just what TSCA Section 6 asks EPA, including what “unreasonable risk” is and whether this is a novel concept under Federal law. We will also examine requirements in the law regarding the application of “least burdensome” regulations. We will study the role of risk assessment and cost-benefit analysis, how and whether it is done, and what role it plays in the final rule-making decision.

Understanding Section 6 and its link to the pre-emption provisions in TSCA Section 18 is also important. If EPA has taken action to test a chemical or regulate a new existing chemical in commerce, TSCA forecloses State action unless the State or locality meets one of four criteria. In many areas the States should handle local pollution issues, because they have a wealth of experience and capability to do so. But chemical regulation is not an area where States have traditionally taken a lead role because of the impacts on interstate commerce.

In our June TSCA hearing, witness Beth Bosley said TSCA is a law about products, not pollution. TSCA vests EPA with authority to regulate risks to humans and the environment from chemicals that are not otherwise covered by some more targeted statute. TSCA is about making interstate commerce in chemicals work for all of us.

I thank all our witnesses for appearing today, and look forward to their insights about the appropriate roles of the parties and the uniqueness of TSCA in this respect. I urge members to take today’s opportunity to learn the fundamentals of these Sections of the law.

And now I want to thank the panel. Once I get through with our opening statements, I will then do the introductions of each one of you. We do appreciate you being here. There is kind of an excitement of trying to address a 30-year-old law that we haven’t really revisited in many years. I spent a lot of time during the break talking to various diverse groups of interested parties, so I think it is an exciting time and it really reinforces the need to at least have these hearings, become more educated, learn from you all, and see if we can move to bring a very old law kind of up to date.

[The prepared statement of Mr. Shimkus follows:]

PREPARED STATEMENT OF HON. JOHN SHIMKUS

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Today we explore just what TSCA section 6 asks of EPA, including what “unreasonable risk” is and whether this is a novel concept in Federal law. We will also examine requirements in the law regarding the application of “least burdensome” regulations. We will study the role of risk assessment and cost-benefit analysis, how and whether it is done, and what role it plays in any final rulemaking decision.

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TSCA is about making interstate commerce in chemicals work for all of us. I thank all our witnesses for appearing today, and look forward to their insights about the appropriate roles of the parties and the uniqueness of TSCA in this respect. I urge members to take today’s opportunity to learn the fundamentals of these sections of this law.

Mr. SHIMKUS. With that, I would recognize the ranking member from New York, Mr. Tonko, for 5 minutes.

OPENING STATEMENT OF HON. PAUL TONKO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. TONKO. Thank you, Mr. Chair, and good afternoon. Thank you, Chair Shimkus, for holding this important hearing. Thank you to the members of our panel for participating and sharing information. I am especially pleased to have Mr. Srolovic from the New York State Attorney General’s Office here with us today. As one who served in the New York State Assembly for 25 years, we work closely with the agency, so it is good to have you here.

This afternoon, we will hear from witnesses on Section 6, the regulation of hazardous chemical substances and mixtures, and on Section 18, preemption. As I observed in previous hearings, and as we have heard from previous witnesses, the Toxic Substances Control Act has not worked well. We have too little information about many of the chemicals we encounter every day. Even when it becomes common knowledge that a chemical is harmful, the Environmental Protection Agency does not have sufficient authority to restrict or ban that chemical from the market.

Under the current law, individual States retain sufficient authority to act independently on behalf of their citizens. Although some States’ actions are not permissible under Section 18 of the current

law, it has been possible for States like New York to take action to restrict or ban harmful chemicals. In the absence of Federal actions, States have filled the void. States have used their authorities to protect the public when chemicals are found to indeed cause harm.

While it is good to know that State governments are watching out for their citizens, the Federal Government should be an active participant in this effort and be providing a uniform level of protection for all citizens. The major failings with current law have little to do with the provisions that define the relationship between Federal and State action on toxic chemicals. They stem from the lack of a strong safety standard to protect the public and our environment. Section 6 of TSCA does not provide EPA with the tools needed to ensure that chemicals in commerce are safe.

I am sure we will hear more about Section 6 and its failings from some of our witnesses today. Chemicals that are harmful should be removed from the market and make way for safer alternatives. Revision of this law is long overdue. I hope we will be able to make changes that will provide the assurances of safety desired by the public and the incentive for innovation and regulatory certainty needed by industry.

Thank you again, Mr. Chair, for holding this important hearing. We have another fine group of witnesses on this panel this afternoon, and I thank you all for participating in this hearing. I look forward to hearing your testimony, and with that, I yield back.

Mr. SHIMKUS. Gentleman yields back his time. The chair seeks anyone on the Majority side for an opening statement. Seeing none, chair looks to the Minority side. Seeing no member interested in an opening statement, we will turn to you all.

I just hearken back to my opening statement and trying to sort out the different sections and what they are doing and why they are doing, which reemphasizes the fact that why we invited you here, to help us try to make sense of all these provisions and where they work and where there may be questions about perfecting aspects of the law.

So let me welcome you all here. The first one we will recognize for 5 minutes, Mr. Mark A. Greenwood, who is the principal with Greenwood Environmental Counsel in Washington, DC. Sir, your full statement is in the record. You are recognized for 5 minutes for an opening statement. We won't be—we will be very patient on the time unless you go extraordinarily long and then we will have—we will start gaveling. So you are recognized for 5 minutes.

STATEMENTS OF MARK A. GREENWOOD, PRINCIPAL, GREENWOOD ENVIRONMENTAL COUNSEL, PLLC; WILLIAM K. RAWSON, PARTNER AND CHAIR, CHEMICAL REGULATIONS, PRODUCT STRATEGY AND DEFENSE PRACTICE, LATHAM & WATKINS, LLP; JENNIFER THOMAS, DIRECTOR, FEDERAL GOVERNMENT AFFAIRS, ALLIANCE OF AUTOMOBILE MANUFACTURERS; JUSTIN JOHNSON, DEPUTY SECRETARY, VERMONT AGENCY FOR NATURAL RESOURCES, ON BEHALF OF THE ENVIRONMENTAL COUNCIL OF THE STATES; LEMUEL M. SROLOVIC, CHIEF, ENVIRONMENTAL PROTECTION BUREAU, OFFICE OF NEW YORK STATE ATTORNEY GENERAL; AND LINDA REINSTEIN, PRESIDENT/CEO AND CO-FOUNDER, ASBESTOS DISEASE AWARENESS ORGANIZATION

STATEMENT OF MARK A. GREENWOOD

Mr. GREENWOOD. Chairman Shimkus, Ranking Member Tonko, and members of the committee, thank you for the opportunity to testify here today. My name is Mark Greenwood, I am an environmental lawyer, and I have the dubious pleasure of saying I have worked on TSCA for 25 years. Now that is a long time. Some of it was in private practice where I advised clients on many issues, but it also was during my time at EPA. I was the Associate General Counsel for Pollution Prevention and Toxics, and I was in pesticides. I was also Director of the Office of Pollution Prevention and Toxics as well. This is the part of EPA that actually regulates under TSCA.

I am going to be addressing Section 6 in my comments here today. Obviously that is a very important section. It is the section under which the Agency does regulate existing chemicals. But I think as you alluded to, Mr. Chairman, it is also important politically because when people say that TSCA is a broken statute, they tend to refer to Section 6. And so it is all the more important to understand how it has worked and the structure of the law.

I am going to talk about three general issues that are within Section 6, the first being the unreasonable risk standard, which is the basic guideline for regulation. Under Section 6C, what that means is EPA has to weigh four factors: the health and environmental risk of substances, the benefits of those substances, the availability of alternatives, which also includes their risks, and the reasonable and ascertainable economic consequences of the rule. I think it is important to recognize up front that this is not a standard that is unique to TSCA. In fact, if you look across Federal law, you will find that a vast majority of the laws that regulate products in commerce include either the unreasonable risk standard per se, or a set of factors that essentially replicate the factors I just mentioned.

Certain aspects of this standard are really not that controversial. Everybody, of course, assumes we want to look at environmental risks and health risks. The alternatives are also a very important consideration, because it tends to determine whether any change would be a significant technological change for industry, and the risks associated with those is an extremely important consideration, because if you take an action against one chemical that pushes people into another chemical that is more risky, of course, that was not a good result.

There is an area of, I think, controversy which primarily comes up in the area of how to consider the benefits of a product and the cost issues. Now what that very quickly tends to go to is the issue of cost benefit analysis. TSCA does not require cost benefit analysis, but it is a framework in which that certainly would be allowed. One of the things I think is important for you to consider as you think about how this Act would work is recognize that for over 30 years, the Executive Branch has pursued various executive orders on regulation that require cost benefit analysis. So that is part of the framework in which EPA and other agencies will be working. And so I think for your purposes, it is really important to think about your view of cost benefit analysis when you are trying to decide whether this unreasonable risk standard makes sense.

Now the second area I would like to talk about is something called the least burdensome alternative. Basically Section 6 says EPA shall regulate, but it must try to find the least burdensome alternative in its regulatory strategy. Now as a general matter, Federal agencies probably think this is fairly reasonable. In my corner, this would be called smarter regulation. You want to try to find a way of achieving your environmental objective, your health objective without having major disruption in the economy and in the society, if you can. That is a worthy goal. It makes sense. I think most people agree with it.

Now, this is the one area that I would focus on where I would say that the decision corrosion-proof fitting, which is the decision related to asbestos, did some damage to what EPA can do, because essentially the corrosion-proof fitting case says that in order to meet this standard of least burdensome alternative, it is up to EPA to look at essentially each alternative that could possibly be less burdensome than the alternative they are considering. Now, that is a much bigger job than EPA and other agencies generally do, and it is broader than the obligations under the executive order. So this is becoming, I think, a very serious issue for consideration. I can absolutely tell you when we first looked at the corrosion-proof fitting decision at EPA, this was the issue that stuck in everybody's mind because it looked to us like it could be a process of what we call paralysis by analysis, which we would have to be looking at many, many options doing many and many cost benefit analyses on each one and there was a deep concern. So again, I think this is one of those key issues that you want to think about and ask the question, here we have a very broad principle of least burdensome alternative that makes sense to many people. Now the question is in implementation, how can you run something like that so it does not create unreasonable analytical obligations for an agency who needs to act.

A third topic I will just mention briefly is the procedures that are in Section 6. Now as you are probably aware, most Federal agencies do rulemaking through notice and comment rulemaking. That procedure is required under Section 6, but there is an additional set of requirements in Section 6 which would call for a legislative hearing, something like an event like this where EPA people ask questions of people who are participating, but also an opportunity for cross examination, which creates a sort of trial type of pro-

ceeding inside the rulemaking. Now, there is not a lot of history on this one. It was really only used once, which was in the asbestos rule. I participated in that particular proceeding. I will say that there was probably a bit more heat than light in that proceeding, and I am not sure how valuable it was. But I think this is the kind of issue that you want to think about, whether or not the procedures that are there add value and are warranted.

So with that, I thank you again for having the chance to testify, and I look forward to your questions.

[The prepared statement of Mr. Greenwood follows:]

**Testimony of Mark Greenwood
Before the U.S. House of Representatives Energy and Commerce
Subcommittee on Environment and the Economy**

**Hearing on
“Regulation of Existing Chemicals and the Role of Preemption
under Sections 6 and 18 of the Toxic Substances Control Act”**

September 18, 2013

Chairman Shimkus, Ranking Member Tonko and members of the Committee, I thank you for the invitation to testify today on the implementation of Section 6 of the Toxic Substances Control Act (“TSCA”), the principal legal authority under which the U.S. Environmental Protection Agency (“EPA”) is authorized to regulate existing chemicals in commerce.

My name is Mark Greenwood. I am an attorney practicing environmental law through my firm Greenwood Environmental Counsel. I am appearing here today to offer my personal views on the implementation of TSCA, and do not represent the interests or views of any particular client. My comments are informed by my experience in private practice as well as my experience at EPA. From 1988 to 1990 I was Associate General Counsel for Pesticides and Toxic Substances, and from 1990 to 1994 I served as Director of the Office of Pollution Prevention and Toxics (“OPPT”). In these roles I was directly involved in EPA’s efforts to address the risks of existing chemicals, including the challenges presented by EPA’s asbestos ban and phase-out rule, the litigation surrounding

that rule and the program aftermath when the rule was vacated by the U.S. Court of Appeals for the Fifth Circuit.

My testimony will focus on the key elements of Section 6 that commenters on TSCA often cite when arguing that the EPA existing chemical program has failed to achieve its intended objectives. My goal is to provide members of the committee with contextual information surrounding the regulation of existing chemicals under TSCA that I hope will assist your evaluation of this subject.

Overview of EPA Experience with TSCA Section 6

When TSCA was originally enacted in 1976, the statute was viewed by many people in EPA and outside the Agency as the cutting edge of environmental law. In 1971 the Nixon Administration submitted the first version of the Toxic Substances Control Act to Congress. In support of the legislation, the Council on Environmental Quality submitted a report indicating that this bill was intended to provide a “New System” for addressing the environmental challenges of the time that would not be limited by the jurisdictional limits of media-specific statutes for air and water pollution or of statutes that only looked at certain materials, such as pesticides. This new system would allow EPA to address health and environmental risk in an integrated and comprehensive way. Regarding the regulation of existing chemicals, the CEQ report characterized the new role for EPA as follows:

The Administrator of the Environmental Protection Agency would be empowered to restrict or prohibit the use or distribution of a chemical substance if such restriction were necessary to protect health or the environment. In imposing such

a restriction, the Administrator would be required to consider not only the adverse effects of the substance but also the benefits to be derived from its use.¹

While the legislation proposed by the Nixon Administration was modified, in some cases significantly, before the enactment of TSCA in 1976, the perspective reflected in this statement was carried forth as an expectation for how EPA would be using its Section 6 authority to address existing chemicals.

EPA did not, however, move ahead quickly to use Section 6 on specific existing chemicals. Many explanations have been offered for the slow implementation of the TSCA existing chemical program but several factors are particularly worth noting. First, once TSCA was enacted EPA had a pressing responsibility to create the TSCA Inventory and then establish the framework for the new chemical program. Since chemical manufacturers had immediate statutory responsibilities in this area, it was important to give priority to clarifying those responsibilities. Second, the first major existing chemical challenge for the Agency involved creating the regulatory structure for the ban on polychlorinated biphenyls ("PCBs") that was mandated under Section 6(e) of the statute. This effort required a variety of complicated rulemakings addressing precedential issues for EPA on how it would regulate hazardous substances in commerce and provide for their safe disposal.

Third, EPA was also challenged by the broad mandate, with no specific agenda, that Congress had provided in TSCA. After the statute was passed, there were substantial internal debates within EPA about the relative importance of, and thus resource allocation

¹ U.S. Council on Environmental Quality, "Toxic Substances" (April 1971), p. vi.

for, information collection, chemical testing and risk management activities. Given the thousands of chemicals in commerce, EPA was further challenged to determine which chemicals warranted priority action.

EPA reached a conclusion early in the history of TSCA's implementation, however, that asbestos would be a prime target for regulatory action under Section 6. The rulemaking on asbestos began with the issuance of an Advance Notice of Proposed Rulemaking on October 17, 1979. As time passed into the 1980's without EPA initiating Section 6 actions on other chemicals, the asbestos rulemaking took on an importance larger than the issue of asbestos itself. It became the test case of whether Section 6 (and the promise of TSCA itself) could work. The stakes became particularly high as the Agency's regulatory strategy also began to shift from an array of less stringent approaches, such as labeling or limitations of particular uses, to a comprehensive ban and phase-out of all asbestos uses.

The final asbestos ban and phase-out rule was issued on July 12, 1989. It drew legal challenges from multiple parties in U.S. Court of Appeals, Fifth Circuit. The court issued its decision on the various challenges to the rule on October 18, 1991 in *Corrosion-Proof Fittings, et al. v. Environmental Protection Agency*, 947 F.2d 1201 (5th Cir. 1991). The decision represented a complete loss for the Agency, as the court vacated the primary sections of the rule.

With this decision, some stakeholder groups began to characterize TSCA as a “broken” statute. While this characterization was probably an overstatement, the court’s opinion clearly set forth a more restrictive version of EPA’s authority and flexibility under Section 6 than the Agency had assumed TSCA provided. The decision came at a time when OPPT was being given additional responsibilities in the Agency, including expansion of the Toxic Release Inventory and other “right to know” programs, as well as implementation of the Pollution Prevention Act. As Office Director of OPPT during this time, I worked with my staff to develop and pursue a variety of new approaches, both regulatory (e.g., expanded use of TSCA Significant New Use rules) and collaborative (e.g., Design for Environment program), to recast the TSCA program as an effort to improve the management of existing chemicals using a variety of tools, without being dependent on Section 6 as the primary mode of action.

Over the last several years, legislative efforts aimed at reform of TSCA have once again focused on a rewriting of Section 6 as the centerpiece of revitalizing EPA’s existing chemical program. Thus it is useful for the committee to evaluate the current structure of Section 6 to determine its strengths and weaknesses.

Unreasonable Risk Standard

The threshold finding that EPA must make to justify a rule under TSCA Section 6 is that “there is a reasonable basis to conclude that the manufacture², processing, distribution in commerce, use or disposal of a chemical substance or mixture, or that any combination of

² “Manufacture” also includes import of a substance under TSCA.

such activities, presents or will present an unreasonable risk of injury to health or the environment.” Based on this finding, EPA may take a variety of actions, which may include a ban on manufacturing, production restrictions, limitations on use, labeling, controls on disposal, recordkeeping or product recalls.

The essence of the “unreasonable risk” standard is that it requires a weighing of the factors enumerated in Section 6(c), which include the health and environmental risks associated with the substance, the benefits of the substance for various uses, the availability of substitutes, and the “reasonably ascertainable economic consequences of the rule.” TSCA does not require on its face, and the court in the *Corrosion Proof Fitting* case confirmed, that this standard does not necessarily require cost-benefit analysis. However, it certainly would allow EPA to consider the results of a cost-benefit analysis should one be prepared.

While the general standard for regulation of existing chemicals under TSCA is “unreasonable risk”, Congress has amended TSCA several times to require specific actions on certain chemicals. As part of the original statute, Congress directed EPA to phase out the manufacture and use of PCBs. In 1986, Congress amended TSCA to create an EPA program for inspection and management of asbestos in schools. In 1992, Congress added a program to address lead-based paint in residential housing. In 2008, Congress added restrictions on export of elemental mercury. In 2010, Congress required EPA to issue certain standards for composite wood products. In each case, Congress specified differing approaches unique to the particular risk of concern.

Several other federal statutes that address products in commerce have a similar structure. For example, the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), which is the legal framework for pesticide regulation, sets standards based on an unreasonable risk standard for most forms of pesticide exposure, including those affecting consumers in the home, workers or ecological resources. For purposes of pesticide residues in food, however, EPA is required to use a “reasonable certainty of no harm” standard as described under the Food Quality Protection Act. Similarly, the Consumer Product Safety Act’s general standard –setting authorities apply an “unreasonable risk” standard or mandate consideration of a wide range of factors that include a balancing of the costs and benefits of a regulation. At the same time, the law has been amended several times to ban specific chemicals, such as butyl nitrite or phthalates in children’s toys, and to set standards for specific products such as lead in children’s products.

Thus, the committee should be aware that several federal laws regulating industrial technology and products in commerce tend to share a common pattern characterized by a general standard allowing for the weighing of health and environmental risks, the availability of better alternatives, product benefits and overall cost impact, along with targeted restrictions on risks that warrant specific action.

There are certain aspects of the unreasonable risk standard that draw support from many stakeholders. For example, most stakeholders would agree that when EPA considers restricting the uses of a chemical, the Agency should consider whether there are feasible

and practical alternatives that offer net improvements in protection of health and the environment. To do otherwise would run the risk that regulatory action could be counterproductive for health and the environment.

A more controversial topic concerns the role of cost-benefit analysis under the unreasonable risk standard. In this regard, it is useful to consider long-standing regulatory policies that have been pursued by the Executive Branch. At least since the early 1980's the Executive Branch has required federal agencies to conduct cost-benefit analysis on major regulations, to the extent allowed by statute. This approach to regulation was first formalized in the Reagan Administration with the issuance of Executive Order 12291. This Order remained in place for twelve years, to be replaced in 1983 by Executive Order 12866 issued at the beginning of the Clinton Administration. Executive Order 12866 also embraced the cost-benefit principle, stating that a regulation should be adopted "only upon a reasoned determination that the benefits of the intended regulation justify its costs."³ The subsequent Bush and Obama Administrations have retained this element of Executive Order 12866 as the blueprint for their approach to regulation as well.

Thus, when EPA issued its asbestos ban and phase out rule in 1989, it had prepared a detailed cost-benefit analysis of the rule, which the *Corrosion Proof Fittings* cited in its criticism of EPA's decision. This cost-benefit analysis, however, was prepared by EPA because it was a requirement within the Executive Branch, not due to a specific

³ Executive Order 12866, Section 1(b)(6).

obligation in TSCA. What is important to recognize is that such a cost-benefit analysis would have been prepared by EPA under each of the Presidents of the last three decades and would still be required today under Executive Branch policy.

Thus one of the central questions for Congress as it considers reform of TSCA is its perspective on the proper role of cost-benefit analysis in regulatory decisionmaking. The current unreasonable risk standard in Section 6 allows regulatory decisions to be made based on cost-benefit analysis. One of the most important strategic questions in any reform of TSCA is whether the Section 6 standard should be changed to direct the Executive Branch to suspend its long-standing policies favoring cost-benefit analysis when EPA regulates existing chemicals.

Least Burdensome Alternative

Section 6 provides that the regulatory approach selected by EPA to address an unreasonable risk shall “protect adequately against such risk using the least burdensome requirements.” This provision is not inherently a significant constraint on EPA’s authority as agencies routinely examine options that can achieve health and environmental objectives through measures that minimize social and economic disruption. Such an approach is often described as “smarter” regulation.

As with cost-benefit analysis, this principle has also been enshrined in the Executive Branch policies that have guided regulatory policy for decades. As articulated in Executive Order 12866, agencies are expected to assess the costs and benefits of

“potentially effective and reasonably feasible alternatives” to a proposed regulation.⁴

Executive Order 13563, issued in 2011, further refines this mandate by stating “Where relevant, feasible and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.”⁵

This is an area, however, where the *Corrosion Proof Fitting* decision imposed a significant burden on EPA’s ability to utilize Section 6. The court interpreted the “least burdensome alternative” obligation in Section 6 to require EPA to assess each option potentially available that is less burdensome than the option that the Agency intends to pursue. Specifically, the court stated,

Upon an initial showing of product danger, the proper course for the EPA to follow is to consider each regulatory option, beginning with the least burdensome, and the costs and benefits under each option...Without doing this it is impossible, both for the EPA and for this court on review, to know that none of these alternatives was less burdensome than the ban in fact chosen by the agency.⁶

This obligation sets up a task for EPA that goes well beyond the analytical task typically carried out by regulatory agencies under Executive Branch policies and other federal environmental statutes.

⁴ Executive Order 12866, Section 6(a)(3)(C)(iii).

⁵ Executive Order 13563, Section 4.

⁶ *Corrosion Proof Fitting*, at p. 1217.

The general expectation for options analysis in federal regulatory contexts is that agencies must examine a set of major alternatives that are, as articulated by Executive Order 12866, “potentially effective and reasonably feasible.” Instead, the *Corrosion Proof Fitting* court appears to say that EPA must calculate costs and benefits for each alternative, which would essentially mean all alternatives that are arguably less burdensome than the option EPA intends to pursue under TSCA. Given the broad range of potential actions that EPA could take under Section 6, this suggests that EPA would be compelled to undertake an assessment of costs and benefits for a wide array of alternatives, including variations on those alternatives, proposed by opponents of a Section 6 rule in order for the Agency to have an adequate record for the rule.

In my experience as Director of OPPT, it was this aspect of the *Corrosion Proof Fitting* decision that had the most significant chilling effect on the Agency’s willingness to pursue additional Section 6 rules in the wake of the court’s decision. There was a strong concern among EPA lawyers, managers and staff that this part of the decision was a prescription for regulatory gridlock through so-called “paralysis by analysis” in future Section 6 rulemakings. Ironically, EPA viewed this part of the decision as a distortion of a reasonable regulatory principle – looking for “smart” approaches to achieving regulatory goals – that enjoyed broad support in the Agency.

Accordingly, an important issue for the committee to evaluate in its review of Section 6 is to consider the question of how to set a reasonable expectation that EPA should find effective regulatory strategies that minimize economic and social disruption, while at the

same time not imposing an overwhelming analytical burden that would stall necessary action.

Procedural Aspects of Section 6

One of the reasons that TSCA was considered an innovative statute at the time of its enactment was that it constituted a bit of an experiment in administrative law procedures. In the context of the Administrative Procedure Act, most agencies take action either through “adjudication” procedures, which tend to parallel trial-type proceedings in courts, or through “informal rulemaking” procedures, typically understood as notice and comment opportunities for the public. For the most part, EPA acts through informal rulemaking procedures, with the exception of administrative enforcement proceedings and pesticide cancellation and suspension actions.

The procedures set forth in Section 6 of TSCA create a hybrid process, incorporating elements for both informal rulemaking and adjudication. Section 6(c)(2) requires a notice and comment rulemaking process for all rules under the section but also calls for an “opportunity for a public hearing” subject to the procedural requirements of Section 6(c)(3). At this hearing, parties may present oral and documentary submissions and, where there are material facts at issue, cross-examination of witnesses may occur. A transcript of the hearing is created for the record. EPA is allowed to set ground rules for how various parties may be represented and for conduct of the hearing. Under Section 6(c)(4), EPA is allowed to provide compensation for expert witnesses and attorney fees for parties that do not have adequate resources to participate in the hearing.

These procedures for cross-examination of witnesses were invoked during the course of the 10-year asbestos rulemaking. I was involved in the preparation for, and conduct of, the 1988 hearing on the asbestos rule. It was clearly an adversarial proceeding, in which attorneys for the asbestos industry challenged EPA staff witnesses, while Agency lawyers sought to protect these staff witnesses. While these procedures added time to the rulemaking and generated additional documents, they did not, in my view, add new information or uncover new issues that had not already been raised during the multiple rounds of public comment during the rulemaking.

It is worth contrasting these procedures with the kinds of refinements of rulemaking processes that we see more often in current practice. It is much more common today than it was at the time of the asbestos rulemaking to provide an opportunity for peer review of major scientific and technical questions that are central to policy decisions on a rule. In contrast to the Section 6 process, which adds trial-type procedures onto notice and comment rulemaking on the same issues, peer review processes can provide new and valuable insights from credible experts that might not otherwise be part of typical notice and comment processes.

In evaluating Section 6, the committee may want to consider whether the procedural experiments placed in the statute in 1976 continue to have value today, or whether the experience with rulemaking over the last three decades suggests a different approach.

Conclusion

Chairman Shimkus, Ranking Member Tonko and members of the Committee, I thank you again for the opportunity to testify in this hearing. I applaud your efforts to obtain background information on the strengths and weaknesses of TSCA in its current form as a context for consideration of possible statutory reform.

Mr. SHIMKUS. Thank you very much.

Now I would like to recognize Mr. William Rawson, Partner and Chair, Chemical Regulations, Product Strategy, and Defense Practice with Latham and Watkins here in Washington, DC. Sir, you are welcomed. Again, your full statement is in the record. You are recognized for 5 minutes.

STATEMENT OF WILLIAM K. RAWSON

Mr. RAWSON. Thank you, Chairman Shimkus, Ranking Member Tonko, and distinguished members of the committee. Thank you for inviting me to testify today on the subject of the Toxic Substances Control Act. I have practiced environmental law, particularly in the area of TSCA, for 25 years, and have co-authored two TSCA desk books published by the Environmental Law Institute. I am testifying today solely on my own behalf. I do have some preparative remarks, and I will use those to keep me within the time limits.

I do understand that the purpose of the hearing today is not to address specific legislative proposals or to advocate any specific changes, but rather to share perspectives on the current statute, particularly Section 6 and Section 18, and I will address in my remarks both sections.

Starting with Section 6, it is certainly true that there have been a few rulemaking actions undertaken by EPA under that section, and this has contributed to the erosion of public confidence in the statute and the failed asbestos rulemaking. I would urge the committee to take a very close look at the corrosion-proof fittings decision, however, because I think it demonstrates that EPA in that rulemaking had committed procedures in such areas that compelled the court to set portions of the rule aside.

I will address three requirements in Section 6. The first is least burdensome requirement. As Mr. Greenwood has testified, that is, in fact, the way most agencies try to regulate, to engage in smart regulation, meaning impose the requirement that meets the regulatory objective while imposing the least burden. It is quite similar to the language that we see in Executive Order 13563, which directs agencies to identify and use the best and most innovative and least burdensome tools for achieving regulatory ends. The executive order directs each agency to tailor its regulations to impose the least burden on society consistent with obtaining regulatory objectives. So that part of the statute is good policy consistent with what we see in executive orders issued by this and previous administrations.

Secondly, concerning unreasonable risk, as Mr. Greenwood has described, this also is a standard found common in many environmental health and safety statutes, and it also parallels language that we find in the executive orders, including the one cited in my testimony. It is very similar to the standard, for example, that EPA uses when regulating non-food use pesticides, and I will read that standard. It requires EPA to consider any unreasonable risk to man or the environment from the pesticide, and to take into account the economic, social, and environmental costs and benefits of the use of any pesticides. So we can see similarities between the standard in TSCA and the standard in other environmental statutes. And Executive Order 13563 similarly directs EPA and other

executive agencies to take into account benefits and costs, both quantitative and qualitative, and to propose or adopt a regulation only upon a reasonable determination that its benefits justify its costs.

The third aspect of Section 6 I will address briefly is the fact that it places the burden on EPA to demonstrate the need for regulation. This also is not unique. When EPA promulgates a standard, for example, under the Clean Air Act, it typically carries the burden to demonstrate why the particular control or level of protection that is proposed is necessary to protect human health. EPA does apply very conservative health protection methodologies when making risk-based findings under TSCA or any environmental statute, and courts typically give EPA wide latitude to make those kinds of judgments.

I think it is important to recognize that before the failed asbestos rulemaking, EPA had successfully promulgated several Section 6 rules, albeit on a much smaller scale. No legal challenge. It is important to note in the corrosion-proof fittings case that the court actually started with a presumption of validity of the rule and upheld portions of the rule, and set other portions, major portions aside because of the procedural assumption of errors to which I alluded earlier and that are described in my testimony.

It is certainly true that conducting a rulemaking under TSCA or any environmental statute is very challenging, but one of the lessons of corrosion-proof fittings, in my judgment, is that we should not easily or lightly put procedural or substantive requirements aside, as they help ensure the quality or integrity of any rulemaking and any resulting regulatory decision. In my judgment, changes to Section 6 should not simply make it easier for EPA to ban chemicals, but should support sound regulatory decisions that meet all of the objectives of the statute.

I would urge that the number of rulemaking actions taken under TSCA Section 6 is not necessarily the right metric for evaluating the adequacy of the statute, because it doesn't recognize the many times EPA has evaluated chemicals and decided no action is needed because there were no significant risks or the chemical was a low concern for further action. It also doesn't recognize what EPA has accomplished in other parts of the statute, voluntary product stewardship initiatives and the like. All of these are described in EPA's Web site, and I would direct the committee's attention to that Web site for more information.

The big concern that I would raise with TSCA is that I feel EPA needs a strong mandate to do something about the backlog of chemical—assessments of existing chemicals. A clear mandate and adequate resources are needed, in my judgment, to enable EPA to assess in a timely manner the potential risks to health and the environment from chemicals that are present in commerce in significant quantities, and that mandate should direct EPA to prioritize so that the highest number of high priority chemicals can be addressed as quickly as possible, or within reasonable timeframes.

I will quickly close with one comment on preemption, and that is it has played a very limited role under TSCA to date because it only comes into play when EPA has acted under Sections 4, 5, or 6, and States that typically have not been active with respect to

testing TSCA Section 4 or new chemical regulation TSCA Section 6, and relatively few actions have been taken under Section 6, putting aside the regulation of PCBs, so it hasn't been a significant issue yet. But the preemption provision in TSCA is, in fact, similar to preemption provisions in other statutes and it is a well-accepted concept.

Thank you very much.

[The prepared statement of Mr. Rawson follows:]

**TESTIMONY OF
WILLIAM K. RAWSON
LATHAM & WATKINS LLP**

BEFORE THE
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY
U.S. HOUSE OF REPRESENTATIVES

“REGULATION OF EXISTING CHEMICALS AND THE ROLE OF PRE-EMPTION UNDER SECTIONS 6 AND 18
OF THE TOXIC SUBSTANCES CONTROL ACT”

SEPTEMBER 18, 2013

INTRODUCTION

Mr. Chairman and distinguished members of the Committee – good afternoon. I would like to begin by thanking the Committee for inviting me to testify today. I consider it a privilege to have this opportunity to contribute to the public discourse on the Toxic Substances Control Act (TSCA). I hope my testimony will prove useful to the Committee.

I am a partner in the law firm of Latham & Watkins LLP. I have practiced in the environmental area, with an emphasis on chemical regulation under TSCA and other environmental statutes, since 1987. I have co-authored two editions of a TSCA Deskbook published by the Environmental Law Institute. My testimony is based on my experience representing and counseling companies and trade associations on issues arising under TSCA and other environmental statutes over the last 26 years. However, I am testifying today solely on my own behalf.

All major stakeholders agree that improvements to TSCA are necessary to achieve the objectives of the statute and increase public confidence in federal chemical regulatory programs. Divergent views have been expressed in prior hearings before this Committee concerning what needs to be fixed and why. I understand the purpose of this hearing is not to advocate any specific

amendments to TSCA or to address any specific legislative proposals, but rather to share perspectives on the current statute.

As directed, my testimony will focus on EPA's experience assessing and regulating existing chemicals under TSCA section 6, and experience under TSCA section 18 pertaining to preemption. It is important to keep in mind that TSCA is only part of the story. EPA regulates the use, release and disposal of chemical substances under many other environmental statutes. Other federal agencies, including OSHA, FDA and CPSC, also have substantial responsibility for ensuring the safe handling and use of chemicals under their respective statutory mandates.

Additionally, chemical manufacturers have implemented various voluntary initiatives and product stewardship programs over the years to support the safe manufacture and use of their products. Many of these voluntary initiatives have been undertaken in collaboration with EPA and other stakeholders. These initiatives and product stewardship programs help meet the objectives of TSCA, and provide additional context for a discussion about experience regulating chemicals under TSCA.

Section 2 of TSCA states that it is the policy of the United States that "Authority over chemical substances and mixtures should be exercised in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation while fulfilling the primary purpose of this chapter to assure that such innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment." Similarly, Executive Order No. 13563, signed by President Obama on January 11, 2011, states: "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." These similar pronouncements, made 35 years apart, give some indication of the concerns this Committee must address as it considers what amendments to TSCA might best promote the objectives of the statute.

SECTION 6: REGULATION OF EXISTING CHEMICALS

Few rulemaking actions have been taken under section 6 (excluding regulation of PCBs). This has contributed significantly to the erosion of public confidence in TSCA, and is cited as evidence that the burdens on EPA when attempting to regulate under section 6 are too high. The failed attempt to regulate asbestos-containing products also is cited as evidence that section 6 is not workable. I will address first the issue of statutory authority. I then will address what I consider to be the greatest concern relating to EPA's exercise of its section 6 authority, which is the backlog of EPA assessments of existing chemicals. I believe EPA needs a stronger mandate to set priorities and complete safety assessments of chemicals in commerce, to determine whether and how chemicals should be regulated.

Section 6(a) of TSCA gives EPA authority to regulate the manufacture, processing, distribution, use or disposal of a chemical if the Agency has a "reasonable basis" to believe the chemical "presents or will present an unreasonable risk to health or the environment." Section 6 enumerates various regulatory options – from an outright ban to warning and labeling requirements – and provides that EPA may impose one or more of the enumerated requirements "to the extent necessary to protect adequately against such risk using the least burdensome requirements."

When promulgating rules under section 6, EPA must take into account the health and environmental effects of the substance, the magnitude of exposure, the benefits of the substance, the availability of substitutes and their potential health and environmental impacts, and the reasonably ascertainable economic consequences of the proposed rule. Specific hearing requirements are set forth in section 6(c), and any rule that is promulgated must be supported by "substantial evidence" in the rulemaking record considered as a whole.

The Agency also must determine whether the concern could be better addressed by EPA or another agency under another statute. If the risk of injury to health or the environment can be

eliminated or reduced under another statute administered by EPA, then section 6(c) requires EPA to utilize its authority under that statute unless the Agency determines that it is in the public interest to act under TSCA. If the chemical risk may be prevented or sufficiently reduced by action under a federal law not administered by EPA, the Agency must refer information on the chemical's risk to the agency administering the other law. Pursuant to section 9(a), EPA may not take action under TSCA Section 6 if the other agency finds no unreasonable risk or initiates regulatory action.

As noted, Section 6 requires EPA to adopt the "least burdensome requirements" necessary to address the identified health or environmental risks. This precludes a ban of a product if a less burdensome approach would protect human health and the environment. Similarly, Executive Order 13563 directs executive agencies to "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends." The Executive Order compels each agency to "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives."

The "unreasonable risk" standard in section 6 is not unique to TSCA. For example, the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) for non-food use pesticides requires EPA to consider "any unreasonable risk to man or the environment" and take "into account the economic, social, and environmental costs and benefits of the use of any pesticide." Executive Order 13563 similarly directs EPA and other executive agencies in their regulations to "take into account benefits and costs, both quantitative and qualitative." The Executive Order directs each agency to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs."

Section 6 of TSCA places the burden on EPA to demonstrate the need for regulation. This also is not unique. When EPA promulgates an air quality or emission standard under the Clean Air Act, for example, it typically carries the burden of demonstrating the need for the level of

protection and/or specific control measures that are proposed. Courts typically give EPA wide latitude to make these kinds of judgments.

EPA applies numerous health-protective assumptions when making “unreasonable risk” findings, whether under TSCA or other environmental statutes. EPA typically sets the safe level in humans at a level 100- to 1000-fold (or more) below a dose that produced no adverse effect in the most sensitive animal study, and uses conservative assumptions concerning level, frequency and duration of exposure. The end result is that EPA regulates based on theoretical upper bound estimates of risk, with the understanding that true risks are likely to be much lower than upper bound estimates, and could be zero. EPA has stated this explicitly in rulemakings under the Clean Air Act, for example. Again, courts give EPA considerable latitude to make these kinds of judgments.

The failed effort to ban uses of asbestos is often cited as evidence that TSCA does not give EPA sufficient authority to regulate chemicals. A careful reading of the court’s decision shows that EPA made procedural and substantive errors that compelled the court to set portions of the rule aside. EPA did not give proper public notice of a key element of its exposure analysis, that in some cases “completely altered” EPA’s assessment, until after the hearings were closed.¹ Asbestos-containing friction products (primarily replacement drum and disk brakes) accounted for “the lion’s share of the proposed benefits of the asbestos regulation,” but a study commissioned by EPA raised significant concerns about the effectiveness of substitute products. One of the study authors testified that the “replacement/substitution of asbestos-based with non-asbestos brake linings will produce grave risks,” and that “the expected increase of skid-related highway accidents and resultant traffic deaths would certainly be expected to overshadow any potential health-related

¹ *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1212-13 (5th Cir. 1991).

benefits of fiber substitution.”² Other equally significant errors are noted in the court’s opinion. The ruling certainly was disappointing to EPA, which had spent 10 years on the asbestos rulemaking, but I would urge careful review of the court’s decision before any conclusions are drawn.

Before the failed asbestos rulemaking, EPA had successfully promulgated several section 6 rules, albeit on a much smaller scale, without legal challenges, and without conducting a quantitative risk assessment for every alternative control measure (one of the complaints emanating from the *Corrosion Proof Fittings* decision). Further, the court in *Corrosion Proof Fittings* did not completely vacate the asbestos rule; it upheld EPA’s ban on products not currently being produced in the United States, and the ban on unknown, future uses of asbestos. The court actually started with a “presumption of validity” in favor of EPA’s rule, but found such fundamental errors in the rulemaking that all product-specific bans were struck down.

Witnesses at the prior hearings of this Committee have noted that conducting a rulemaking, whether under TSCA or any other environmental statute, can be time-consuming and challenging for the Agency and can take several years. Nevertheless, I would submit that one lesson of *Corrosion Proof Fittings* is that procedural requirements and substantive criteria should not be lightly set aside, as they help ensure the quality and objectivity of regulatory decisions.

Section 6 of TSCA was crafted to support sound regulatory decisions that protect human health and the environment while not placing undue economic burdens on companies that manufacture, process or use chemicals. The similarities to several provisions in Executive Order 13563 are noteworthy and provide context for evaluating the requirements of TSCA section 6. Changes to section 6 should not simply make it easier for EPA to ban the use of chemicals, but should support sound regulatory decisions that meet all the objectives of the statute. Decisions

² *Id.* at 1224 n. 25 (citing written testimony).

made under TSCA should be governed by the same principles that govern other environmental statutes, and fundamentally should remain risk-based.

It remains true that very few rulemaking actions have been taken by EPA under section 6. That is not necessarily the right metric for evaluating the adequacy of the statute as a whole, as it does not account for assessments of existing chemicals and uses by EPA that did not result in regulation because chemicals or activities were found not to present significant risks or to be of low concern for further evaluation. It also ignores accomplishments under other sections of the statute, including significant new use rules promulgated under section 5(a) to curb uses of some existing chemicals. Further, it ignores voluntary product stewardship actions and other voluntary initiatives that have at times rendered formal action under section 6 unnecessary. Many of these activities addressing existing chemicals are described on EPA's website, and they are substantial. They have often involved partnerships with industry and other stakeholders, and international cooperation. But the lack of rulemaking actions under section 6 receives more attention, and continues to undermine public confidence.

This leads to the concern I expressed at the beginning of this section of my testimony. There is still a backlog in EPA's assessment of existing chemicals. I believe addressing this backlog should be the top priority for bringing EPA's regulation of existing chemicals in line with regulation of new chemicals. A clear mandate and adequate resources are needed to enable EPA to assess in a timely manner the potential risks to health and the environment from chemicals that are present in commerce in significant quantities. Once risks have been assessed, action can be taken where necessary. Additionally, the public also can take comfort with respect to those chemicals and uses that EPA determines present low concern.

All stakeholders recognize the need for EPA to prioritize its resources. I believe a rational prioritization scheme with reasonable timelines would give greater confidence to the public that

significant risks are being identified and addressed in a systematic and timely manner. Some chemicals and uses can be quickly identified as low concern. Others require more effort to characterize potential risks and ensure safety. Any new mandate should give EPA flexibility (indeed, should require EPA) to set priorities and direct resources accordingly, so that the greatest number of high priority chemicals can be assessed within reasonable timeframes.

In a prior Administration, EPA announced a Chemical Assessment Management Program (ChAMP) that was intended to accelerate dramatically the preparation of screening-level assessments for approximately 7,000 chemicals for which periodic exposure information reporting was being required under the Inventory Update Rule, now called the Chemical Data Reporting Rule. EPA did this on its own, with no statutory mandate and no change in its authority under section 6. The initiative was replaced in the current Administration in favor of Chemical Action Plans that focused on a very short list of chemicals, and more recently EPA has implemented a TSCA Work Plan which also will address a relatively small subset of existing chemicals. This is not the first time EPA has abandoned one chemical risk management initiative for another. I believe it would be very helpful for EPA to have a strong mandate to increase the rate at which it identifies and assesses high priority compounds, with follow-through to completion.

SECTION 18: PREEMPTION

As you are aware, the concept of preemption is rooted in Article VI of the Constitution, which provides that the laws of the United States shall be the supreme law of the land, notwithstanding the laws of any states. The purpose of preemption is to prevent state and local laws that might thwart the effectiveness of a national legislative and regulatory scheme. Preemption discourages state law requirements that would hinder interstate commerce by placing varying requirements on companies operating across more than one state. Preemption provisions are found in several different Federal laws regulating products, including the Consumer Product

Safety Act (CPSA), the Food, Drug, and Cosmetic Act (FDCA), and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

TSCA section 18 preempts state and local law only when EPA has issued a rule under section 4 (testing), 5 (approval of new chemicals), or 6 (regulation of existing chemicals). If EPA has not acted, states and localities are free to act. If, however, EPA has issued a rule under section 4, 5, or 6, states and localities must apply to EPA for an exemption from preemption prior to enacting additional restrictions. EPA may grant the exemption only if the state or local law would provide a higher degree of protection from risk of injury to human health or the environment than the TSCA rule and would not unduly burden interstate commerce. The state or local law also must not cause the manufacturing, processing, or distribution in commerce of the substance, mixture or article to be a violation of any TSCA requirement.

Notably, several types of state laws are not subject to preemption and the exemption process. State or local laws governing the manner or method of disposal of toxic substances are not preempted where EPA has issued a relevant disposal rule pursuant to TSCA section 6(a)(6). State or local laws that are identical to a rule issued by EPA under section 5 or 6 are not subject to preemption. State or local laws that were adopted under the authority of another federal law such as the Clean Air Act also are not preempted. Additionally, a state or local law may prohibit the use of a substance or mixture, other than its use in the manufacture or processing of other substances or mixtures.

As a practical matter, preemption has rarely come into play under TSCA because EPA has promulgated few rules under section 6 (other than regulation of PCBs), and states generally have not been in the business of regulating new chemicals (TSCA section 5) or requiring testing of existing chemicals (section 4). One TSCA preemption case is *Rollins Environmental Services (FS), Inc. v. The Parish of St. James*, in which the Fifth Circuit Court of Appeals found that

preemption applied to a St. James Parish, Louisiana, ordinance prohibiting commercial solvent cleaning in certain areas as part of an effort to ban PCB disposal activities.³ EPA had promulgated comprehensive PCB disposal regulations under TSCA section 6(e)(1), and St. James Parish did not apply for an exemption. The court found that “[i]f every locality were able to dodge responsibility for and participation in this program through artfully designed ordinances, the national goal of safe, environmentally sound toxic waste disposal would surely be frustrated.”⁴ Thus, preemption in this case met the goal of not allowing state law to thwart a national regulatory scheme.

As noted, the CPSA, FDCA, and FIFRA also contain preemption provisions. A brief overview of these preemption provisions will provide context for evaluating preemption under TSCA.

Preemption under the CPSA works in a manner similar to preemption under TSCA.⁵ If the CPSC has issued a rule pursuant to the CPSA that addresses the risk of injury associated with a consumer product, non-identical state and local standards relating to product performance, composition, packaging, labeling, etc., that address the same risks addressed by the CPSC are preempted. As with TSCA, states and localities are free to act if the CPSC has not. The CPSC may exempt non-identical state and local standards so long as the standard does not unduly burden interstate commerce and provides a significantly higher degree of protection from risk of injury than the CPSC’s consumer product safety standard.

Under the FDCA, no state or locality may establish any requirement that is not identical to an FDA regulation governing over the counter (OTC) drugs and medical devices.⁶ States and

³ *Rollins Environmental Services (FS), Inc. v. The Parish of St. James*, 775 F.2d 627 (5th Cir. 1985).

⁴ *Id.* at 637.

⁵ 15 U.S.C. § 2075.

⁶ 21 U.S.C. § 360k, 379r.

localities are free to act if FDA has not acted. States and localities may apply to the FDA for an exemption from preemption. The preemption provision for OTC drugs contains an exemption for product liability actions.

Under FIFRA, a state may not regulate the sale or use of any federally registered pesticides or impose any packaging or labeling requirements that are different from those required by EPA under FIFRA.⁷ However, a state may permit registration for additional uses of federally registered pesticides to meet special local needs, subject to a right of cancellation by EPA.

These other statutes demonstrate that preemption is an important concept, particularly in the area of product regulation where state laws or regulations could create conflicts with federal requirements or otherwise pose significant burdens on interstate commerce.

I hope my testimony is helpful to the Committee.

Thank you.

⁷ 7 U.S.C. § 136v.

Mr. SHIMKUS. Thank you very much.

I would like to now recognize Ms. Jennifer Thomas, Director of Federal Government Affairs for the Alliance of Automobile Manufacturers here in Washington, DC. Same thing, your written statement is in the record and you have 5 minutes. Thank you for coming.

STATEMENT OF JENNIFER THOMAS

Ms. THOMAS. Thank you, Chairman Shimkus, Ranking Member Tonko, and members of the subcommittee. My name is Jennifer Thomas and am I the Director of Federal Government Affairs to the Alliance of Automobile Manufacturers, which is a trade association that represents 12 auto makers that make roughly three out of every four new vehicles sold in the U.S. each year. On behalf of the Alliance, I appreciate the opportunity to offer our views on TSCA and the need for one national program for chemical regulation.

Not only are auto makers producing more fuel efficient and safer cars than ever, we have also made tremendous strides in reducing the amount of substances of concern from autos. For example, for more than a decade, auto makers have maintained an industry focus, global substance of concern list, and tracking database to actively reduce their usage in global production. The industry has invested more than \$30 million on these systems, which now tracks more than 2,700 substances, to ensure that restricted substances are not in our products. Auto makers have eliminated the use of lead wheel weights, mercury-containing switches, asbestos-lined brake pads, and are currently phasing out the use of deca as a flame retardant, and working to identify an alternative brake friction material to replace copper. But we recognize that there is more work to do.

TSCA remains the only Federal environmental statute that has not been substantively revised. We support modernizing TSCA in part because inaction at the Federal level is creating an environment in which States feel compelled to go out on their own to regulate chemicals, creating a patchwork of State standards. As you might suspect, such a patchwork presents great obstacles to effective chemical management for large industry sectors, in particular, manufacturers of complex durable goods, such as autos. The Alliance strongly believes that modernizing TSCA to avoid a balkanized approach to chemical management is more in line with today's manufacturing realities.

The average auto has 30,000 unique components, and each individual component is comprised of multiple chemicals and mixtures. Many components are obtained from our suppliers as finished products, which are then integrated into the vehicle. Auto makers recent steps to streamline production and reduce costs through common design and platform sharing resulted in better products for our customers and allowed us to stay competitive in this global market. An overwhelming array of State chemical regulations, rather than one Federal chemical management program, increases costs, hinders flexibility, and reduces competitiveness. Multiple State programs also have the potential to conflict with stringent fuel economy and safety standards. To meet the aggressive 54.5

miles per gallon fuel economy standards by model year 2025, auto makers will be relying on lightweight materials like plastics that contain multiple chemical components. Auto makers spend billions of dollars annually on R&D to advance fuel efficiency, innovate new safety technologies, and develop more sustainable materials before the need of any regulation. A myriad of State programs has the potential to derail this progress by shifting the industry's focus from R&D to regulatory compliance. We readily acknowledge that States have a very important role to play, and the Alliance supports a process by which States can address their specific chemical concerns with EPA in a common scientifically-based framework under TSCA. Legislative efforts to modernize TSCA should seek collaborations with States to achieve product safety, yet continue to maintain strong Federal preemption provisions. A unified national program would provide much-needed regulatory certainty while ensuring that products and chemicals are uniformly safe across all 50 States.

Moving forward, it is critical that any legislative efforts to modernize TSCA consider the unique concerns of complex durable goods manufacturers. Currently, article exemptions are in place for most TSCA requirements. However, we are noticing a significant trend at the State level targeting not just chemicals, but consumer products or articles. The Alliance urges the committee to consider establishing clear standards for the regulation of articles under TSCA and support the continued use of existing article exemptions in most circumstances.

Finally, legislation modernizing TSCA should allow sufficient lead time to investigate and qualify viable alternatives, maintain a de minimus threshold of .1 percent for chemical control actions, and provide an exemption for service—for automotive service parts. Such an exemption would avoid any disruption in the supply of thousands—hundreds of thousands of replacement parts and allow auto makers to continue to fulfill customer warranties and replace existing fleet.

The Alliance appreciates the opportunity to offer our views on TSCA and the need for one national program for chemical regulation. We stand ready to work with this committee on any efforts to modernize this important policy. Thank you again, and I look forward to any questions you might have.

[The prepared statement of Ms. Thomas follows:]



AUTO ALLIANCE
DRIVING INNOVATION®

**STATEMENT
OF
*THE ALLIANCE OF AUTOMOBILE MANUFACTURERS***

**BEFORE THE:
ENERGY AND COMMERCE COMMITTEE
THE SUBCOMMITTEE ON ENVIRONMENT
U.S. HOUSE OF REPRESENTATIVES**

SEPTEMBER 18, 2013

PRESENTED BY:
Jennifer Thomas
Director, Federal Government Affairs

Summary

Protecting consumers from harmful exposure to hazardous materials is a top priority for automakers. Not only are we producing more fuel-efficient and safer cars than ever, we have also made tremendous strides in reducing the amount of substances of concern from automobiles. Automakers have eliminated the use of mercury and lead wheel weights in automobiles, and are currently working to phase out deca-BDE flame retardants and copper-lined brake pads. For more than a decade, automakers and our suppliers have maintained a global substance of concern list and database that tracks more than 2,700 substances used in automotive components to ensure restricted substances are not in autos. Additionally, automobiles are among the most recycled consumer products in the U.S – roughly 86% of a vehicle's material content recycled, reused, or used for energy recovery.

However, more work remains, and the Alliance supports modernizing the Toxic Substances Control Act (TSCA) to keep pace with advances in science and technology. Inaction at the federal level to reform TSCA is compelling states to regulate on their own, creating a patchwork of state standards. A single federal chemical management program could accomplish the goal of properly managing hazardous materials in products while also creating a more predictable regulatory environment and more effectively address safety and risk issues from chemical uses nationwide.

Moving forward, legislative efforts to modernize TSCA should consider the unique concerns of complex durable goods manufacturers, such as automobile manufacturers. The average automobile has 30,000 unique components and each component is comprised of multiple chemicals and mixtures. Each automaker works with a global network of more than 1,000 suppliers, spanning multiple sectors. The Alliance urges the Committee to consider establishing clear standards for the regulation of articles under TSCA and support the continued use of existing article exemptions in most circumstances. Additionally, legislation modernizing TSCA should allow sufficient lead time to investigate and qualify viable alternatives.

The Alliance stands ready to be a productive partner in any efforts to modernize this important environmental policy.

Testimony

Thank you, Chairman Shimkus, Ranking Member Tonko and members of the Subcommittee. The Alliance of Automobile Manufacturers (Alliance) is a trade association of twelve car and light truck manufacturers including BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars, Toyota, Volkswagen Group and Volvo Cars.

Together, Alliance members account for roughly 3 out of every 4 new vehicles sold in the U.S. each year. On behalf of the Alliance, I appreciate the opportunity to offer our views on the Toxic Substances Control Act (TSCA) and the need for one national program for chemical regulation. We commend the Committee for its thoughtful and thorough examination of this environmental policy.

The greater automobile industry is a massive employer reaching well beyond the iconic names of auto companies familiar to us all. Auto manufacturing depends on a broad range of parts, components and materials provided by thousands of suppliers, as well as a vast retail and vehicle maintenance network of dealers. Nationwide, 8 million workers and their families depend on the auto industry. Each year, the industry generates \$500 billion in paychecks, while generating \$70 billion in tax revenues across the country.

Protecting consumers and our employees from harmful exposure to hazardous materials is a top priority for automakers. In fact, we have a good story to tell. Not only are we producing more fuel-efficient and safer cars than ever, we have also made tremendous strides in reducing the amount of substances of concern from automobiles. For example:

- For more than a decade, automakers have maintained the Global Automotive Substance List (GADSL), a longstanding industry-focused global substance of concern list, as well as a sophisticated tracking database – called the International Material Data System (IMDS) – to actively reduce industry-wide use of substances of concern in global production. The auto industry has invested more than \$30 million dollars to build GADSL and IMDS, which now track more than 2,700 substances used in automotive components to ensure that restricted substances are not in our products. Without automakers developing a common list of substances to track and a common database for

suppliers to report into, tracking and controlling such a large number of substances would not be possible.

- In 2006, together with EPA, states, environmental groups and other industry stakeholders such as steelmakers and auto dismantlers and recyclers, automakers created the National Mercury Switch Removal Program to ensure the safe removal of mercury-containing switches in automobiles. More than 5 million switches have been collected to date, preventing approximately 11,000 pounds of mercury from being released into the environment.¹
- Automakers eliminated lead wheel weights from all automobiles by the end of 2009, are currently phasing out the use of deca-BDE as a flame retardant, and are working with brake pad manufacturers to identify an alternative brake friction material with a smaller environmental impact than copper.

Most importantly, automobiles are among the most recycled consumer products in the U.S. Through the recycling process, end-of-life vehicles are recycled into new vehicles, old consumer products are recycled into components of new vehicles, and parts of old vehicles are recycled into new consumer products. Approximately 86% of a vehicle's material content is recycled, reused or used for energy recovery.² For example, used carpet becomes air cleaner assemblies and engine fan modules, and manufacturers build new tires with 10% recycled tire rubber material.

But automakers recognize that there is more work to do. TSCA remains the only major federal environmental statute that has not been substantively revised. We support modernizing TSCA to keep pace with advances in science and technology and automakers want to be part of the solution. We understand that inaction at the federal level is creating an environment in which states feel compelled to regulate chemicals on their own, potentially creating a patchwork of state standards. As you might suspect, myriad of inconsistent or conflicting state chemical

¹ ELVS Mercury Switch Recovery Program Reporting at www.eqonline.com/services/ELVS-Mercury-Switch-Recovery-Program/annual-report.asp?year=all

² Society of Automotive Engineers (SAE). 2011. "Vehicle Recycling, Reuse, and Recovery: Material Disposition from Current End of Life Vehicles"

regulatory programs presents great obstacles to effective chemical management for large industry sectors, in particular manufacturers of complex durable goods, such as automobiles.

We strongly believe that reforming the national program to avoid a balkanized approach to chemical management is more in line with today's manufacturing realities and will better protect the public while supporting U.S. competitiveness and jobs. Automakers design and build vehicles to synthesize a variety of systems and individual parts to meet an array of individual customer needs and demands and to comply with thousands of pages of international, federal and state regulations. The average automobile has 30,000 unique components and each individual component is comprised of multiple chemicals and mixtures. Each automaker works with a global network of more than 1,000 suppliers, spanning multiple sectors from electronics to textiles. Many automotive components are obtained from suppliers as finished products, which are then integrated into the vehicle. Government oversight of the construction and assembly of automobiles on a component-by-component basis is burdensome, inefficient, and unnecessary to effectively manage chemicals. An approach focusing on situations presenting a real potential for consumer exposure to substances of concern would be more effective than such an overly broad approach. And even more importantly, automakers simply cannot cope with a myriad of state-specific programs of this nature, each with its own unique hurdles.

Ultimately, multiple state chemical regulatory programs will likely conflict with stringent federal environmental and safety standards. NHTSA, for example, sets vehicle flammability standards and EPA, CARB and NHTSA set greenhouse gas (GHG) emission and CAFE standards. To meet the aggressive 54.5 miles per gallon (mpg) average CAFE/GHG emission standards by MY 2025, automakers will rely on lightweight materials like plastics that contain multiple chemical components, such as flame retardants. Also, nanomaterials are used in electric and fuel cell vehicles. Automakers spend billions of dollars annually on research and development activities to advance fuel efficiency, innovate new safety technologies, and develop more sustainable materials before the need of any regulation. However, a patchwork of state programs has the potential to derail this progress by shifting the industry's focus from R&D to regulatory compliance.

For these reasons, automakers seek a comprehensive and workable national program to regulate chemicals in commerce rather than a hodgepodge of overlapping state and federal

regulations. We readily acknowledge that states do have a very important role to play and the Alliance supports a process by which states can address their specific chemical concerns with EPA in a common, scientifically-based framework under TSCA. Legislative efforts to modernize TSCA should seek collaboration with states to achieve product safety through common chemical actions and requirements yet continue to maintain strong federal preemption provisions.

A single federal chemical management program could accomplish the goal of properly managing hazardous materials in products while also creating a more predictable regulatory environment by eliminating conflicts and inconsistencies that make compliance unnecessarily burdensome and costly for both the private and public sectors. One way the auto industry has restructured itself to become one of the bright lights in a challenging economy has been its shift to fewer vehicle platforms. Reducing the number of vehicle platforms allows auto manufacturers to streamline the manufacturing process throughout production, lowering costs and ultimately resulting in better products for our customers at competitive prices. The public sector is under similar financial pressures to provide cost-effective services to the public. Reforming TSCA to make it an effective national program not only benefits the private sector by providing a unified and efficient regulatory compliance structure, but it also allows state and local governments to focus on other priority issues by freeing resources otherwise allocated to duplicative state chemical regulations. Most importantly, a unified national policy through TSCA reform would more effectively address safety and risk issues from chemical uses nationwide.

Additional Considerations:

Moving forward, it is critical that any legislative efforts to modernize TSCA consider the unique concerns of complex durable goods manufacturers as article manufacturers/assemblers. Currently, article exemptions are in place for most TSCA requirements. However, these are not statutory exemptions but rather they have been written into regulation by EPA and can be lifted, as has recently occurred with the proposed deca-BDE Significant New Use Rule (SNUR) and Test Rule. Furthermore, we are noticing a significant trend towards state legislation and regulations targeting not just chemicals but consumer products (i.e., articles). In 2013, at least 16 broad-reaching chemical regulation bills have been introduced by state legislatures across the country. While some had a specific focus, the definitions went beyond the scope of federal

definitions and were broad enough to include consumer products and automobiles. The Alliance urges the Committee to consider establishing clear standards for the regulation of articles under TSCA and support the continued use of existing article exemptions in most circumstances.

Additionally, legislation modernizing TSCA should allow sufficient lead time to investigate and qualify viable alternatives (typically 5 years in the auto industry and not all vehicles are reengineered at the same time). With roughly 250 million registered vehicles currently operating on U.S. roads³, service parts for legacy vehicles should be exempted from any chemical substitution to avoid any disruption in the supply of hundreds of thousands of older model replacement parts, impacting automakers' ability to fulfill consumer warranties, recalls, service campaigns, or repairs of the existing fleet. This is a significant issue since the average age of the typical automobile on U.S. roads is over 11 years old⁴.

Finally, TSCA/EPA should maintain a minimum threshold of 0.1% for chemical reporting and most chemical control actions. This is the *de minimis* level used by most world governments to effectively control the thousands of chemicals within thousands of products.

We appreciate the opportunity to offer our views on TSCA and the need for one national program for chemical regulation. It might be counterintuitive to some that an industry that relies heavily on chemicals would support legislation that would provide EPA more authority and better tools to regulate chemicals. But it is entirely in keeping with our overall desire as auto companies to offer the best and safest products possible to our customers and protect our employees; we welcome an effective national program. The Alliance stands ready to work with the Committee on any efforts to modernize this important environmental policy. Thank you again and I will be happy to answer any of your questions.

³ Polk. 2013. Polk Finds Average Age of Light Vehicles Continues to Rise [Press Release]. Retrieved from https://www.polk.com/company/news/polk_finds_average_age_of_light_vehicles_continues_to_rise

⁴ Ibid.

Mr. SHIMKUS. Thank you.

Chair now recognizes Mr. Justin Johnson, Deputy Secretary for the Vermont Agency for Natural Resources from the great State of Vermont. Sir, you are welcome and you are recognized for 5 minutes.

STATEMENT OF JUSTIN JOHNSON

Mr. JOHNSON. Thank you, Chairman Shimkus and Ranking Member Tonko, and the other members of the committee. It is a real honor to come down and speak to you about this today. I am the Deputy Secretary of the Agency of Natural Resources in Vermont, but today I am representing the Environmental Council of the States, which is made up of the leaders of the State and territorial Environmental Protection Agencies.

Just yesterday, ECOS passed a resolution on this matter at our annual meeting over in Arlington, and I will be summarizing that position today.

First of all, I would say that ECOS members are very keen to see reform of TSCA. It is very important to us for a number of reasons, which I will spell out. In particular, we have four top issues of concern: preemption, chemical assessments, the safety standard, and CBI, which I know is not the specific topic today and you have addressed before, but that is also an important one.

Preemption is the number one topic, simply because States do not want to lose the ability to act to restrict a chemical in order to prevent harm to the public or the environment. This ability to act is important to States as a backstop to either a Federal program that does not work as intended, or a Federal program that acts slowly or fails to act when reliable scientific data indicates that action is needed. Without this ability to act, the only recourse would be to come back to Congress to do what we are doing, and it is a very high bar indeed. Retaining our ability to act does not mean that 50 States with 50 different chemical laws is the outcome. States are only looking to have the ability to act on chemicals in a way that their legislatures, governors, and people deem appropriate. It is expensive and time consuming to take these actions, and the way States are these days, we are not looking for more work, but we will act if we need to to protect citizens.

States have lost confidence that TSCA works as thoroughly or as quickly as it ought to, leaving States to pass their own laws and rules on chemical management. However, if TSCA did work thoroughly and quickly, there would be much less incentive for States to act with additional requirements. State authority would be preserved, but seldom invoked. As a practical matter, implementation of a comprehensively reformed TSCA will render the State implementation issue largely moot, as States will focus their increasingly limited resources on other priorities.

During the last 20 years, however, States have acted to fill the regulatory void of the Federal level, illustrating the vitally important role States play in providing a backstop to Federal inaction. With regard to the current impact of TSCA Sections 6 and 18 on the exercise of States action or on common law authority, we suggest that because EPA has acted on so few chemicals under TSCA, preemption of State authority has not been an issue to date.

States believe that for TSCA to work well, there are at least three other key requirements. Chemical assessments need to be conducted. There are thousands of chemicals that the EPA hasn't acted on. Currently, EPA must conduct reviews of new chemicals to determine if they are a threat. Because of the current TSCA requirements for EPA to generate most of the data itself, this burden is beyond the Agency's capability and so very few get reviewed. Most chemicals simply pass into commerce. When this happens, States may see a problem with some of these and then act. The key, then, is for EPA to prioritize and review high priority chemicals, then it can focus on the chemicals of greatest concern. But EPA doesn't currently have the resources to conduct this process, so industry should supply some or all of the needed data. This is why ECOS says that TSCA reform should ensure that the burden is effectively placed on manufacturers.

The safety standard burden of proof should be less onerous. Currently, States think that the action standard the EPA is held to is too high in their ability to restrict a chemical's use. Currently, TSCA's safety standard requires EPA to prove that harm from a chemical has occurred before it can restrict use of the chemical. This is almost an impossible standard for EPA to meet. In our resolution, we ask that TSCA be reformed so that EPA can take expedited action when a chemical presents a very serious or immediate risk to public health or the environment, including the ability to impose interim conditions to be in effect until EPA has had the opportunity to make a safety determination. This will help alleviate State concerns about the effectiveness of TSCA.

Finally, I will just say on confidential business information, States need access to confidential data to help us fulfill our requirements to protect citizens and the environment. We understand that States should have to follow Federal guidelines that restrict distribution of these materials, but we believe that that is an important step in making TSCA more open and available to people so they can understand the decisions that are being made. There are other issues, but during our resolution and with the permission of the committee, I would provide a copy of that final resolution as an addendum to my written testimony.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Johnson follows:]

Testimony
Hearing on Regulation of Existing Chemicals and the Role of Pre-Emption
under Sections 6 and 18 of the Toxic Substances Control Act
Subcommittee on Environment and the Economy
House Committee on Energy and Commerce
Wednesday, September 18, 2013
by
Justin Johnson, Deputy Secretary
Vermont Agency for Natural Resources

Main Points

1. ECOS believes that new legislation is needed to strengthen the Toxics Substances Control Act (TSCA).
2. The primary concerns of states are:
 - a. That states should not be pre-empted by TSCA revisions beyond those currently in the statute;
 - b. The need for EPA to conduct more chemical assessments;
 - c. The safety standard burden of proof should be less onerous;
 - d. States should have access to Confidential Business Information.

Ladies and gentlemen of the committee, thank you for inviting me here today to talk about our organization's views on the Toxics Substances Control Act (TSCA). I am representing the Environmental Council of the States (ECOS), whose members are the leaders of the state and territorial environmental protection agencies, and I may make comments from my own state's point-of-view as well, which I will note at the time.

My role in ECOS is as the Chairman of our Cross-Media Committee. Our Committee works on issues such as chemical management and other matters that affect air, water, and waste. Over the past year, the committee has been intently interested in TSCA reform. Our first resolution on this matter dates back to 2001, asking that states have access to confidential business information. During the ECOS Annual Meeting on September 17, we will be considering modifications to our resolution entitled "Reforming the Toxic Substances Control Act." Because I do not know the outcome of this discussion yet, I cannot address our changes in

this written testimony. I will however discuss the outcome during my oral testimony. Instead, I will summarize the primary concerns of the states as expressed in a series of conference calls about the resolution that we've had during 2013.

First, ECOS wants TSCA reform to occur and we seek a bi-partisan bill that will pass both houses and be signed by the President. We understand that we might not see every item we seek in the final bill, but some issues are of very high importance to states. Our resolution speaks for itself with respect to our priorities, but in this testimony I will focus on the top four issues of concern to ECOS.

Pre-emption is our number one topic. States don't want to lose the ability to act to restrict a chemical in order to prevent harm to the public or the environment. States can agree, however, that a state requirement that makes it impossible for the manufacturer to comply with both state and federal rules should result in the federal rule taking precedence. This ability to act is important to states because it is the backstop to a weak federal program, or a federal program that does not work as intended, or a federal program that acts very slowly or one that fails to act when reliable scientific data indicates that action is needed. Without the state ability to act, the only resource would be for Congress to re-address TSCA, and that is a very high bar indeed. Even though states want to keep the ability to act, I expect that not all states will need to act, and that retaining our ability to act does not mean 50 states with 50 different chemical laws. It means that states can act on chemicals in a way that their legislatures, Governors, and people deem appropriate.

This is where we find ourselves today. States have had a loss in confidence that TSCA works as thoroughly or quickly as it ought to, leaving states to pass their own laws and rules on chemical management. However, if TSCA did work thoroughly and quickly there would be

much less incentive for states to enact additional requirements. State authority would be preserved but seldom invoked. As a practical matter, implementation of a comprehensively reformed TSCA will render the state preemption issue largely moot, as states will focus their increasingly limited resources on other priorities. During the past 20 years, however, states have acted to fill the regulatory void at the federal level, illustrating the vitally important role states play in providing a “backstop” to federal inaction and as laboratories of innovation. With regard to the impact of the current TSCA Sections 6 and 18 on the exercise of states action, or on common law authority, we suggest that because EPA has acted on so few chemicals under TSCA, preemption of state authority has not been an issue under the current law.

States believe that for TSCA to work well there are at least three other key requirements.

1. Chemical Assessments Need to be Conducted. There are thousands of chemicals that the U.S. Environmental Protection Agency (EPA) hasn’t acted on. Currently, EPA must conduct reviews of new chemicals to determine if they are a threat. Because of the current TSCA requirements for EPA to generate most of the data itself, this burden is beyond the agency’s capability and so very few get reviewed. Most chemicals simply pass into commerce. When this happens, states may see a problem with some of these and then act. The key then, is for EPA to prioritize and review high priority chemicals, perhaps by a set of prioritization criteria. Then it can focus on the chemicals of greatest concern. But EPA currently does not have the resources to conduct this process. So, industry should supply all the needed data. This is why ECOS says that TSCA reform should ensure the burden is effectively placed on manufacturers.
2. The Safety Standard Burden of Proof Should Be Less Onerous. Currently, states think that the action standard that EPA is held to is too high, restricting its ability to limit a chemical’s

use. Currently, TSCA's safety standard requires EPA to prove harm from a chemical has occurred before it can restrict use of that chemical. This is an almost impossible standard for EPA to meet. In our new resolution, we ask that TSCA be reformed so that EPA can take expedited action when a chemical presents a very serious or immediate risk to public health or the environment, including the ability to impose interim conditions to be in effect until EPA has had the opportunity to make a safety determination. This will help to alleviate state concerns about the effectiveness of TSCA.

3. Sharing Confidential Business Information with States. States need access to confidential data submitted to EPA. This is to help us fulfill our requirements protect human health and the environment. We understand that states will have to follow federal guidelines that restrict distribution of these materials, rather than the state standards which are often more open.

The other issues that our resolution addresses are also important to states although I am not detailing them here. With your permission, I will provide a copy of our final resolution as an addendum to my written testimony so that you can see these for yourself.

There are two other issues that ECOS discussed in our many calls on TSCA reform that we did not address in our resolution, primarily because of time constraints. One of these is defining what are adequate resources for EPA (e.g., annual budget) needed to conduct the assessments, prioritizations and reviews. As managers of state agencies, we understand that much is expected of us and that our ability to succeed is sometimes limited by the resources at hand. The same is true at EPA. We want EPA to succeed in chemicals management. Part of the reason we did not address this issue in our resolution is because we do not have a number to suggest, or the information we need to develop such a number.

Our second unaddressed issue is deadlines for chemical reviews. There was discussion among the states about having a more rigid system of timelines for review of chemicals. Most states have deadlines for air or water permit issuance, and so states find the use of deadlines to be customary. Perhaps similar deadlines for EPA would be appropriate and would assure timely action, but we are not currently able to suggest to you what those deadlines ought to be.

I am happy to take questions when you are ready.

Mr. SHIMKUS. Thank you, sir.

Now chair turns to—and I hope I don't butcher it—Lemuel Srolovic. Close? All right. That is the last time I am going to try. Chief of the Environmental Protection Bureau of New York State Office of the Attorney General. Sir, you are welcomed. Your full statement is in the record and you are recognized for 5 minutes. Just hold on for one second. Let's see if we can get—there should be a light that goes on if you press it. If not, just grab one of your other panelists'—

STATEMENT OF LEMUEL M. SROLOVIC

Mr. SROLOVIC. A little help from the sister State here. Thank you.

Chairman Shimkus, Ranking Member Tonko, and distinguished committee members, thank you for the opportunity to testify this afternoon on behalf of Eric T. Schneiderman, Attorney General of New York.

For many decades, New York has been a leader in protecting public health and the environment from toxic chemicals. That exercise of traditional State power has allowed New York to protect its citizens and natural resources, and to serve as a laboratory for nationwide solutions to threats posed by toxic chemicals.

For example, in 1970, the State of New York banned the use of the insecticide DDT, which was devastating many bird populations, including the American bald eagle. EPA followed New York's lead in banning DDT. Now when you travel from New York City to Albany along the Hudson River, you can routinely see bald eagles along the way and it is a highlight of that trip.

New York has taken other actions to protect public health and the environment by restricting the sale and use of products containing harmful chemicals. Some of those actions include to protect babies and young children, New York has banned bisphenol A, or BPA, in pacifiers and baby bottles for use in children under 3 years of age. BPA has been shown to mimic the behavior of estrogens, potentially causing changes in the onset of puberty and reproductive functioning. New York also restricts the concentration of lead, cadmium, mercury, and chromium in product packaging. Lead and mercury are probable human carcinogens, while cadmium and chromium are known human carcinogens. To protect New Yorkers that rely on groundwater for their drinking water supply, New York prohibits the sale or distribution of gasoline within the State containing methyl tertiary butyl ether, or MTBE. MTBE has been shown to have adverse health effects, and when in drinking water, may impart bad taste and odor.

The goal of TSCA is to establish necessary and appropriate Federal restrictions on the manufacture and use of chemicals that present an unreasonable risk of injury to the health of Americans or the environment. Attorney General Schneiderman strongly supports this goal, and recognizes the critical contribution that TSCA, in partnership with State efforts, could make in ensuring the adequate protection of public health and the environment.

Unfortunately in practice, TSCA has largely failed to live up to its goal because only a small number of chemicals have been tested, and just a handful have been restricted.

It is essential that TSCA be reformed to require EPA to increase its knowledge of the toxicity of the potentially dangerous chemicals on its inventory as quickly as possible, and to impose appropriate restrictions on their manufacture and use as necessary to adequately protect public health and the environment.

Over on the Senate side, a pending bill, S.1009 proposes to reform TSCA in important respects. Attorney General Schneiderman believes that a number of these amendments represent critical improvements to TSCA; however, the Attorney General also believes that that legislation could be further improved.

Protecting the Nation's public health and the environment is best achieved through a dynamic Federal-State relationship in which the authority of States to enact enforced protections, which are at least as stringent as Federal protections, but may also be more stringent, is preserved. That relationship animates our national laws regarding air and water pollution, hazardous waste, pesticides, as well as TSCA. TSCA's preemption provision preserves the States' traditional authority to restrict chemicals that States have found dangerous, as well as allowing States to continue to serve as laboratories for nationwide solutions.

In considering necessary reform of TSCA's regulatory provisions, the traditional authority of States to take action to protect their citizens and the environment from threats posed by toxic chemicals should be preserved.

In conclusion, achieving TSCA's goal of ensuring the adequate protection of public health and the environment from toxic chemicals is critically important, as is preserving the authority of States to protect public health and the environment. Because TSCA has not met its goal, Attorney General Schneiderman strongly supports your efforts and offers the full assistance of our office to you and your colleagues as you review this important Federal law.

Thank you, and I look forward to any questions.

[The prepared statement of Mr. Srolovic follows:]

**Testimony to House Committee on Energy and Commerce,
Subcommittee on Environment and the Economy**

**Hearing on
“Regulation of Existing Chemicals and the Role of Pre-Emption
Under Sections 6 and 18 of the Toxic Substances Control Act”**

By

**Lemuel M. Srolovic
Bureau Chief, Environmental Protection Bureau
Office of New York State Attorney General Eric T. Schneiderman
September 18, 2013**

SUMMARY

(1) New York Attorney General Eric T. Schneiderman strongly supports the goal of the federal Toxic Substances Control Act of 1976 (TSCA) and recognizes the critical contribution that this law — in partnership with state efforts — could make in ensuring the adequate protection of public health and the environment from toxic chemicals.

(2) The State of New York has played and is playing a leading role in protecting our citizens and the environment from harms posed by toxic substances, including protecting our residents — particularly those who are most vulnerable — from carcinogens, chemicals that mimic estrogen, and other dangerous chemicals..

(3) In practice, TSCA has largely failed to live up to its goal. TSCA should be strengthened by requiring EPA to conduct expeditious safety reviews of the tens of thousands of chemicals to which Americans are exposed. Once EPA has done so, it should be required to timely impose restrictions on the manufacture and use of those chemicals as necessary to adequately protect public health and the environment.

(4) In any reform of TSCA, it is critical to preserve the ability of states to protect their citizens and environment from chemicals that states have found dangerous. This goal can be achieved by allowing state restrictions to remain in place until EPA has imposed a restriction, and in some circumstances allowing a state restriction on a chemical to remain in effect even after EPA has imposed a restriction.

(5) Because Attorney General Schneiderman believes that achieving TSCA's goal of ensuring the adequate protection of public health and the environment from toxic chemicals is as important as ever, he offers the full assistance of his office to this Subcommittee as you review this important federal law.

TESTIMONY**Introduction**

Good afternoon Chairman Shimkus, Ranking Member Tonko, and distinguished members of the Subcommittee on Environment and the Economy. Thank you for the opportunity to testify today on behalf of Eric T. Schneiderman, Attorney General of New York, regarding the regulation of toxic chemicals. I would like to begin by discussing the role that New York has played and is playing in protecting our citizens and the environment from harm posed by toxic substances. I will then discuss the need for strengthening the federal Toxic Substances Control Act of 1976 (TSCA), and the New York Attorney General's support for doing so. Lastly, I will discuss the Attorney General's views on the appropriate balance between federal and state restrictions on toxic chemicals.

Actions by New York to Protect Human Health and the Environment

For many decades, New York has been a leader in protecting public health and the environment from toxic chemicals. That exercise of traditional state power has allowed New York to protect its citizens and natural resources and to serve as laboratory for nationwide solutions to threats to human health and the environment posed by toxic chemicals.

For example, in 1970 New York banned use of the insecticide DDT, which was devastating many bird populations, including American bald eagles, peregrine falcons, brown pelicans, and ospreys. Two years later, EPA followed New York's lead in banning DDT. Twenty years later, the American bald eagle was recovering, and was "up"-listed from an endangered species to a threatened species.

New York has taken other actions to protect public health and the environment by restricting the sale or use of products containing harmful chemicals. They include the following:

- To protect babies and young children from exposure to biologically active bisphenol A (BPA), New York has banned the chemical in pacifiers and baby bottles for use by children under three years old. N.Y. Env'tl. Conserv. Law § 37-0501 *et seq.* BPA leaches into liquids and foods and has been shown to mimic the behavior of estrogens in the human body, potentially causing changes in the onset of puberty and reproductive functioning.
- To protect babies and young children from exposure to biologically active tris(2-chloroethyl) phosphate (TRIS), New York has banned the flame retardant chemical in products intended for use by children under three years of age, including toys, car seats, nursing pillows, crib mattresses, and strollers. N.Y. Env'tl. Conserv. Law § 37-0701 *et seq.* The Consumer Products Safety Commission classifies TRIS as a probable human carcinogen. Studies have shown that young children are often the group most highly exposed to TRIS, and estimate that children can ingest up to ten times as much of this chemical as adults do because of their tendency to put their hands and other objects into their mouths.
- To protect humans from harm posed by pentabrominated and octabrominated diphenyl ethers (both of which are polybrominated diphenyl ethers or PBDE), New York restricts the concentration of these brominated flame retardants in products manufactured, processed or distributed in New York. N.Y. Env'tl. Conserv. Law § 37-0111. PBDE has been correlated with lower birth weight in newborns. Animal

studies indicate that pre- and post-natal exposures to PBDE may cause long-lasting behavioral alterations and can affect motor activity and cognitive behavior.

- To protect humans and the environment from toxic metals in product packaging, New York restricts the concentration of lead, cadmium, mercury, and hexavalent chromium in inks, dyes, pigments, adhesives, stabilizers, or other additives in product packaging. N.Y. Env'tl. Conserv. Law § 37-0205 *et seq.* EPA has determined that lead and mercury are probable human carcinogens while cadmium and chromium are known human carcinogens. Exposure to high levels of any of these heavy metals can permanently damage the brain, kidneys, and other vital organs.
- To protect the public from a toxic and flammable dry cleaning solvent, New York restricts the use of n-propyl bromide in dry cleaning. *See* "Approved Alternative Solvents for Dry Cleaning" at <http://www.dec.ny.gov/chemical/72273.html>. N-propyl bromide has been found to cause sterility in both male and female test animals, and to harm developing animal fetuses. In humans, the chemical can damage nerves, causing weakness, pain, numbness, and paralysis. As a result, New York will not issue an air facility registration to any facility proposing to use n-propyl bromide as an alternative dry cleaning solvent because n-propyl bromide does not qualify as an approved alternative solvent under 6 N.Y.C.R.R. Part 232. New York City also specifically bans n-propyl bromide under its fire code because of its flammability. N.Y.C. Admin. Code §§ 27-426, 27-427.
- To protect New Yorkers that rely on groundwater for their drinking water supply, New York prohibits the import, sale, or distribution of gasoline containing methyl tertiary butyl ether (MTBE). N.Y. Agric. & Mkts. Law § 192-g. Studies of animals

have shown that exposure to large amounts of MTBE had effects on their nervous systems, and people exposed to MTBE have reported headaches, nausea, dizziness, and irritation of the nose and throat. MTBE in drinking water may also adversely affect taste and odor.

- To protect New York's rich surface water resources — from Long Island Sound to Lake Erie and Lake Ontario — New York limits the phosphorus content of household cleaning products and the sale and use of phosphorus lawn fertilizers. N.Y. Env'tl. Conserv. Law §§ 17-2103, 35-0105(2)(a). Phosphorus entering New York's waters has caused reductions in the oxygen that is necessary for fish to breathe and has contributed to algae that turns water green and degrades drinking water quality.

The Federal Toxic Substances Control Act

The goal of TSCA is to establish necessary and appropriate federal restrictions on the manufacture and use of chemicals that present an unreasonable risk of injury to the health of Americans or the environment. New York strongly supports this goal and recognizes the critical contribution that TSCA — in partnership with state efforts — could make in ensuring the adequate protection of public health and the environment from toxic chemicals. Unfortunately, in practice TSCA has largely failed to live up to its goal.

The primary requirements of TSCA are:

- Under § 8(b), EPA is required to maintain an inventory of chemicals currently manufactured or processed in the United States. 15 U.S.C. § 2607(b).
- Under § 5, manufacturers must notify EPA before using a chemical that is not on the inventory or creating a new use of a chemical that is on the inventory. *Id.* § 2604.

- Under § 4, EPA is required to issue a rule requiring testing of a chemical that “may present an unreasonable risk of injury to health or the environment” or that is or will be “produced in substantial quantities” and will either enter the environment in substantial quantities or lead to human exposure in substantial or significant quantities, if there is insufficient data about the chemical. *Id.* § 2603.
- Under § 6(a), if EPA finds that “there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal” of a chemical “presents an unreasonable risk of injury to health or the environment,” EPA shall protect against that risk using “the least burdensome requirement” with respect to the chemical’s manufacture, processing, distribution, use or disposal. *Id.* § 2605(a).

TSCA has largely failed to meet the goal of keeping Americans and the environment safe from dangerous chemicals because only a small number of chemicals have been tested and only a handful have been restricted. For example, after TSCA went into effect in 1977, 60,000 existing chemicals were placed on EPA’s inventory but only about 200 of those chemicals were tested and only a handful were restricted.

As a result of the failure of TSCA to fulfill its goal, the American public and our environment are currently being exposed to potentially hazardous chemicals on an ongoing basis, even though their toxicity is not yet fully understood. It is essential that TSCA be reformed to require EPA to increase its knowledge of these chemicals’ toxicity as quickly as possible and to impose appropriate restrictions on their manufacture and use as necessary to adequately protect public and environmental health.

The pending Senate bill, S. 1009, proposes several ways to accomplish that reform, including:

- Amending § 4 of TSCA to require EPA to classify every chemical on the inventory as either low or high priority;
- Amending § 6(a)-(c) to require EPA to make a safety assessment and safety determination about every high-priority chemical;
- Amending § 6(c) to provide that, if EPA finds as a result of the safety determination that a chemical will present an unreasonable risk of injury to health or the environment under its “intended conditions of use,” EPA is required to impose additional restrictions as “necessary”; and
- Further amending § 6(c) to remove the “least burdensome requirement” provision, which has acted as a barrier to regulation.

I believe that these amendments represent critical improvements to TSCA. However, I also believe that these amendments could be further improved by imposing deadlines on EPA for designating chemicals as low priority or high priority, for conducting safety assessments and determinations, and for imposing additional restrictions on chemicals that are found to present an unreasonable risk to health or the environment.

Preemption of State Laws under TSCA

Protecting the Nation’s public health and the environment from the adverse effects of toxic chemicals is best achieved through a dynamic federal/state relationship in which the authority of states to enact and enforce protections — which are at least as stringent as federal protections but may also be more stringent — is preserved. That relationship animates our national laws governing air and water pollution, hazardous waste, and pesticides as well as TSCA.

TSCA's preemption provisions allow a state to impose its own restriction on a dangerous chemical until EPA has restricted a chemical, exempt several categories of state restrictions from preemption even after EPA has imposed a restriction, and establish a preemption waiver process. These provisions help to ensure that states retain their ability to protect their citizens and environment from chemicals that states have found dangerous as well as allowing states to continue to be laboratories for nationwide solutions.

§ 18(a)(1) of TSCA provides that a state may regulate any chemical unless and until EPA regulates the chemical under § 6. 15 U.S.C. § 2617(a)(1). Once EPA regulates a chemical because it has found that the chemical presents an unreasonable risk, § 18(a)(2)(B) provides that a state may not enforce an existing regulation or establish a new regulation "which is designed to protect against such risk" after the effective date of that federal regulation. *Id.* § 2617(a)(2)(B).

However, § 18(a)(2)(B) exempts a state restriction on a chemical from preemption if the state restriction is: (1) identical to EPA's restriction; (2) enacted pursuant to another federal law; or (3) a complete ban on in-state use of the chemical. *Id.* These exceptions provide important protections to states. For example, the exception for restrictions that are identical to EPA's restriction allows a state to enforce a restriction under its own law and administrative enforcement process rather than seeking to enforce it in a citizens' suit brought under TSCA in federal district court.

In addition, § 18(b) provides that a state may seek a waiver from preemption if a state restriction: (1) would not create a violation of EPA's regulation; (2) provides a significantly higher degree of protection than EPA's regulation; and (3) would not unduly burden interstate commerce. *Id.* § 2617(b). In considering necessary reform of TSCA's regulatory provisions,

the authority of states to take action to protect their citizens and the environment from threats posed by toxic chemicals should be preserved.

Conclusion

In conclusion, achieving TSCA's goal of ensuring the adequate protection of public health and the environment from toxic chemicals is critically important, as is preserving the authority of states to protect public health and the environment from the risks posed by toxic chemicals. Because TSCA has not met its goal, Attorney General Eric T. Schneiderman strongly supports your efforts and offers the full assistance of our office to you and your colleagues as you review this important federal law.

I would like to thank you Chairman Shimkus, Ranking Member Tonko, and the other members of this committee and subcommittee for your consideration of TSCA and its necessary reform.

Mr. SHIMKUS. Thank you, sir, and now the chair recognizes Ms. Linda Reinstein, correct, President, CEO and Co-Founder of Asbestos Disease Awareness Organization from California. You are welcomed and you are recognized for 5 minutes.

STATEMENT OF LINDA REINSTEIN

Ms. REINSTEIN. Thank you for giving me the honor and the opportunity to testify today at your critically important hearing.

I know far too well that toxic chemicals are not just threats. They are a real part of life and death for many Americans. During the past 10 years since I have been coming to Washington, more than 100,000 Americans have lost their lives because of asbestos. I want to make it clear, I am neither a lobbyist nor an attorney. I am a mesothelioma widow.

I co-founded the Asbestos Disease Awareness Organization back in 2004. We have become the largest independent non-profit organization in the United States dedicated to eliminating asbestos-caused diseases.

It is important for me today. I want to dedicate my testimony to Janelle and to Michael. Tragically, Janelle lost her life to mesothelioma just a few months ago. She was only 37 years old. She has left behind her husband and an 11-year-old son. Michael, age 29, a mesothelioma patient, is fighting for his life and he faces limited treatment options.

My husband, Alan, was diagnosed with pleural mesothelioma in 2003. We had never heard of this asbestos-caused cancer, and we shortly learned it was incurable. Alan chose to undergo radical surgery. They removed a left rib, his left lung, resected his pericardium, and surgically replaced his diaphragm. When mesothelioma attacked his remaining lung, he was then tethered to oxygen and he felt like he was breathing through a pinched straw each breath, every second, every minute, every day. In 2006, my then 13-year-old daughter and I were by his side as he took his last breaths and died.

Sadly, our stories are far too common. Asbestos is a known human carcinogen, and it remains legal and lethal in the United States. The Toxic Substances Control Act, TSCA, has failed to protect public health and our environment. In 1989, EPA issued a final rule under Section 6 of TSCA banning asbestos-containing products. In 1991, however, this rule was overturned by the 5th Circuit Court of Appeals. As a result, there was no ban on the manufacture, importation, processing, or distribution in commerce of asbestos-containing products.

Asbestos has been banned in 54 countries without an economic consequence. It is time for TSCA reform, and more importantly, the burden of proof should shift to the chemical manufacturers to prove their chemicals are safe.

I want you to know that consumer, environmental, and occupational exposures continue. From 1900 to 2010, we have used more than 31 million tons of asbestos, and since 1965, nearly 1.4 million tons of asbestos have been used in friction products: brakes, clutches, and others. But I ask you today, each of you, do you know where asbestos is in your home, in your district, or inside the Capitol?

Your constituents can't manage the toxic risks on their own. It was reported that 2,600 tons of asbestos debris were removed after the Joplin, Missouri tornado, and I want you to know that there are tons of toxic debris that littered the coastline after Hurricane Sandy. It was California's Prop 65, not the EPA, that removed a child's toy from the consumer shelves that was contaminated with asbestos. Horrifically, last year we imported 1,060 tons of asbestos to meet so-called manufacturing needs.

Now I want to be clear about this also. I have tried for 2 years through FOIA requests to identify who is importing asbestos, what is being manufactured, and where is the end product being used? My questions have all gone unanswered. Due to trade laws such as U.S. Code Title 13, Chapter 9, Section 301(g), the information is all confidential. Yet asbestos has caused the largest manmade disaster. The CDC NIOSH statistics from 2000 to 2010 revealed 43,464 Americans have died from mesothelioma and asbestosis, and those are just two of the asbestos-caused diseases.

So when we think about cost benefit analysis and some of the other hoops that we have to jump, I want you to think about the lives that are claimed as you draft and pass meaningful TSCA reform. For Alan, Janelle, Michael, and the hundreds of thousands of other asbestos victims and their families, we deserve responsibility, accountability, and transparency, and without these three, no one is safe. No one.

The asbestos facts are irrefutable. Every day, 30 Americans die from preventable diseases. We cannot alter history or bring back the dead; we can only learn and work to learn to save the future lives. It is time for Congress to protect public health and pass meaningful TSCA reform legislation which truly empowers the EPA to finally ban asbestos.

As I have been saying for 10 years, one life lost to a preventable asbestos-caused disease is tragic. Hundreds of thousands of lives lost is unconscionable. Prevention remains the only cure. I have attached to my testimony a petition signed by 2,700 people who support a ban of asbestos, and I welcome your questions. Thank you.

[The prepared statement of Ms. Reinstein follows:]

Linda Reinstein – Summary

The Toxic Substance Control Act (TSCA) has failed to protect public health and our environment. All forms of asbestos can cause cancer and respiratory diseases, yet it is still legal and lethal in the United States. Asbestos, a known human carcinogen, has caused one of the worst man-made disasters in history. The facts are irrefutable, yet, each day, 30 Americans die from preventable asbestos-caused diseases. The WHO, ILO, EPA, and our Surgeon General all agree that there is no safe level of exposure to asbestos.

Americans trust that their air, soil, and water are safe from toxic contaminants; however, the U.S. government's failure to ban asbestos is the ultimate example of TSCA's limitations. In 1989, the EPA issued a final rule under Section 6 of TSCA, banning most asbestos-containing products. In 1991, however, most of the original ban on the manufacture, importation, processing, or distribution in commerce of asbestos-containing products was overturned. From 1900 to 2012, the U.S. Geological Survey (USGS) reported that we have used more than 31 million tons of asbestos. Those indestructible fibers remain forever in our communities. In the 30 year period beginning in 1965, nearly 1.4 million tons of asbestos was used just in friction products, such as vehicle brakes and clutches. In 2012, the USA consumed 1,060 tons of asbestos.

Americans can't manage this ever-growing risk of asbestos exposure. In 2007, ADAO identified 5 consumer products, including a child's toy, that contained asbestos. Following the 2011 tornado in Joplin, Missouri, it was reported that 2,600 tons of asbestos debris were removed from the community. Last year, tons of toxic debris littered the coastline after Hurricane Sandy. Right here under the Capitol, 10 Architect of the Capitol employees were exposed to and sickened from asbestos while maintaining the tunnels.

Congress should take responsibility for public health by drafting and passing meaningful TSCA reform legislation that truly strengthens protections for our families and environment by preventing the further use of asbestos. Americans have lost confidence in the chemical industries' ability to protect us from toxins. Congress needs to hold these industries accountable. We need to ensure that in the future, the process of approving chemicals is more transparent. The public deserves to have access to vital health and safety information.

The only true measurement of strong TSCA Reform is the legislation's ability to empower the EPA to ban asbestos.



The Committee on Energy and Commerce
 Subcommittee on Environment and the Economy
"Regulation of Existing Chemicals and the Role of Pre-Emption under Sections 6 and 18 of the Toxic Substances Control Act"
 Linda Reinstein, President/Co-founder and Mesothelioma Widow
 Asbestos Disease Awareness Organization (ADAO)
 Wednesday, September 18, 2013

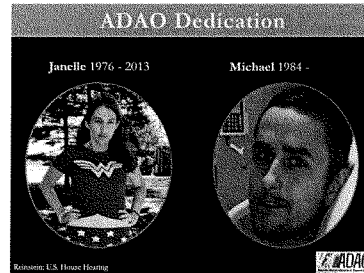
I would like to thank Chairman Shimkus, Ranking Member Tonko and the entire Subcommittee on Environment and the Economy for the honor and opportunity to testify at this hearing, "Regulation of Existing Chemicals and the Role of Pre-Emption under Sections 6 and 18 of the Toxic Substances Control Act." I know far too well that toxic chemicals are not just "threats." They are a very real part of the life and death of many people, including my husband.

My name is Linda Reinstein. I am neither a lobbyist nor an attorney. I am a mesothelioma widow and Co-founder of the Asbestos Disease Awareness Organization (ADAO). Founded in 2004, ADAO is the largest independent non-profit organization in the U.S. dedicated to preventing exposure to eliminate asbestos-caused diseases.

Since EPA Deputy Administrator John R. Quarles testified about the "Need for Toxic Substances Act"¹ in 1975, science and technology have advanced exponentially. Asbestos, a human carcinogen, has caused one of the worst man-made disasters in history. The facts are irrefutable, yet, each day, 30 Americans die from a preventable asbestos-caused disease.

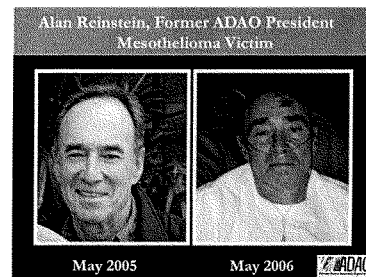
¹ <http://www2.epa.gov/aboutepa/quarles-testifies-need-toxic-substances-act>

Honoring our ADAO tradition, I'd like to dedicate my testimony today to two asbestos victims, Janelle and Michael. Tragically, three months ago, Janelle lost her life to mesothelioma at the age of 37, leaving behind her husband and 11-year-old son. Michael, a 29-year-old mesothelioma patient, continues to fight for his life and faces limited treatment options. Neither Janelle nor Michael ever worked with asbestos. The asbestos victim's profile has changed; once a blue-collar worker in his mid-sixties, now there is a new, younger patient profile emerging with no known occupational exposure – people like Janelle and Michael. It is no longer only at-risk workers being diagnosed; it's also their families: children who hugged their parents and spouses who washed their clothes.



MES-O-THE-LI-O-MA – CAN'T PRONOUNCE IT – CAN'T CURE IT

My husband, Alan, was diagnosed with pleural mesothelioma in 2003. We had never heard of the asbestos-caused cancer, mesothelioma, and shortly learned it was incurable. Alan chose to have an extrapleural pneumonectomy, a radical surgery which removed a rib and his left lung, stripped off his pericardium and surgically replaced his diaphragm – all in hopes of more time with us. In 2005, the cancer came back on his remaining lung. Alan felt like he was breathing through a pinched straw, every breath, every minute, every day. When his oxygen levels became critically low, he was tethered to supplemental oxygen. He fought a hard battle with chemotherapy for nearly a year. In 2006, Alan took his last breaths with our then 13-year-old daughter and me by his side. Alan paid the ultimate price for his job – his life.



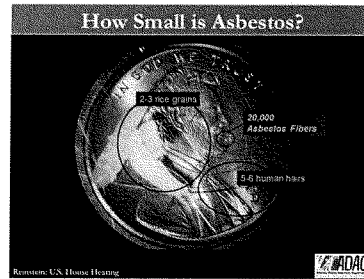
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Our daughter was only ten years old when we began our arduous family battle to fight mesothelioma and work with Congress to ban asbestos.

Today, I somberly represent Alan, Janelle, Michael and hundreds of thousands of other victims whose voices have been silenced by asbestos. I use the word “victim” because it is the only word that appropriately describes an individual exposed to asbestos; a patient, living or deceased, who was diagnosed with an asbestos-related disease; or a family member of those exposed or diagnosed. For each life lost, a shattered family is left behind.

FROM MAGIC MINERAL TO DEADLY DUST

Asbestos was once considered a “magic mineral” due to its light weight, tensile strength, heat resistance, and low cost. All six types of asbestos – chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite – are carcinogenic. Asbestos fibers can be nearly 700 times smaller than a human hair and are odorless, tasteless, and indestructible. All forms of asbestos can cause mesothelioma and lung, gastrointestinal, laryngeal, and ovarian cancers, as well as non-malignant lung and respiratory diseases.



The World Health Organization², International Labor Organization³, U.S. Environmental Protection Agency⁴ (EPA) and Surgeon General⁵ all agree that there is no safe level of exposure to asbestos. Asbestos-related diseases are often misdiagnosed and under-reported. Exacerbated by a latency period of 10–50 years, late stage diagnosis

² http://www.who.int/occupational_health/publications/asbestosrelateddiseases.pdf

³ http://www.ilo.org/safework/WCMS_144446/lang-en/index.htm

⁴ <http://www2.epa.gov/asbestos/learn-about-asbestos#effects>

⁵ <http://www.surgeongeneral.gov/news/2013/04/pr20130401.html>

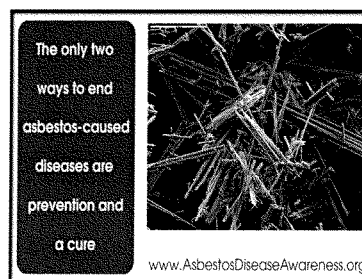
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often limits patients' treatment options. Most patients die within 6 to 12 months after diagnosis. Each death is preventable.

DEADLY MISCONCEPTIONS

Most Americans trust that their air, soil and water are safe from toxic contaminants; however, the Toxic Substances Control Act (TSCA)⁶ has failed to protect public health and our environment. In fact, the U.S. government's failure to ban asbestos is the ultimate example of TSCA's limitations. Only five minor asbestos-containing products were banned as part of the original 1976 TSCA (i.e., corrugated paper, rollboard, commercial paper,

specialty paper, and flooring felt.) The short version of our nation's failure to ban all asbestos in commerce goes like this:



In 1979, EPA announced it would be exploring how TSCA Section 6 could be used to protect the public from exposure to asbestos. For seven years, the agency assembled and evaluated the scientific evidence. In 1986, EPA proposed for public comment a prohibition on the commercial manufacture, import, processing, and distribution in commerce of asbestos. The Agency noted that the "human health effects caused by exposure to asbestos are well-documented...[Moreover] it is well-recognized that asbestos is a human carcinogen and is one of the most hazardous substances to which humans are exposed in both occupational and non-occupational settings." For this reason, EPA indicated that permitting the continued use and import of asbestos posed an unreasonable risk of injury to human health.

⁶ <http://www.epa.gov/oppt/newchemicals/pubs/chem-pmn/appendix.pdf>

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The public's participation in EPA's rulemaking process (1986-1988) yielded more than 45,000 pages of comments and testimony. EPA noted that there was wide agreement that all types of asbestos fibers are associated with pulmonary fibrosis (asbestosis), lung cancer, and mesothelioma. Ultimately, the George H.W. Bush Administration concluded that a regulation banning asbestos was the appropriate step to protect public health. (54 *Federal Register* 29460, July 12, 1989).⁷

When EPA's final rule was issued, however, the Asbestos Information Association, the Asbestos Institute, Corrosion Proof Fittings, and other powerful interests filed a lawsuit to block the asbestos ban. The Canadian Government and the Province of Quebec tried to latch onto the lawsuit because they are major exporters of asbestos. The petitioners raised all sorts of procedural complaints about how EPA conducted the rulemaking process (e.g., designating a hearing officer rather than an administrative law judge to oversee the public hearing). The U.S. Court of Appeals for the Fifth Circuit labeled this legal strategy the "protest everything approach." (947 F.2d 1201 (1991))⁸. Two key arguments made by the petitioners; however, did influence the Court: (1) the EPA did not provide the public with its methodology for estimating the benefits of an asbestos ban; and (2) the EPA did not "give adequate weight to statutory language requiring it to promulgate the least burdensome, reasonable regulation required to protect the environment adequately."

The judges returned the regulation to EPA for reconsideration, and the Administration did not appeal the Court's decision. That 30-year chronology of events leads public health advocates to ask: "If EPA can't ban a known

⁷ <http://www2.epa.gov/asbestos/asbestos-ban-and-phase-out-federal-register-notice>

⁸ http://scholar.google.com/scholar_case?case=6165892895625819539&q=Corrosion+Proof+Fittings+v.+EPA&hl=en&as_sdt=2,5&as_vis=1

carcinogen---at which no level of exposure is safe---how can EPA regulate any toxic substance?" ("The Failed EPA Asbestos Ban," Environmental Working Group, March 2004.)⁹

Without a comprehensive ban on asbestos, companies continue to contaminate our communities with these deadly fibers. Without a comprehensive ban, asbestos continues to accumulate in our communities. The U.S. Geological Survey (USGS) reported that in 2012, 1,060 tons of asbestos was imported into the United States. We can't even manage that new *additional* risk because we don't know where the asbestos is being introduced and used.

ASBESTOS: STILL LEGAL AND LETHAL IN THE UNITED STATES

The collateral damage of asbestos consumption is staggering. USGS reported that from 1900 to 2012, we have used more than 31 million tons and imports continue. Furthermore, about 50 percent occurred between 1960 and the end of 2003.¹⁰ From 1965 – 2000, nearly 1.4 million metric tons of asbestos was used in friction products such as brakes and clutches, and insulation.¹¹ Today, ships docked in U.S. ports still unload asbestos in the states of Louisiana, Texas, California, New Jersey, and more.

The United States remains dependent on imports to meet so-called manufacturing needs. USGS reported that in 2012, "the chloralkali industry accounted for an estimated 57% of U.S. consumption; roofing products, about 41%; and unknown applications, 2%."¹² For the past two years, we have seen an increase in asbestos consumption in the chloralkali industry, even though viable and affordable asbestos substitutes exist.

⁹ <http://www.ewg.org/research/asbestos-think-again/asbestos-still-not-banned>

¹⁰ <http://pubs.er.usgs.gov/publication/cir1298>

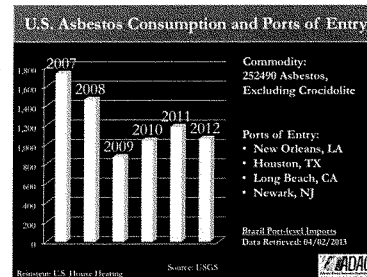
¹¹ <http://pubs.er.usgs.gov/publication/cir1298>

¹² <http://minerals.usgs.gov/minerals/pubs/commodity/asbestos/mcs-2013-asbes.pdf>

In 2012, the US imported 1060 tons of chrysotile asbestos from Brazil who is the world's third largest asbestos producer.

In response to this continued public health crisis, 18 months ago, I began my inquiry about the toxic asbestos import trade by asking three questions via a Freedom of Information Act (FOIA) request:

- Who are the U.S. companies and/or government agencies importing asbestos?
- What asbestos-containing products are being manufactured in the U.S.?
- Where are the asbestos-containing products being used in or exported from the U.S.?



I've filed FOIA requests and exchanged emails with government

officials. The hurdles and obstacles have been frustrating and maddening, especially for a small non-profit in a home office without staff.

I have been unable to get answers to any of my questions due to U.S. Code Title 13, Chapter 9, Section 301(g), which protects the confidentiality of export data collected by the U.S. Census Bureau. This roadblock led me to different questions: Why *is* the United States "dependent on imports to meet manufacturing needs," as USGS states?

To my dismay, the officials at USGS and the Census Bureau insist that information about asbestos imports cannot be disclosed. Importing and using a deadly chemical that has been banned in 54 countries across the globe, is granted a secret status? I support business, innovation, and transparency – but Americans are shutout from information needed to protect their health and our environment.

Asbestos Disease Awareness Organization is a registered 501(c)(3) nonprofit organization
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According to the Center for Public Integrity, the American Chemistry Council released a statement saying, “Diaphragms made of asbestos are a critical separation medium in the chlorine manufacturing process. Chlorine is essential for manufacturing life-saving medicines, producing solar cells, and providing safe drinking water.” The statement asserted that chlorine producers “work to manage the risks and potential adverse effects to human health and the environment” and “workers potentially exposed to asbestos are protected by wearing appropriate personal protective equipment and following strict work processes.”¹³

Despite the irreversible, harmful health effects of asbestos exposure, the American Chemistry Council statement continues: “Employees in the chlor-alkali industry are given annual medical examinations to determine whether an employee has incurred any adverse effects due to any possible exposure.” As an asbestos widow, that statement is alarming and distorted. If a medical examination results in an asbestos-disease diagnosis, it’s too *late* to save that patient because the health effects are irreversible. There is no cure for asbestosis or mesothelioma.

We have ignored the World Health Organization’s Resolution stating: “The most efficient way to eliminate asbestos-related diseases is to stop using all types of asbestos.”¹⁴

ASBESTOS CAN TAKE YOUR BREATH AWAY, FOREVER

The facts are clear: the tons of asbestos that have been mined in and imported to the U.S. have created a public health crisis. Asbestos remains in our homes, schools, and buildings, and even on consumer shelves. Workers and consumers cannot adequately identify the toxic fibers nor manage the risks of consumer, environmental and occupational asbestos exposure in products or places.

¹³ <http://www.publicintegrity.org/health/public-health/asbestos>

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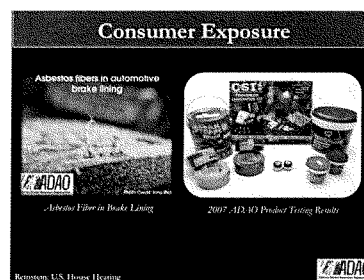
Members of the Committee, do you know where these nearly invisible, deadly fibers are in your home, child's school, on consumer shelves? Do you know where they are in your district, or here in the Capitol? Americans want to know where asbestos puts their communities at risk.

CONSUMER, ENVIRONMENTAL AND OCCUPATIONAL EXPOSURE

CONTINUES

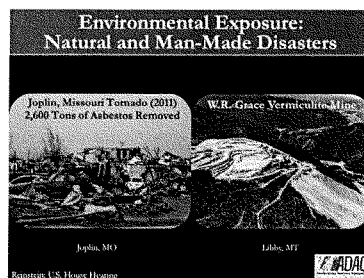
CONSUMER EXPOSURE:

- From 1965 – 2000, nearly 1.4 million metric tons of asbestos was used in friction products such as brakes and clutches, and insulation.
- In 2007, ADAO identified 5 consumer products, including a child's toy, that were contaminated with asbestos.



ENVIRONMENTAL EXPOSURE:

- Natural and man-made environmental disasters have plagued us. It was reported that 2,600 tons of asbestos was collected after the 2011 Joplin, Missouri tornado and tons of toxic debris littered the coastline after last year's Hurricane Sandy.

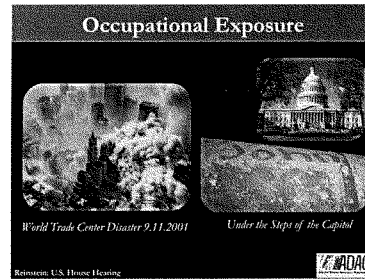


¹⁴ http://whqlibdoc.who.int/hq/2006/WHO_SDE_OEH_06.03_eng.pdf
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- W.R. Grace Vermiculite Mine, a man-made disaster in Libby, MT, has been costly in dollars and lives. The federal government has spent more than \$450 million to remediate the toxic areas in Libby, MT and provide medical care to the residents.

OCCUPATIONAL EXPOSURE:

Although we have laws and regulations, workers are still being exposed on the job and the asbestos fibers they have on their clothes and shoes, and in their cars are taken home. This take-home toxin threatens their families with deadly hugs and chores. Occupational exposures can occur during auto repair work, maintenance, construction, abatement, and hazardous debris removal.



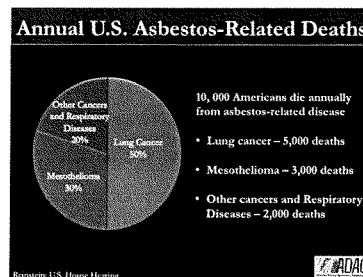
- The medical journal *The Lancet* reported that 9/11 first responders are now suffering from a variety of diseases and are 19% more likely to have cancer than other first responders. Asbestos was the primary insulation compound used when the World Trade Center was built, beginning in 1968. Due to the long latency period of asbestos-caused diseases, it will be decades before we can accurately calculate collateral damage from 9/11.¹⁵
- Right here under the Capitol, ten federal employees were exposed and sickened by their work maintaining the tunnels. Asbestos dust was so thick that a worker was able to write his name on the pipe. One of their wives now has pleural thickening, an asbestos-related health condition, from washing her husband's contaminated clothes.

¹⁵ <http://www.thelancet.com/themed-911>

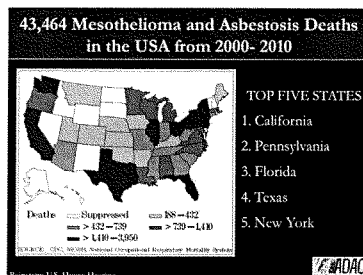
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AMERICANS REMAIN AT RISK TODAY

Each year, an estimated 10,000 Americans die from asbestos-related disease. Many physicians and public health experts indicate that this estimate is likely low due to underreporting and a focus limited to occupational surveillance. Annually, about 3,000 Americans die from mesothelioma, 5,000 from asbestos-related lung cancer, and 2,000 from other asbestos-related cancers or respiratory diseases.



The Centers for Disease Control and Prevention's NIOSH statistics from 2000 to 2012 reveal that 43,464 Americans died from mesothelioma and asbestosis – just two of the asbestos-caused diseases. The top five states with the highest mortality were California, Pennsylvania, Florida, Texas, and New York.



The Occupational Safety and Health Administration states that in the United States, "Asbestos is well recognized as a health hazard and is highly regulated. An estimated 1.3 million employees in the construction and general industry face significant asbestos exposure on the job." In May 2010, the United States President's Cancer Panel (PCP) released the landmark 200-page report entitled, "*Reducing Environmental Cancer Risk: What We Can Do Now*"¹⁶. The panel reported, "Construction workers were found to be 11 times more likely to develop mesothelioma, due to asbestos exposures at the site."

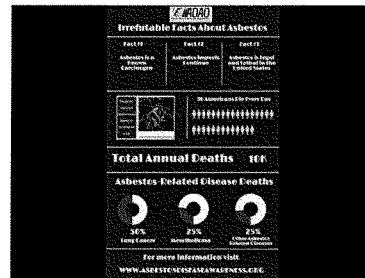
¹⁶ http://deainfo.nci.nih.gov/advisory/pcp/annualReports/pcp08-09rpt/PCP_Report_08-09_508.pdf

HISTORY IS A GREAT TEACHER TO THOSE WHO LISTEN

We cannot alter history or bring back the dead, but we can learn from the past to save lives. Every day, 30 Americans will die from preventable asbestos-caused diseases, yet asbestos continues to be legal and lethal in the United States. We know so much and have done so little to mitigate this disaster. Human, environmental, and civil rights have all been compromised because of asbestos, and patients like Janelle, Michael, and Alan pay the price. I know too well that the only two ways to end asbestos-caused diseases are prevention and a cure. For each life lost, a shattered family is left behind.

IRREFUTABLE ASBESTOS FACTS

1. Asbestos is a known human carcinogen and there is no safe level of exposure.
2. 54 countries have banned asbestos, but the United States has not.
3. Asbestos imports and exposure continue. In 2012, the United States imported over 1,060 tons of asbestos.
4. An estimated 10,000 Americans die each year from preventable asbestos-caused diseases.
5. Americans cannot determine or manage consumer, environmental, and occupational asbestos risk.



It is because of my husband, Alan, Janelle, Michael, and thousands of asbestos cancer warriors that I fight every day to protect and help families impacted by asbestos disease. They deserve responsibility, accountability, and transparency. Meaningful TSCA reform addressing these three issues will save lives.

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- Congress should take responsibility for public health by drafting and passing meaningful TSCA reform legislation that truly strengthens protections for our families and the environment by preventing the further use of asbestos.
- Americans have lost confidence in the chemical industries' ability to protect us from toxins. Congress needs to hold them accountable.
- We need to ensure that in the future, the process of approving chemicals is more transparent. The public deserves to have access to vital health and safety information.

The only true measurement of strong TSCA Reform is the legislation's ability to empower the EPA to ban asbestos. One life lost to a preventable asbestos-caused disease is tragic; hundreds of thousands of lives lost is unconscionable.

I have attached to this testimony a petition signed by over 2,700 people urging Congress to ban asbestos.

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Mr. SHIMKUS. Thank you. We appreciate your testimony.

Now I would like to recognize myself for 5 minutes for the first round of questions. My first question goes to Mr. Greenwood.

You mentioned this in your opening statement, but for clarification, TSCA Section 6 provides EPA broad authority to regulate chemicals if EPA reasonably believes a chemical "presents or will present an unreasonable risk of injury to health or the environment." EPA imposed controls range from chemical bans to restricted uses to warning label requirements. What does unreasonable risk mean in the TSCA context?

Mr. GREENWOOD. Mr. Chairman, as I indicated a little bit in my initial statement, it involves a balancing of multiple factors. I mean, you have to look at the risks. You have to look at product benefits. You look at alternatives, and then, of course, you look at costs. So I think the key thing there is it is a combination of those factors and an analysis. It does not necessarily require, for example, cost benefit analysis, but that is often done.

It is useful to perhaps recognize since asbestos is such a topic here that a cost benefit analysis was done on asbestos under the executive order, not under TSCA, and the administration determined that despite the significant risks, that rule was worth sending out. So the point is I think what you look at here is both of the factors that were considered, but they still led to decision to try to ban asbestos. So that doesn't necessarily, as unreasonable risk, mean you are doing less for more regulation.

Mr. SHIMKUS. And you reiterated what you said in your opening statement. You have health and environmental risks, I think benefits, availability of alternatives, and economic consequences of the rule. That was the kind of four criteria that we use to evaluate that. And you believe this is a workable standard for TSCA?

Mr. GREENWOOD. I think it is and can be. I mean, I think—again, as I mentioned and I think Mr. Rawson mentioned, too, you got to remember that the unreasonable risk standards is out there and in many ways the prevailing standard that exists for regulation of products. And so you see experiences in other parts of the government, including pesticides at EPA, where there has been a very active program with an unreasonable risk standard. So I think the issues that you see in TSCA, at least with Section 6, as I mentioned in my testimony have less to do with the unreasonable risk standard than they do with that interpretation of what least burdensome alternative is.

Mr. SHIMKUS. And Mr. Rawson, Mr. Greenwood referred to you. Do you agree with that, those statements?

Mr. RAWSON. I do. I think because you see the same standard in other statutes, including statutes administered by other agencies such as the Consumer Products Safety Act administered by the CPSC, and we see the basic criteria that make up the unreasonable risk standard in the executive order issued by this administration and similar executive orders issued by prior administrations. So I do think it is the right target to aim for.

Mr. SHIMKUS. Having said that, do you think that the preemption provision similarly needs to be strengthened?

Mr. RAWSON. Well, the preemption provision in TSCA acts similar to the preemption provisions in the Consumer Products Safety

Act and some other statutes. It basically says if EPA hasn't acted, States are free to act. Where EPA has acted under particular sections, then States typically can't act, although there are some exceptions. States can adopt identical laws to make them enforceable under State law. The States can actually prevent the use of the chemical within their boundaries, other than for the use to make other chemicals or mixtures. So there is still some latitude for the States.

In terms of strengthening it, the one thing that the current preemption clause doesn't do, it preempts State action when EPA acts to regulate. If EPA takes a hard look at a chemical and says this one is OK, this activity is safe, there is no risk, it doesn't preempt us in the absence of regulation. It doesn't prevent States from saying well, we are going to regulate it. So one thing that could be considered is when EPA takes a hard look, all the interested stakeholders have an opportunity to comment and have their say and no risk is found, you could argue that preemption could make sense there to have national uniformity. That is not the current approach.

Mr. SHIMKUS. Thank you. Ms. Thomas, some people think TSCA Section 6 should not include any exposure of magnitude effect considerations. What else—what other considerations should be evaluated?

Ms. THOMAS. Thank you for the question. While I am not a TSCA expert by any means, we would support that a process where active chemicals in commerce are evaluated, are prioritized, and assessed in a science-based, risk-based manner that takes into full account things like chemical use, hazard information, potential exposure, and the availability of alternatives. And we would be more than happy to work with you to try to find that right balance so that all of those things are accomplished.

Mr. SHIMKUS. So if I can restate what you—you think that there is—a robust science assessment would be helpful in this process?

Ms. THOMAS. Absolutely, yes.

Mr. SHIMKUS. Great. I thank you for your answers.

I would now like to yield to Mr. Tonko, the Ranking Member, for 5 minutes.

Mr. TONKO. Thank you, Mr. Chair. I thank the witnesses again for their testimony, and particularly welcome Mr. Johnson and Mr. Srolovic from my home State who can provide an important State perspective.

In recent years, it appears as though States have led the way on chemical regulation, as EPA's program has faltered. It is vitally important that we hear from them today. Any effort to reform TSCA should protect the hard work States have devoted to protecting their citizens from the risks of dangerous chemicals, and learn from those success stories.

Mr. Srolovic, can you describe briefly some of the chemical risks New York has been working to address?

Mr. SROLOVIC. Yes, Ranking Member Tonko. Thank you.

In New York, the most recent example I alluded to in my testimony was the risk to groundwater and public health posed by MTBE. That assessment led to the ban that was successfully defended from a challenge. I think overall, what we found, our kind

of lesson learned is that environmental laws work best when there is a strong State and Federal partnership, and the problem with chemical regulation is that we don't have an effective Federal partner. And while New York continues to use its traditional authority to protect public health and the environment, we can't do it alone. We need EPA to have a clear mandate and the authority and the resources to timely assess the myriad of chemicals in our society for risks to health and the environment, and to enact appropriate restrictions.

Mr. TONKO. Thank you. EPA's attempts to regulate asbestos have utterly failed in light of industry-backed litigation. Have the New York State regulations faced legal challenges, or Vermont, if you can share your story, either of you?

Mr. JOHNSON. So Vermont has not had a successful challenge. We also banned MTBE in gasoline. The challenge for Vermont with its 620,000 residents and one toxicologist is that we just—we have looked at some chemicals, we have a lot of concerns, but we don't have an ability. We just haven't had an ability to do the work that we think ultimately ought to be done at the Federal level. We are absolutely in agreement in Vermont that a nationwide process would be the most appropriate one. It would work best for everybody if it was comprehensive and robust, but we will certainly be looking—you know, if this latest approach attempt to sort of reform TSCA doesn't come to fruition, I think the pressure will be on in my legislature to do more in Vermont. I think it will take a lot of work, but we could be successful.

Mr. SROLOVIC. The New York ban on MTBE, as I mentioned, was challenged by industry. My office successfully defended that through trial. The district court found that the exercise of New York's traditional power to protect its groundwater and its public health were not in conflict with the approval or authorization of MTBE as a gasoline additive by EPA under the Federal Clean Air Act. So in that case, the court found, in fact, that there was no conflict between the State and Federal regimes, and that basic decision was just recently revisited by the U.S. Court of Appeals for the Second Circuit in a case involving New York City groundwater contamination, and again found that there was no conflict between these two programs.

Mr. TONKO. Thank you. It is interesting to note that after New York acted to address the risks of the pesticide DDT, EPA followed suit. Mr. Srolovic, one of things this subcommittee should understand is what tools States need in a situation where Federal and State requirements are the same. If EPA adopts chemical regulations that mirror rules currently in place in New York, does New York still need authority to enforce the existing New York State requirements, or is it sufficient for the State to rely on Federal enforcement or the availability of citizen suits under TSCA?

Mr. SROLOVIC. It is important for States to retain the ability to adopt under their own State laws the same requirements as the Federal requirements. And the reason for that primarily is that it then allows the State environmental agencies—in New York, it is the Department of Environmental Conservation—but the environmental regulatory agencies around the State do the bulk of day-to-day enforcement of our environmental laws, whether it is a State

standard or a Federal standard. And having the ability which is presently preserved under TSCA for States to adopt that same requirement under their own law is very important for enforcement around the country.

Mr. TONKO. I see that I have exhausted my time, so I yield back. Thank you, Mr. Chair.

Mr. SHIMKUS. Gentleman yields back his time. The chair now recognizes the gentleman from Pennsylvania, Mr. Murphy, for 5 minutes.

Mr. MURPHY. Thank you, Mr. Chairman, and I thank the distinguished panel for being with us today.

Mr. Greenwood, I am just trying to get a sense from your testimony, a couple clarifications. Which is more important to help us get to the truth on chemical safety questions, peer review of data and scientific analysis, or cross examination requirements under TSCA's Section 6C?

Mr. GREENWOOD. Well, I guess I would opt for peer review. Let me amplify that a bit. I do think, particularly in the context of TSCA Section 6, by the time you get to this cross examination stage, there has been a fairly extensive airing of the issues, and at the point—at least with my experience with asbestos, by the point you were talking about cross examination, there was essentially everybody hunkered down in their own positions taking shots at each other. To me, a better approach is what we see often with peer review, which is more typical of what we see today in regulation, where experts come together, see if they can develop consensus, see if they can provide some useful advice to an agency. And my general sense is that is probably more valuable.

Let's say that peer review is not necessary every time, because depending on the issue and the rulemaking, you may not need that, but my general experience is that has been more successful.

Mr. MURPHY. Let me ask also then about cost benefit analysis. Does that also proceed in any kind of a scientific version, and what kind of data is included in a cost benefit analysis?

Mr. GREENWOOD. Well, the range of data could be quite extensive. Obviously you are looking at the most best available information you can find. For the cost side, it is often a little easier. The real challenge is usually how you articulate benefits, because the key aspect of cost benefit analysis is you try to monetize if you can and compare, as apples to apples, costs and benefits. And some of that is much easier to do for some benefits than others, and that becomes one of the difficult challenges, but it can work well.

Mr. MURPHY. Thank you. Is the requirement that EPA consider the availability of viable substitutes for chemicals for specific uses appropriate?

Mr. GREENWOOD. I think it absolutely is. It is critical, I would say, for at least two good reasons. One is it is critical in making a clear signal about whether there is going to be a technological issue. In other words, if you find that there are no alternatives, then you know you are entering a world in which you could have significant disruption, and that is an important thing to understand.

The other thing about alternatives is it helps set up this question of shouldn't there be some assessment of those alternatives to see

if they are better or worse, because the worst thing you want to do is push one chemical out of the economy and substitute another one that has got a bigger hazard.

Mr. MURPHY. Let me ask another question about this scientific quality of these decisions with regard to when they try to make a good risk decision, how does a focus on conditions of use of a chemical affect that scientific quality?

Mr. GREENWOOD. That is a very important question, and I think it comes up more and more, because the question is as you have a general concern about a chemical, you need to translate that into something that you can actually do. And part of that is to look, then, at uses of chemicals. Once you know what the uses are, you can then do better exposure assessments, because you have very tangible situations to look at. It is also, again, critical for this issue of alternatives. Once you know exactly what your use is and your technology, then you can begin to ask the question what really are the realistic alternatives for that particular function, that use, and that exposure?

Mr. MURPHY. Thank you.

Mr. Rawson, a quick question here. In your experience, we know that in the 37-year history of TSCA, EPA has only successfully imposed restrictions on, I think, five chemicals using Section 6. Does this mean that TSCA provides EPA inadequate authority to regulate, or there are some other issues there?

Mr. RAWSON. Thank you. Well, it certainly reflects the track record, but my own personal view is it reflects more EPA's reaction to the corrosion-proof fittings decision than problems with the statute itself. We have walked through the core elements of Section 6 and shown how they are actually in line with the standard practice for most agencies trying to address unreasonable risk and where possible, use the least burdensome approach to address the problem. But of course, the approach has to address the problem. So that is fairly standard and what is in the statute is consistent with smart regulation.

The problem with corrosion-proof fittings is that there are some really serious issues with the rulemaking. I don't want to drag through those, but the Agency alters exposure assessment in very significant ways after the hearings were closed, and so nobody had a chance to comment. It was presented with really credible evidence that substitutes would actually cause more deaths than would be prevented by the rule. So these were big issues. We were all familiar with the adage that bad law makes—excuse me, bad facts make bad law. In this case, I think we had a situation where bad facts made for a very strong decision, and the Agency took that as saying that somehow now Section 6, because of this judicial gloss, is harder than what most agencies have to do. My feeling is that there are all too many statements in that decision that say if you had done it better, if you hadn't made these egregious errors, the court would have been much more deferential. So I sort of feel like too much of a hard lesson was learned from that decision.

Mr. SHIMKUS. Gentleman's time is expired. Chair now recognizes gentleman from California, Mr. McNerney, for 5 minutes.

Mr. MCNERNEY. Thank you, Mr. Chairman. I thank the witnesses for coming today.

I would like to start with Mr. Greenwood. What would you—or how would you formulate an alternative to a least burdensome alternative? How would you formulate something better than that?

Mr. GREENWOOD. Well, one of the things I think is worth looking at is the way the current executive order frames the issue. It basically says that you are supposed to be looking at alternatives that are potentially effective and reasonably feasible. There is kind of an implied rule of reason there. The agent has to look at large, broad options. He doesn't have to look at every possible version, every possible variation, and I think—

Mr. MCNERNEY. So that has to be done in language, right, that can be followed?

Mr. GREENWOOD. Yes.

Mr. MCNERNEY. That is a bit of a challenge. Do you have a specific wording or specific language that you would want to use?

Mr. GREENWOOD. Well again, I think if you use that language and then kind of focus on the way it has been implemented in executive orders, I think you find a system that works, because—just to give you a ballpark, it is very common for agencies to, let's say, look at three or four large options, which is within the scope of their capability. They can analyze them, they can present the information. It goes to public comment. It is work. It takes a little bit of effort. It takes a bit of time, but it is not an impractical approach.

Mr. MCNERNEY. Mr. Rawson, I believe you said that Section 6 places the burden on the EPA to demonstrate the need for regulation. What would you think would be a better approach than having the burden on the EPA?

Mr. RAWSON. So I actually think that is fine. I think it is fairly typical that the burden is on the Agency to justify its action. But I think the burden should often be on industry to supply much of the information, the test data, to provide information on exposure and other information that would support that decision. So my view of the world is that industry should supply much of the information, the Agency should make the decision about risk, and then if it finds a significant risk, propose the least burdensome approach that would address that risk.

Mr. MCNERNEY. Well the opposite would be to require industry to prove that their chemicals are safe.

Mr. RAWSON. Right. That is effectively what is happening right now with new chemical regulation, because with new chemicals companies have to—and this was covered by the previous hearing, of course, they have to provide a pre-manufacture notice. Typically, EPA either gets the information it wants or the restrictions it wants, or the PMN is withdrawn. But with the universe of existing chemicals and all the myriad uses and so on, it is just not practical at this point in time to have industry prove a negative for every chemical for every use. What we really need, in my judgment, is EPA to have a mandate and the resources to prioritize and address in a reasonable timeframe the high priority chemicals, hopefully identify that most uses of most chemicals don't pose unreasonable risks, and then focus on the ones that might.

Mr. MCNERNEY. Well, the European countries, at least some of them, appear to have the mandate that you are talking about.

Mr. RAWSON. What they have is a mandate under their current program, known as REACH, a requirement that industry assemble chemical safety reports, dossiers, on their chemicals. But in only very limited circumstances will there be a requirement to seek authorization to continue uses. It is a very narrow subset of chemicals for which that approach would be taken.

Mr. MCNERNEY. Well, I believe that you implied in your opening remarks that the EPA asbestos rule—overturning of the EPA asbestos rule had a chilling effect on that Agency's ability to conduct further rulemaking. Is that—did I hear you right about that?

Mr. RAWSON. Yes, and Mr. Greenwood was there at the time. He was head of OPPT, and he has described that in his testimony. So certainly the Agency read that opinion and thought wow, this is hard. Maybe we shouldn't try to do this. Maybe we should act in other ways. I wasn't there. When I read the opinion, I am more struck by the errors, procedural and substantive errors that really forced the court's hand. And I would urge, there are some statements. I will just read one statement. This is in the conclusion where the court sort of tries to say to the Agency look, you can do this again, just follow some of the things I have said. And the court said EPA does not have the duty under TSCA of affirmatively seeking out and testing all possible substitutes. But when an interested party comes forward with credible evidence that the planned substitutes present a significant and even greater toxic risk than the substance in question, the Agency must make a formal finding on the record, otherwise the court can't evaluate. So to me, again, what I feel is that bad facts made a strong decision. I think it was premature to conclude that Section 6 just couldn't work anymore.

Mr. MCNERNEY. All right. Thank you, Mr. Chair.

Mr. SHIMKUS. Gentleman's time is expired. Chair will now recognize the gentleman from Mississippi, Mr. Harper, for 5 minutes.

Mr. HARPER. Thank you, Mr. Chairman, and thank you for holding this very important hearing.

If I could, I will start with Mr. Greenwood, and my question would be should overall statutory standards for science and data quality in regulatory decision-making be made more stringent?

Mr. GREENWOOD. I think these questions about data quality, there are already some restrictions under the Information Quality Act that actually have been incorporated into many agencies' procedures, so I think you are seeing some of that. I do think it is difficult to, in a sense, regulate or legislate good science, so I think to some extent, this is one of these things where if you have a robust process where good science can be heard—we mentioned peer review earlier—I think these are the sorts of mechanisms that will help improve better science and how decisions are made.

Mr. HARPER. What was the take home lesson for EPA in the 1991 corrosion fittings court decision?

Mr. GREENWOOD. Well, I think we just heard my view and Mr. Rawson's view of how we reacted. The Agency reacted, I think, very strongly with a notion that as we read the opinion, we were seeing this as a case that says you need to evaluate each individual option that is less burdensome, and that one of the things we were afraid of was a tactical approach that we would see with industry would continue to put in front of us more and more alternatives and op-

tions and suboptions. And with TSCA being as broad as it was, you could do almost anything. The ability to do that was very real, so this is one of those issues that it was interesting at the time, it was the consensus of the lawyers, the managers, and the staff that this was a new world. This was a new set of burdens on the Agency that we weren't really quite ready for. Remember that at the time, the executive order that we were operating under required that we develop alternatives and look at options. We did that. However, that was not enough for this court.

Mr. HARPER. Mr. Rawson, if I could ask you, some States have been more active than others, obviously, in regulating chemicals. Have any State requirements for chemicals been preempted by TSCA in its 37-year history?

Mr. RAWSON. By and large the answer is no, because preemption is triggered under three sections, Section 4, testing, and Section 5, new chemicals, and States typically haven't been active in those areas. And then Section 6, where we have heard that EPA has promulgated very few regulations, apart from the PCP regulations. There is at least one case out of Louisiana where a parish's attempt to prevent the siting of a PCP disposal facility was preempted, but there are other cases where narrow regulations at the State level governing the disposal of PCPs were not preempted. But by and large, thus far preemption has not been a significant factor.

Mr. HARPER. Well, let me ask you—in your opinion, of course—if TSCA is amended to require EPA to more systematically assess the safety of chemicals in commerce, do you think TSCA's preemption provision similarly needs to be strengthened?

Mr. RAWSON. As I suggested earlier, an argument could be made that right—well, right now preemption only is triggered when EPA acts by regulation. That is similar to what happens, for example, with the CPSC. When CPSC promulgates a regulation governing a product, States can only do the same thing. They can't do something different. There is an obvious reason for that.

But what we don't have here is a situation where EPA takes a very hard look, everybody with an interest comments, and concludes this product is safe, no regulations are required. That doesn't have a preemptive effect. One could argue that if it is done right once, it doesn't have to be done 50 other times. One could also argue the opposite, that States should be free to be more stringent.

Under the current approach, by the way, they have the ability to petition the EPA for an exemption to be more stringent, and they have the ability to just simply say you can't use the chemical in our State. So there are—there is latitude now, even when EPA has acted, for some State role.

Mr. HARPER. Ms. Thomas, if I could ask you, how are your members affected under current TSCA by California's green chemistry law?

Ms. THOMAS. That is a great question. Thank you very much.

So we are seeing a trend at the State level towards going beyond regulating just chemicals and starting to regulate consumer products, and they are using broad definitions of consumer products that would capture autos. A perfect example is the California Safe Consumer Products regulations, which would give the Department of Toxic Substances authority to regulate up to 10 components in

a 3-year period to undergo alternative assessments, and the way component is designed—defined, it would capture things, complex things like vehicle assemblies, transmissions, which in itself is a very complex component made up of multiple subcomponents and materials, and more importantly, the likelihood of exposure is minimal to nonexistent. So the idea of having to do an alternatives assessment for a transmission would be extremely costly and take many years, so imagine that times 10 in a 3-year period. So it is simply not feasible and very, very complicated.

Mr. HARPER. And who would you expect would ultimately bear that cost, additional expense?

Ms. THOMAS. We would, the auto makers.

Mr. HARPER. OK. All right, I yield back.

Mr. SHIMKUS. Gentleman's time is expired. Chair now recognizes the gentlelady from Colorado, Ms. DeGette, for 5 minutes.

Ms. DEGETTE. Thank you very much, Mr. Chairman. I want to thank all the witnesses for being here. Sometimes I feel like I am in that movie "Groundhog Day" because I have been on this committee for 16 years now. I can't tell you how many hearings we have had where the witnesses come in and say, you know, there is consensus. Everybody agrees we need to figure out what to do about TSCA. Maybe we will have the magic moment this year, and I would be certainly happy to work with you, Mr. Chairman. I think everybody agrees, we need to do something, particularly about Section 6.

And you know, when I was sitting here thinking when you talk about Section 6 of TSCA, I mean, the reason we have seven options for controls of chemicals in TSCA is they are all supposed to be actual regulatory options, not barriers towards trying to regulate and to enforce against potentially dangerous chemicals. You know, Section 6, ever since the asbestos debacle, has just really not been an actual regulatory option for the EPA, and that is a problem. It is a problem because for whatever reason, whether you think the court decision was proper or not, the EPA doesn't feel like they can go back and go through that same regulatory process again. So I think we really need to think about why that section doesn't work on its own and what we can do, especially after you hear testimony like Ms. Reinstein gave us today about the very real health effects that asbestos is having. And I want to thank you for sharing that human moment with us.

Mr. Greenwood, in your testimony you said accurately that many Federal laws share a common pattern of weighing health and environmental risks against the cost and benefit of action, as well as the availability of alternatives. Under the Clean Air Act, the EPA sets national ambient air quality primary standards that protect public health regardless of cost, but implements those standards who state implementation plans that incorporate cost benefit analysis. And so I am wondering, could a framework where chemical determinations are made based only on health risks but are implemented considering the cost or benefit of different options be more effective? What do you think about that?

Mr. GREENWOOD. I mean, I think that is an option that is worth considering. You mentioned the Clean Air Act. Essentially that is what you have in the Safe Drinking Water Act as well.

Ms. DEGETTE. Right.

Mr. GREENWOOD. So that is a model. I think one of the questions will be kind of what factors distinguish those things that are the health-based criteria from those things that would be this unreasonable risk notion.

Ms. DEGETTE. Right.

Mr. GREENWOOD. And so I think that is a key factor, but certainly, that is a model that could be considered.

Ms. DEGETTE. Well you know, one thing that the EPA says when thinking about how they are going to have reform is they say chemicals should be reviewed against safety standards that are based on sound science—that is a radical concept, by the way, sometimes in this committee—and reflect risk-based criteria protective of human health and the environment. What do you think about that standard? Mr. Greenwood, what do you think about that?

Mr. GREENWOOD. Well, I think—

Ms. DEGETTE. That is what the EPA says that their guidelines should be.

Mr. GREENWOOD. Well, I think that is what they think they do, and that is exactly what their guideline is. But I think that is certainly part of at least a component of the unreasonable risk standard that we think of as this notion of looking at the risks through looking at exposure and hazard, and then perhaps getting into the risks of the alternatives. So I think it is consistent with unreasonable risk in that sense.

Ms. DEGETTE. OK. So Mr. Srolovic, New York has been really successful in placing restrictions on dangerous chemicals. What was the process that New York used in making those determinations?

Mr. SROLOVIC. The restrictions at the State level in New York have been legislative decisions, so those bans or restrictions that I mentioned work through our State legislation process.

Ms. DEGETTE. OK, but I assume the legislature used some kind of a basis for making those determinations?

Mr. SROLOVIC. Indeed. They—

Ms. DEGETTE. Let me ask you this. Is it a cost benefit analysis or an analysis of alternatives? Do you know?

Mr. SROLOVIC. It includes those considerations, certainly. When the—for example, the BPA ban was passed, all the voices were heard: industry, producers, users, the medical community. So there in essence was a legislative hearing process that led to the legislature making that balance that considered all of those factors.

Ms. DEGETTE. And they used—did they use science?

Mr. SROLOVIC. Indeed.

Ms. DEGETTE. OK, just checking.

Mr. Johnson, you know, you talked about the need for States to know about some disclosure. That got me to thinking about the EPCRA statutes that relate to storage of chemicals. We could do something similar with TSCA for chemicals—for disclosure of chemicals, right, where you are letting people know what those chemicals are but maybe not disclosing proprietary information?

Mr. JOHNSON. Right. I think there is a balance in there that was—there was attempt to achieve, originally. The problem was,

from what I understand, is that you—for a long time, companies take the box that said confidential—the material is automatically confidential without any much review and today, as a State official, I can go on the Internet and read material about chemicals that EPA, by statute, cannot talk to me about because it is confidential.

Ms. DEGETTE. Right, right. OK. Thank you. Thanks, Mr. Chairman.

Mr. SHIMKUS. Gentlelady's time is expired. Chair now recognizes the gentleman from Ohio on the top panel, Mr. Latta, for 5 minutes.

Mr. LATTA. Well, it is good to know we have two Ohioans here on the committee, Mr. Chairman. Thanks very much, and thanks very much for our panel for being with us today.

If I could ask a couple questions to you, Ms. Thomas, if I may. Are some of the public policies in conflict with others when it comes to designing and producing a new car or truck, and kind of following up on that, how often does that happen, and is it the Federal that are really conflicting with the State, or vice versa?

Ms. THOMAS. Thank you, Congressman. Yes, multiple State laws and regulations have the potential to comply with Federal environmental and safety standards. You know, a good example is in order to meet the aggressive fuel economy standards for model years 2017 through 2025, my members are going to be relying heavily on lightweight materials like plastics that contain chemicals like flame retardants in them. And NTSA, under DOT, also has authority to regulate the flammability standards, so we comply with those standards by using flame retardants. But then at the State level, you are seeing bills banning different flame retardants that are used in different products, but in the same way, so the problem becomes when they—when requirements for a couch are misapplied in error to an automobile, which obviously is very different from a couch.

Mr. LATTA. Let me follow up. On page four of your testimony, you—it calls for continually—pardon me, continuation of regulatory exemption for articles. Would you want these exemptions to preempt States, or should States be allowed to regulate beyond those exemptions on the articles?

Ms. THOMAS. Yes, so I am happy to be here today to talk about the proactive steps that my companies have been taking to reduce substances of concern from their vehicles. We work with our suppliers on maintaining a tracking database for—to ensure that restricted substances of concern do not end up in our vehicles.

But the reality is a car is a very complex product with thousands of components, each made up of multiple chemicals and mixtures, so any requirements at the State level become very challenging, because they each have their own hurdles. So we would like to see a strong Federal approach that focuses on specific applications with potential for actual consumer exposure. We believe that would be a more effective approach than an overly broad one.

Mr. LATTA. Thank you.

Ms. THOMAS. And yes, Federal action should preempt State action on that regard.

Mr. LATTA. Thank you.

Mr. Johnson, on the last page of your testimony you have a couple things you say. The second one of the unaddressed issues is timelines for chemical reviews. And you also state—you say that perhaps similar deadlines to the EPA would be appropriate and would ensure timely actions, because States are doing certain things when it is coming to set deadlines for air and water permit issuance. But you say in the last line then that you are currently unable to suggest what those deadlines ought to be. Any idea, though, because are we running the situation where it is dragging on too long on the Federal side and we need to get these things resolved, and what would you personally like to suggest?

Mr. JOHNSON. I appreciate the question. You know, it is a bit of a challenge. Our members passed the resolution without any “no” votes, and they are a pretty broad group, the States. I think that the biggest concern for us is that when you look at your—and it has already been stated here, 37 years, five chemicals, it seems to us that it needs to be quicker than that. You know, when EPA is in a process of reviewing a chemical, I think certainly for my State of Vermont, if EPA could get through that process—I don’t know whether it is somewhere 6 months, 2 years to get through all the processes that would need to happen, and make a regulatory decision on that that was transparent and open, then that would, I think, make it much easier for us to address issues of concern from the people in my State. Because what happens is they come in year after year just asking the State to do something, and we are ever hopeful that something might happen at the Federal level, but 3, 4, 5, 6 years later, it starts to get difficult to sort of just defer to the Federal EPA on these things.

Mr. LATTA. Thank you very much, and Mr. Chairman, I see my time is expired and I yield back.

Mr. SHIMKUS. Gentleman yields back his time. Chair now recognizes gentleman from Texas, Mr. Green, for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman, for holding the third hearing on TSCA reform. Just for the panel, I have a district in Houston in East Harris County. It is home to one of the largest collection of chemical plants in the country, and seeing TSCA that works for the affected is important by this important statute, including industry and employees and workers and consumer advocates is vital to our constituents and the regional economy.

Mr. Rawson, are you aware of any voluntary safety initiatives or product stewardship programs run by the chemical manufacturers?

Mr. SHIMKUS. Can you check your microphone?

Mr. RAWSON. Thank you. Yes, there are quite a few. Some in collaboration with EPA and other stakeholders that are described in EPA’s Web site, initiatives to phase out certain chemistries without having to determine that they present an unreasonable risk, but because sufficient concerns have been raised, and there are many private—I shouldn’t say private. There are many product stewardship initiatives that are not done with the Agency but are just part of the good practices of a company. So to my view, this is certainly an important part of making sure that chemicals or manufacture processed and used safely.

Mr. GREEN. So EPA has collaborated with chemical manufacturers in promoting some of the programs and—

Mr. RAWSON. Yes, it has, and in many cases, with other stakeholders at the table.

Mr. GREEN. OK. Do you know how many rulemaking actions have been taken by the EPA under Section 6 since the corrosion-proof fittings ruling?

Mr. RAWSON. I cannot think of one. They tried for many years with respect to grout materials, but ultimately it was a very long process and controversial, but ultimately became unnecessary because personal protective equipment was developed that made it unnecessary.

Mr. GREEN. OK. So are the requirements for rulemaking under Section 6 too burdensome for EPA to regulate?

Mr. RAWSON. Well, so we can have a range of opinions at the table. My view is that the statute creates the right target. Corrosion-proof fittings read EPA the riot act a little bit, and so—and the Agency concluded let's not try that again. My feeling is they gave up a little bit too quickly. But if there are ways we can make easier without—easier to make good decisions. To me, the goal here is to make good decisions that meet all the objectives of the statute, not just to make it easier to ban chemicals. So that is what we want to do. If we make changes, we want to make sure that anything that is done helps EPA make good decisions to consider all the factors, unreasonable risk, safety of alternatives, et cetera.

Mr. GREEN. So your testimony is we really need a structure for EPA to do it? They have enough—do you think they have enough resources to be able to do it if we gave them a statutory structure?

Mr. RAWSON. I think they could use some more resources, and particularly as described in my testimony, I think it would be helpful if they really sped up the review of existing chemicals. And you know, we hear over and over again with five in 37 years, and that is the number regulated, but they have actually assessed hundreds, thousands. We need a much more transparent way to keep track of that so people can have more confidence in what is being done, and a greater throughput.

Mr. GREEN. OK. Mr. Greenwood, are the requirements for rulemaking in Section 6 too burdensome for EPA to regulate chemicals?

Mr. GREENWOOD. Pardon me? I didn't—

Mr. GREEN. Is the rulemaking requirements in Section 6 too burdensome for EPA to regulate chemicals?

Mr. GREENWOOD. Well I think—as I have indicated a couple times now—I think there is a problem with the least burdensome alternative finding, the way it has been interpreted. I think unreasonable risk can work as a framework for it. I do think some of the procedural parts of it also may not be necessary.

Mr. GREEN. If there was one change in Section 6, what would it be that you could suggest?

Mr. GREENWOOD. Well, I would try to fix the corrosion-proof fitting determination on least burdensome alternative.

Mr. GREEN. Ms. Reinstein, back in 2008 I was acting chair of the subcommittee, and I actually introduced a bill to ban asbestos in TSCA, and I ended up getting a lot of contacts from, you know, asbestos is a substance that comes out of the ground in California and different places. But one, I would like to thank you for your

leadership and I am sorry about learning of the passing of your husband. I also represent not only an industrial area, but a lot of seafarers, and over the years, asbestosis is something that is part of their life and their families. Can I ask how did consumers first learn about the dangers of asbestosis or asbestos?

Ms. REINSTEIN. How can consumers learn about the dangers? That is a very mystifying question and it is very important because although there are 10,000 Americans that die every year, because the nature of the disease latency period makes it very difficult for the workers and families. So I think we obviously have to work with the medical community, but also go back to labor unions and increase awareness. And that is what ADO has been trying to do is work with the congressional leadership and unions to indeed just do that. But you are right, it is an ongoing problem.

Mr. GREEN. Which professions are more exposed—American workers exposed to asbestos? I know, like I said, people work on ships. Our ships used to be covered with asbestos because of the threat of fire. Any other professions?

Ms. REINSTEIN. That is another great question. If you use the NIOSH database, you can actually sort by industry and you can clearly see that there is a large group between ship building, obviously anyone who served on ships like the veterans, as well as construction and also the auto industry. Those three groups of workers have been most plagued by asbestos exposure.

Mr. GREEN. OK. Mr. Chairman, I know I am out of time and I appreciate your patience.

Mr. SHIMKUS. Gentleman's time is expired. Chair now recognizes gentleman from Ohio, Mr. Johnson, for 5 minutes.

Mr. JOHNSON OF OHIO. The other gentleman from Ohio.

Mr. SHIMKUS. Last, but not least.

Mr. JOHNSON OF OHIO. There you go. Mr. Johnson—that is odd for me to say. I don't say that very often. I can tell by your accent you are from the other side of the family, I think. Do the States participate in EPA's implementation of TSCA today, and if so, how?

Mr. JOHNSON. Well, they have in a fairly small way. I mean, I think the biggest challenge for the States is because EPA has been so challenged to get to chemicals, one of the things that States have really felt is necessary is a better way for States to sort of be the petition or somehow to get the chemicals that are coming up and being raised as of concern among citizens in States to get EPA to look at those. It is a challenge because I think as has already been mentioned, new chemicals there is somewhat of a process for, but we have this huge group of chemicals that got grandfathered in 37 years ago, and I think certainly amongst the people in our States, the idea that they may be dangerous but we don't know, but they are in commerce and we will get back to them maybe never is just not an answer.

Mr. JOHNSON OF OHIO. Well maybe I am a little unclear. Are they delegated any authority under TSCA today or do they have to go "Mother, may I" to—

Mr. JOHNSON. Well, what happens today is because EPA hasn't really assessed a lot of chemicals, they don't have to go to EPA to do it. They go to the State legislature and if they can pass a regula-

tion like California or New York or Oregon or Washington or Maine have done——

Mr. JOHNSON OF OHIO. So they have to assume the authority?

Mr. JOHNSON. Then they would assume it, yes.

Mr. JOHNSON OF OHIO. Do the States engage in chemicals management?

Mr. JOHNSON. Some States do and some States don't. It is—except for California, which is at the moment or is just about to roll out a pretty comprehensive regulation that is—they spent the last 3 years working on that would be sort of more of a system approach, most States have done it on a chemical-by-chemical basis because of a particular concern raised. And as was mentioned earlier, it usually goes through the legislature. People come in and say we need you to do something about this chemical, and so I would say that that has been—in those States that have done it, there is certainly a way to do it, but it is not particularly efficient and it means you have a spotty landscape.

Mr. JOHNSON OF OHIO. Why do you think some States have engaged more actively in chemical management than others?

Mr. JOHNSON. Part of it is resources. Some bigger States have just been in a better position to do it, because they have been able to bring some resources to bat, either through their health department or their environmental regulatory agency. Some States have just had individual legislators who have a particular interest who have been able to bring something forward and get it passed. States like mine have been somewhat reticent to get into the business of regulating chemicals, because we haven't worked out how we would actually pay for it. And we quite honestly think that it makes sense to do it at the Federal level. Our market in Vermont is pretty small, and we don't want to somehow isolate ourselves by having a block to commerce that would just have us cut out of the market. Although we don't have a lot of industry, we do have an IBM chip manufacturing plant and the semiconductor industry is one of the ones a bit like the car industry, a lot of components involved in there. But it is really a resource issue.

Mr. JOHNSON OF OHIO. One final one for you, Mr. Johnson. Do some of the concerns that States have addressed fall under laws other than TSCA or agencies other than the EPA, for example, FDA or OSHA?

Mr. JOHNSON. They do, although in pesticides, for instance, and Food and Drug Administration there has been a lot more activities by those agencies. It is sort of the reverse, generally pretty good. I think people feel confident. The American people seem pretty confident in those agencies, with the occasional sort of thing that stands out as an issue, whereas TSCA is almost the other way. It is like generally not confident with the occasional thing that stands out as being OK.

Mr. JOHNSON OF OHIO. Sorry I didn't have any questions for the rest of you. It was just more comfortable family to family here, so thank you.

Mr. JOHNSON. I appreciate it.

Mr. JOHNSON OF OHIO. Mr. Chairman, I yield back.

Mr. SHIMKUS. Gentleman yields back his time. Chair now recognizes ranking member of the full committee, Mr. Waxman, for 5 minutes.

Mr. WAXMAN. I thank you, Mr. Chairman.

Today the subcommittee continues its oversight work on the Toxic Substances Control Act, tackling two important and related issues: EPA's authority to regulate harmful chemicals, and the ability of States to take action when necessary.

EPA's regulation of chemicals can be an important part of protecting families from harmful environmental exposures and pollution. Unfortunately, TSCA has so far fallen short of its objectives. Its failures have meant avoidable suffering, disease, and death. Asbestos is one of the clearest examples. Over the course of 10 years, EPA undertook a rulemaking and built an exhaustive record in an attempt to regulate this dangerous toxin, but the court threw it out and essentially, EPA gave up hope of using TSCA to address chemical risks.

Mr. Rawson, you suggested in your testimony that you agree with the court's decision to throw out EPA's asbestos rule. Specifically, Mr. Rawson seems to argue that the automobile brake pads should remain on the market unless EPA can prove that brake pads not containing asbestos are safe to use.

Ms. Reinstein, you know firsthand the terrible suffering associated with exposure to asbestos, and what can you tell us about the health risks posed by exposure to asbestos from brake pads?

Ms. REINSTEIN. Thank you, Ranking Member Waxman, and you are also my Congressman so it is lovely to finally meet you in person.

We know that asbestos is a carcinogen causing disability and deaths. I can only tell you that those who are diagnosed with these diseases and their entire families suffer. We have many asbestos victims who have changed brakes and have inhaled and obviously been exposed to asbestos. And again, the latency period complicates it. There is no cure for any of these diseases; however, prevention is a cure. Substitutes do exist.

Mr. WAXMAN. In your view, if Congress were to consider TSCA reform legislation, should we ensure that EPA be able to put an end to the ongoing asbestos exposures in this Nation?

Ms. REINSTEIN. I think that if there is a bill passed that can't do that, it needs to go back to the wood shed. Clearly, any TSCA reform must ban asbestos.

Mr. WAXMAN. Thank you. Ms. Thomas, you represent 12 major automobile manufacturers. Do your manufacturers still use asbestos brake pads and linings on new cars?

Ms. THOMAS. To the best of my knowledge, no.

Mr. WAXMAN. Do you or your members have concerns about the safety of non-asbestos brake pads?

Ms. THOMAS. I am sorry, repeat that question one more time.

Mr. WAXMAN. Do you or your members have concerns about the safety of non-asbestos brake pads?

Ms. THOMAS. No.

Mr. WAXMAN. But my understanding is that brake pads containing asbestos remain on the market today. Asbestos can still be

found in imported brake pads sold in the aftermarket. Isn't that correct?

Ms. THOMAS. Yes, that is my understanding.

Mr. WAXMAN. Now, Mr. Rawson, I would like to go back to you. Let's put aside whether the court decided the asbestos case correctly or EPA built the best record it could over the course of its 10-year effort. Do you think that this was a good policy outcome? Do you believe it was good for the public for asbestos to remain on the market? Public health advocates and State regulators remain concerned about asbestos in brake pads. For example, some States, including California, have passed bans on asbestos brake pads.

Mr. RAWSON. Thank you for the question. First of all, I obviously don't take lightly the hazards of asbestos and share the sympathies of everybody in this room for all families who suffered losses as a result. So I take that as seriously as everybody else. At the time of the rulemaking, new cars were already not using asbestos in brake pads.

Mr. WAXMAN. Well what do you think the policy ought to be? Do you think it was a good policy outcome?

Mr. RAWSON. I am trying to answer that.

Mr. WAXMAN. Do it very quickly, because my time is running out.

Mr. RAWSON. The issue was with replacement brakes, using non-asbestos brake pad on a car engineered for a brake pad could cause many more deaths than it would prevent. An EPA study said that and EPA experts said that the loss of life from putting the wrong brake pad on the car would far outweigh any benefit of the rule. The problem was EPA didn't answer that. Had they answered that—

Mr. WAXMAN. Let me ask Mr. Srolovic, how important is it to maintain the ability of States to take actions like that to address health risks from chemicals when EPA can't? It is an important issue. I can't support legislation that would undermine the few protections that are in current law or that would preempt successful State efforts to protect the public. What do you think?

Mr. SROLOVIC. Congressman, I think it is very important to preserve the traditional power of States to take legislative regulatory action under their traditional powers to protect their citizens and their environment from the hazards posed by toxic chemicals.

Mr. WAXMAN. Thank you. Well, I appreciate that. I am sorry to have cut you off, but my time is already over and I have to yield back to the chairman to call on another member.

Mr. SHIMKUS. And he knows how tough I am on time, so thank you. I thank the ranking member. Chair now recognizes my colleague from Illinois, Ms. Schakowsky, for 5 minutes.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman. I had some questions for Mr. Greenwood which really go back to the history of TSCA.

You made the argument that the EPA struggled over resource allocation in the early years of TSCA, and here we are almost 40 years later and I can't imagine that efforts by this body to get funding—by this body to gut EPA funding—we are talking about cutting, including the interior and environmental appropriations bill, by 34 percent, a 34 percent cut to the EPA have made it much better.

But here is my question. What TSCA-related risks to human health and the environment can be anticipated if the EPA were severely underfunded?

Mr. GREENWOOD. That is a major question. It is hard to translate that, a budget cut into specific actions. I think the budget situation at EPA, as I understand it, is that they are very limited on what they can do on new chemicals. The staffing is as lean as it can be—

Ms. SCHAKOWSKY. I am sorry, on new chemicals?

Mr. GREENWOOD. On new chemicals. And as to existing chemicals, they have started to lay out a fairly, I think, constructive plan with a list of 83 work plan chemicals that they are trying to address, and they have a budget for it and I think it is something that I think we all would like to see progress. They are going to be using good science to assess and then decide what they can do from a risk management point of view. My guess is that that is the area that is most likely to be hurt if there are severe budget cuts, and I think it is not in the interest of most of us.

Ms. SCHAKOWSKY. Thank you. It seems to me that the EPA's effort to address asbestos is illustrative of some of the underlying problems of TSCA and the existing chemicals. As you said in your testimony, asbestos was seen as a test case to prove the efficacy of TSCA. Still, it took 10 years from the advance notice of proposed rulemaking to the official ban, and that ban was overturned in 2 years and despite the findings that there are no safe levels for asbestos, many products from kids' toys to car brakes, which we were just talking about, have been found to contain asbestos since 1991. And as Ms. Reinstein said, 30 Americans die each day from preventable asbestos-caused disease. So what does the asbestos case tell us about TSCA and how should the law be changed, amended, fixed to ensure that dangerous products, you know, many years and decades later aren't still on the market?

Mr. GREENWOOD. Well, I think that the case has told us that there are parts of the structure of the statute that prevent problems from getting decisions made. I have mentioned this now multiple times. The least burdensome alternative—

Ms. SCHAKOWSKY. I apologize for coming so late.

Mr. GREENWOOD. No, that is OK. Least burdensome alternative provision and how it was interpreted by the court, I think most of us felt that EPA at the time after the decision came down was a surprise and was something that would have long term effects. I think it is important to recognize though that we didn't necessarily think that the other parts of the statute couldn't work. I don't recall any discussion where people thought that unreasonable risk was an inappropriate standard. It was very focused on this one issue, so I think for most of us at EPA at the time, that was the major takeaway message of concern.

Ms. SCHAKOWSKY. Thank you. Again, I apologize for having you repeat it, but I appreciate your indulgence.

Thank you. I yield back, Mr. Chairman.

Mr. SHIMKUS. Gentlelady yields back her time. The chair wants to thank the panelists here today. Again, this is the third of a set of hearings on TSCA. As my colleague from Colorado said, this is one everybody would like us to do something on, hopefully some-

thing positive, and it is kind of exciting to open up the can of worms and start pulling them out and see what works and what doesn't. So I appreciate your attendance and look forward to working with you. I appreciate the involvement of the Minority and the very active questioning and the like.

I would like to ask unanimous consent for a letter to Mr. Waxman from Californians for a Healthy and Green Economy, as well as a press statement from CHANGE to be submitted into the record, also a letter from the American Alliance for Justice that was sent to myself and Mr. Tonko concerning State tort law to be submitted for the record, and a resolution from ECOS, which they have been very helpful over my time as a chairman in dealing with issues, referenced by Mr. Johnson in his testimony. That will all be submitted into the record. Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. SHIMKUS. And with that, I would like to declare the hearing adjourned.

[Whereupon, at 3:52 p.m., the subcommittee was adjourned.]

**Opening Statement of the Honorable Fred Upton
Subcommittee on Environment and the Economy
Hearing on "Regulation of Existing Chemicals and the Role of Pre-Emption under
Sections 6 and 18 of the Toxic Substances Control Act"
September 18, 2013**

(As Prepared for Delivery)

Today's hearing, the third of an ongoing examination of the Toxic Substances Control Act, gives us a chance to think through two values that should always guide our policy decisions: respecting the authority of the states and facilitating interstate commerce. Getting this balance right is a matter of justice because government decisions are only just when they are made at the right level of government.

This subcommittee's first hearing this Congress was entitled, "The Role of the States in Protecting the Environment." We saw firsthand just how seriously state officials take their duty to protect the environment, and how they each apply distinct local knowledge and experience to find the optimum policy outcome for the people they serve.

Meanwhile, in four different centuries, each with its own set of technologies and challenges, this committee has been the main steward of the power vested in Congress to regulate commerce among the states.

Why is that important?

No matter how dedicated we are to respecting the primary role of the states in governing Americans, we all recognize the importance of issues only Congress can tackle. The Standard Time Act is just one example. And TSCA is in the same family. A system shared by all states that imbeds safety in the invention, manufacture, and use of chemicals and chemical based-products is the very purpose of TSCA.

Can the states and members of Congress find common ground on chemical safety regulation? It is imperative that we do so. Our duty at the state and federal level must represent consumers, workers, and the general public who want and need protection from unreasonable exposure risks, but also want and need an integrated U.S. market for products that contain chemicals. All states, all consumers, and all workers are better off if we share, and don't impede, that market.

Let's ensure that the national government's scrutiny of chemicals and the products they go into is objective and thorough, and that any necessary restrictions are in place. But let's also avoid excess regulation. That way, the states can be confident that they don't have to reinvent the wheel and shoulder this regulatory responsibility one by one.

Finding this balance, and understanding what's at stake, is our purpose today in this ongoing effort.

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September 17, 2013

The Honorable Henry Waxman
Member, Subcommittee on Environment and Economy
United States House of Representatives
2204 Rayburn House Office Building
Washington, DC 20515

RE: Hearing on Regulation of Existing Chemicals and the Role of Pre-Emption under Sections 6 and 18 of the Toxic Substances Control Act

Dear Congressman Waxman:

Californians for a Healthy and Green Economy (CHANGE) is a statewide coalition of 37 environmental health and environmental justice groups, health organizations, labor advocates, community-based groups, and others who are concerned with the impacts of toxic chemicals on human health and the environment.

We have closely tracked chemicals policy in California and in Washington DC and are have a deep and direct interest in the central topic of discussion in the Subcommittee on Environment and Energy hearing on September 18th, specifically the issue of pre-emption. With the lack of action by the EPA due to the failure of the Toxic Substances Control Act (TSCA), the states have stepped in to fill that void and protect their citizens. CHANGE has advocated strongly for the legislation in California which arguably provides the strongest protections of any state in the country. While we understand that this hearing is not about any specific legislation, we are deeply concerned about the preemption language in the Senate Chemical Safety Improvement Act (S.1009 – CSIA). As the subcommittee considers the very important issue of pre-emption and the states' right and responsibility to act when the federal government fails to, we urge you to protect the leadership role CA has played in protecting our citizens from exposure to toxic chemicals.

We are writing to encourage you to attend the hearing and to consider the concerns expressed in our official statement (attached) on the CSIA, which provides detail and analysis on key shortcomings of the bill, including preemption of state laws. We deeply appreciate your efforts to solve the problem of widespread exposure to harmful chemicals while protecting states' rights and look forward to working with you moving forward.

Sincerely,

Kathryn Alcántar
Campaign Director
Californians for a Healthy and Green Economy
changealifornia@gmail.com
510-655-3900, x315

encl: CHANGE Statement on the CSIA July 24, 2013

cc:
Congresswoman Lois Capps, CA-24
Congressman Jerry McNerney, CA –9
Congresswoman Doris O. Matsui, CA-6

Asian and Pacific Islander Obesity Prevention Alliance * Bayview Hunters Point Community Advocates * Black Women for Wellness * Breast Cancer Action * Breast Cancer Fund * California Healthy Nail Salon Collaborative * California Latinas for Reproductive Justice * California Pan-Ethnic Health Network * Californians Against Waste * Californians for Pesticide Reform * Center for Environmental Health * Center for Race, Poverty and Environment * Clean Water Action * Coalition for Clean Air * Commonwealth * Communication Workers of America- District 9* Communities for a Better Environment * East Yard Communities for Environmental Justice * Environment California * Environmental Working Group * Forward Together * Green Schools Initiative * Green Science Policy Institute * Healthy 880 Communities * Healthy Child, Healthy World * Healthy Children Organizing Project* Instituto de Educación Popular del Sur de California * Just Transition Alliance * Making Our Milk Safe * Movement Strategy Center * Pesticide Action Network North America * Physicians for Social Responsibility- Los Angeles * Science and Environmental Health Network * Silicon Valley Toxics Coalition * United Steel Workers- Local 675 *
www.changealifornia.org



Californians for a Healthy and Green Economy (CHANGE)

Opposes the Chemical Safety Improvement Act of 2013 (S.1009 Lautenberg/Vitter) Unless Substantial Changes Are Made to Protect Public Health, Workers and Communities

July 24, 2013

Californians for a Healthy and Green Economy (CHANGE - <http://www.changecalifornia.org/>) is a statewide coalition of 37 environmental health and environmental justice groups, health organizations, labor advocates, community-based groups, parent organizations, faith groups, and others who are concerned with the impacts of toxic chemicals on human health and the environment.

There is widespread agreement across the political spectrum that chemicals policy in the United States is broken and needs a comprehensive upgrade. The primary law that regulates industrial chemicals in the U.S., the Toxic Substances Control Act (TSCA), dates to 1976 and is ineffective and outdated. The Chemical Safety Improvement Act (CSIA - S.1009), introduced in the U.S. Senate on May 22, 2013 with bi-partisan support, reflects this consensus about the need for reform.

Increasing scientific research clearly indicates that many chemicals can be harmful to public, environmental, and occupational health. Yet industrial chemicals that have been identified by authoritative scientific bodies as hazardous remain under-regulated and are commonly found in many products Americans use every day at home, work and in the community. Basic health and safety data about the effects of exposure to many of these chemicals is not available to the public because chemical manufacturers are not required to conduct adequate studies before bringing their chemicals to market, or the information is inappropriately protected as a trade secret, or toxicity studies simply have not been done.

CHANGE recognizes that a bipartisan effort to address the shortcomings of TSCA is an important development. However, the CSIA as written fails to solve the problem: the pervasive, ongoing, and indiscriminate exposure to toxic chemicals for everyone on Earth.

It is undeniable that hundreds of hazardous and/or under-studied chemicals are now routinely found in human tissue in biomonitoring studies. It is equally clear that these hazards are plausibly linked to many diseases and adverse health endpoints. CHANGE is not the first to note that we are in the middle of an uncontrolled chemistry experiment. These substances do not belong in our bodies. We must reduce exposure to hazardous chemicals, even as we continue to learn more about their influences on the health of people, environments, and organizations.

CHANGE strongly opposes the CSIA unless significant amendments are made. The language of this bill does not advance prevention, protect public health, nor reduce harm. The CSIA does not fix many of TSCA's significant problems that have left the public unprotected from toxic chemicals. Specific shortcomings include:

Asian and Pacific Islander Obesity Prevention Alliance * Bayview Hunters Point Community Advocates * Black Women for Wellness * Breast Cancer Action * Breast Cancer Fund * California Healthy Nail Salon Collaborative * California Latinas for Reproductive Justice * California Pan-Ethnic Health Network * Californians Against Waste * Californians for Pesticide Reform * Center for Environmental Health * Center for Race, Poverty and Environment * Clean Water Action * Coalition for Clean Air * Commonwealth * Communication Workers of America - District 9 * Communities for a Better Environment * East Yard Communities for Environmental Justice * Environment California * Environmental Working Group * Forward Together (formerly Asian Communities for Reproductive Justice) * Green Schools Initiative * Green Science Policy Institute * Healthy 880 Communities * Healthy Child, Healthy World * Healthy Children Organizing Project * Instituto de Educación Popular del Sur de California * Just Transition Alliance * Making Our Milk Safe (MOMS) * Movement Strategy Center * Pesticide Action Network North America * Physicians for Social Responsibility - Los Angeles * Science and Environmental Health Network * Silicon Valley Toxics Coalition * United Steel Workers - Local 675 * Worksafe

Contact: Kathryn Alcántar, CHANGE Campaign Director - changealifornia@gmail.com or 510.655.3900 x315

www.changecalifornia.org

1. The CSIA's safety standard fails to shift the burden of proof about chemical health and safety onto the chemical manufacturers to demonstrate their products are safe. The bill too closely parallels the failed language of TSCA by saying a chemical must not pose an "unreasonable risk to human health or the environment under intended uses." We support the language of the 1996 *Food Quality Protection Act*, as well as the introduced *Safe Chemicals Act* (S.696), both of which call for "reasonable certainty of no harm." That language provides a much higher margin of health and safety, and level of protection for the public, as it shifts the burden of proof onto the manufacturer to demonstrate "reasonable certainty of no harm." Surely this is the standard we want for our children.

2. The CSIA does not adequately consider aggregate exposure, which is the reality in the world today. We know from biomonitoring studies that everyone is exposed repeatedly to multiple environmental chemicals. By not requiring an assessment of cumulative exposure, the CSIA repeats the mistake in TSCA by looking at one chemical at a time without acknowledging cumulative impacts from ongoing exposures.

3. There is no mandate that disproportionately-affected communities and vulnerable populations receive added protections. Over-exposed and burdened fence-line communities, workers who handle chemicals, and people at sensitive developmental stages, such as infants and pregnant women, are more vulnerable to harm from chemical exposures than the general population. They require a law that protects their ability to thrive and attain their right to good health by addressing the impacts of disproportionate exposures that lead to actual reductions in toxic chemicals in their home and work environments.

4. The CSIA effectively curtails the rights of states to determine their own standards of protection in environmental, occupational, and other public health arenas. The bill would prohibit states from taking action once the U.S. EPA designated a chemical as either a high or low priority, or if EPA simply began a safety determination process. A waiver provision for states to act is limited and cumbersome and is unlikely to succeed in many cases. We need a federal law that is as protective as possible, but states absolutely must retain the right to set a higher bar than federal minimums.

Furthermore, under the CSIA, "no State or political subdivision of a State may establish or **continue to enforce**..." current laws that in any way pertain to a chemical that EPA begins to address. This means that current and proposed regulations that offer real preventive action about chemicals would be invalidated. This would be particularly harmful in California, affecting occupational health regulations (e.g., registering the presence of carcinogens in occupational settings, the 200-plus permissible exposure limits/PELS unique to the state), environmental health regulations (e.g., the *Safer Consumer Products Regulations*) and public health activities (e.g., about lead).

5. The CSIA has no timelines or milestones for EPA action, instead calling for EPA action "from time to time" or in a "timely manner." We know from experience that regulatory action to prevent or reduce harm from chemicals is a long process in the best of circumstances. EPA must have firm deadlines and deliverables to advance its obligations under any new law.

6. The CSIA requires the use of cost-benefit analysis at the critical regulatory decision-making point where a phase out or ban of a chemical is contemplated. While the bill provisions state that only health considerations can be factors in making a "safety determination" (which we support), it must also be the case that regulatory decisions, including but not limited to phase-out or bans of problematic chemicals, should also be based solely on health factors. Traditional cost-benefit analyses are unlikely to adequately consider externalities such as costs to the public health, the need for environmental remediation, decline in property values, and reduced



productivity at work, for example. The end result will mean some of the most toxic chemicals will remain in commerce despite their failure to meet the safety standard.

7. The CSIA makes an unsupportable assumption that lack of information equals a lack of harm. Any bill reforming TSCA should require a minimum toxicity data set be submitted and reviewed before any chemical is designated as a "low priority."

8. Confidential Business Information (CBI) provisions in the CSIA include a "gag rule" on medical professionals who receive information necessary to treat patients who may have been harmed by exposure to toxic chemicals. This restricts health care providers from carrying out their mission to "do no harm." The CSIA's CBI provisions also impair the ability of public health practitioners to do their job, and reduce the right-to-know for workers, employers, and other members of the public.

9. The CSIA makes no special provisions for nanomaterials despite the fact that they are insufficiently studied, differ structurally from their parent compounds, and may present new health hazards and risks.

10. There is no language in the CSIA that allows the EPA to collect fees to help pay for safety assessments or determinations. Coupled with the lack of enforceable deadlines, this ensures that meaningful action to reduce exposure to toxic chemicals will be extremely modest.

11. The CSIA has no provisions that support the development of green chemistry-based alternatives. The bill needs meaningful incentives in the bill that strengthen innovation in the marketplace for non-toxic and less-toxic alternatives that promote safety and economic growth.

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Formerly the Association of Trial Lawyers of America (ATLA®)

September 18, 2013

The Honorable John Shimkus
Chairman
Subcommittee on Environment and Economy
House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Paul Tonko
Ranking Member
Subcommittee on Environment and Economy
House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Shimkus and Ranking Member Tonko:

The American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), hereby submits comments in relation to the Energy and Commerce Committee Subcommittee on the Environment and the Economy's hearing titled "Regulation of Existing Chemicals and the Role of Pre-Emption under Sections 6 and 18 of the Toxic Substances Control Act." AAJ, with members in United States, Canada and abroad, is the world's largest trial bar. It was established in 1946 to safeguard victims' rights, strengthen the civil justice system, promote public safety and protect the constitutionally mandated right to a trial by jury.

AAJ has seen time and again how dangerous chemicals in our drinking water, children's toys and consumer products can disastrously impact the lives of American families. As advocates for the people harmed by toxic chemicals, AAJ strongly supports efforts to reform the Toxic Substances Control Act (TSCA), but in order for reform to effectively protect the American public, it is imperative that Americans' access to state courts is protected. Accountability achieved through our civil justice system is a vital component of the effort to protect the public from toxic chemicals and to shed light on products harmful to human health. The civil justice system serves to complement and enhance regulatory efforts by providing an additional layer of accountability and safety. This is especially true when federal agencies are underfunded, have limited access to information or have insufficient resources to adequately enforce safety measures. Any effort to reform TSCA must specifically preserve the ability of individuals to pursue their rights under state law.

State Tort Law Complements Federal Regulation

Strong federal oversight is essential to ensuring public health, but federal standards but should not prevent Americans from seeking necessary recourse when dangerous substances cause harm. There are practical limits to how effective regulation alone can be in protecting the public. Just because a chemical is deemed "safe" by a federal regulator should not mean that the manufacturer's duty to protect the public ends. If it turns out that a manufacturer learns additional information about the safety of its product, or the manufacturer hid information from the public and injuries occur as a result, individuals should have the right to hold that manufacturer accountable.

State tort law is critical to shedding light on new information regarding the dangers of products. The limits on federal resources, rapidly changing technologies and the ever-expanding proliferation and use of

chemicals, can prevent sufficient testing or regulation at the federal level. And state tort law is the only way for consumers to hold manufacturers accountable when they fail to behave in a reasonable manner given the available technology and information, even if that technology or information is not reflected in the current health and safety standards. Manufacturers should compensate individuals and families who are injured as a result of a chemical producer's failure to act responsibly, even if they are not subject to fines or other sanctions for violating a particular regulatory requirement.

State Tort Law Ensures Accountability

Federal health and safety laws generally do not provide compensation for those injured by regulated entities; state tort law is the only mechanism that allows injured individuals the right to recover for harms wrongfully perpetrated against them. If a company poisons the groundwater with a harmful chemical that causes a person to get cancer, that company will be responsible for paying for that person's medical care. If the right to hold corporations accountable is preempted by federal law and individuals are unable to file claims against the companies that harm them, manufacturers will no longer be held responsible. As a result, medical and other costs that would typically be paid by the responsible party will shift to government agencies, such as Medicare and Medicaid, and taxpayers. This contrasts starkly with the historical common law tradition of a person or business who commits a tort taking responsibility as a matter of basic justice and fairness.

State Tort Law Provides a Safety Net when Federal Regulation is Insufficient

State-based tort law also provides an additional safety net when federal regulations are out of date or inadequate. Regulatory policy needs to be continually revised to reflect the most up to date information about risks, and what new technologies will sufficiently protect us from that risk. However, even in the best of economic times, federal regulatory agencies can go decades without updating a particular regulation to reflect the most current information or practices. In times of budgetary shortfalls, federal agencies will often lack the necessary funds to provide for adequate enforcement of their various standards. When regulations become ineffective or out of date, state tort law assumes the crucial role of filling these inevitable regulatory gaps.

State tort law requires companies or manufacturers to meet basic standards of reasonable behavior and to provide additional protections to consumers beyond compliance with federal regulations. This function, in particular, highlights the complementary roles of the tort and regulatory systems in ensuring public health and safety. When regulations fail and enforcement is unavailable, state-based tort law is the only remedy to ensure that companies and manufacturers can be held accountable for the harm that they cause. If weak federal standards preempt state tort law, manufacturers operate without sufficient incentive to update their products to reduce health and safety risks to consumers and the environment.

AAJ looks forward to working with the committee on safeguarding the public health and ensuring citizens' rights to access the civil justice system.

Sincerely,



Linda Lipsen
Chief Executive Officer

American Association of Justice



Resolution Number 10-8
Approved August 30, 2010
Whitefield, New Hampshire

Revised September 17, 2013
Arlington, Virginia

As certified by
R. Steven Brown
Executive Director

REFORMING THE TOXIC SUBSTANCES CONTROL ACT

WHEREAS, U.S. daily production and importation in 2005 of chemicals increased by 80% from 42 billion to 74 billion pounds from 2002 levels; and

WHEREAS, there are significant impacts to public health and the environment as a result of chemical pollution and states incur significant responsibilities and costs addressing those impacts; and

WHEREAS, the Toxic Substances Control Act (TSCA) enacted in 1976, authorizes U.S. EPA to control chemicals that pose an unreasonable risk to public health or the environment, and remains U.S. EPA's primary authority to control the safety of chemicals in commerce; and

WHEREAS, legal and procedural hurdles under TSCA prevent the U.S. EPA from taking quick and effective regulatory action to protect the public against well-known risks, even in those cases where the U.S. EPA has adequate data on a chemical; and

WHEREAS, in January 2009, the U.S. General Accounting Office (GAO) added U.S. EPA's regulatory program for assessing and controlling toxic chemicals to its list of "high risk" programs, finding that:

- U.S. EPA has been unable to keep its existing assessments current or to complete assessments of important chemicals of concern; and
- U.S. EPA requires additional authority to obtain health and safety information from the chemical industry and to shift more of the burden to chemical companies to demonstrate the safety of their products; and
- TSCA does not provide sufficient chemical safety data for public use by consumers, businesses and workers; and fails to create incentives to develop safer alternatives. (More than 16,000 of the roughly 84,000 chemicals included on the TSCA inventory are classified as confidential); and

WHEREAS, U.S. EPA, the National Conference of State Legislatures, and a coalition of 13 states have each separately announced guiding principles for TSCA reform to strengthen TSCA's effectiveness; and

WHEREAS, on May 22, 2013, Senate Bill 1009, the “Chemical Safety Improvement Act of 2013 (CSIA),” was introduced in the U.S. Senate to modernize the Toxic Substances Control Act; and

WHEREAS, although CSIA contains a number of improvements compared to TSCA, the Attorneys General and environmental agency leaders from a number of states have strongly objected to the state preemption provisions of CSIA noting that the proposed language would unnecessarily restrict the states’ ability to take actions necessary to protect public health and the environment; and

WHEREAS, states have an important stake in shaping TSCA reform.

NOW, THEREFORE, BE IT RESOLVED THAT:

ECOS commends the bipartisan effort in the U.S. Senate led by Senator Vitter and the late Senator Lautenberg to propose changes to TSCA.

ECOS commends U.S. EPA, the National Conference of State Legislatures, the Product Stewardship Institute, the National Pollution Prevention Roundtable, individual states and others for their leadership in support of TSCA reform that will strengthen chemicals management.

ECOS supports congressional action on TSCA reform that:

- ensures the burden is effectively placed on manufacturers to prove that existing and new chemicals are safe;
- provides U.S. EPA with adequate authority to ensure that existing and new chemicals are safe and to take action when they are not;
- establishes a streamlined process for U.S. EPA to share data with states, including confidential business information provided to U.S. EPA;
- ensures the preservation of state authority to protect citizens and the environment from toxic exposures and to manage chemicals of concern, and only restricts that authority if compliance with both state and federal law would be impossible;
- enhances timely state/federal consultation and coordination in areas of particular concern to the states, including the development and implementation of hot spot action plans, prioritization of the most severely impacted communities and providing a source of funding to state and local governments to conduct chemicals management technical assistance;
- expands the scope of risk-based safety standards to include hazard assessment;
- authorizes U.S. EPA to require a safer alternatives assessment for any chemical U.S. EPA identifies as a Priority Chemical, such as Persistent, Bioaccumulative and Toxic (PBT) or “very Persistent and very Bioaccumulative chemicals;”
- expands U.S. EPA’s authority to oversee the risk and environmental health impacts of engineered nanomaterials and other emerging technologies;

- authorizes U.S. EPA to take expedited action when a chemical presents a very serious or immediate risk to public health or the environment;
- provides U.S. EPA with authority to impose interim conditions and to take expedited action until a safety determination is made, when data or information suggests significant concern about a chemical; and
- enhances the safer alternatives assessment to encourage a process of continuous improvement and establishment of a set of criteria for performing assessments that, at a minimum, relies on consideration of the impacts through the life cycle of the chemical.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (202) 225-2927
Minority (202) 225-3841

October 29, 2013

Mr. Mark A. Greenwood
Principal
Greenwood Environmental Counsel PLLC
888 16th Street, N.W., Suite 800
Washington, D.C. 20006

Dear Mr. Greenwood:

Thank you for appearing before the Subcommittee on Environment and the Economy on Wednesday, September 18, 2013, to testify at the hearing entitled "Regulation of Existing Chemicals and the Role of Pre-Emption under Sections 6 and 18 of the Toxic Substances Control Act."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Tuesday, November 12, 2013. Your responses should be e-mailed to the Legislative Clerk in Word format at Nick.Abraham@mail.house.gov and mailed to Nick Abraham, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



John Shimkus
Chairman
Subcommittee on Environment and the Economy

cc: The Honorable Paul Tonko, Ranking Member,
Subcommittee on Environment and the Economy

Attachment

Greenwood Environmental Counsel PLLC

Mark A. Greenwood, Esq.

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November 5, 2013

The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515-6115


Re: Additional Questions

Dear Chairman Shimkus:

Thank you for the opportunity to testify at the Subcommittee's hearing entitled "Regulation of Existing Chemicals and the Role of Pre-Emption under Section 6 and 18 of the Toxic Substances Control Act," held on September 18, 2013. In response to your request, I am enclosing for the hearing record my responses to some additional questions posed to me in your October 29, 2013 letter.

Thank you again for the opportunity to provide testimony to your Subcommittee.

Sincerely,



Mark Greenwood
Greenwood Environmental Counsel PLLC

**U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Environment and the Economy**

**Hearing on “Regulation of Existing Chemicals and the Role of
Preemption under Sections 6 and 8 of the Toxic Substances Control Act”
September 18, 2013**

**Responses from Mark Greenwood to
Additional Questions for the Record**

Questions provided by The Honorable John Shimkus:

1. Some think that the Corrosion Proof Fittings case reflects failure of TSCA, others assert parts of TSCA, such as Section 5 dealing with new chemicals, have been a success. What is your view?

One of the unfortunate aspects of the TSCA program’s history is that EPA’s ability to use the broad regulatory authorities in Section 6 became, in the minds of many people, the sole measure of whether the larger TSCA program has been successful. The record of EPA action under Section 6 clearly indicates that this provision has not been the highly effective regulatory authority that many people thought it might be in 1976, when TSCA was passed. That conclusion, however, should not be drawn too broadly.

The historical record shows that EPA has taken many actions on chemicals in commerce, using other parts of the TSCA statute. Some examples are worth noting:

a. New Chemical Regulation under Section 5: While public records are limited on how many new chemical Pre-Manufacture Notices (PMNs) EPA has reviewed, available information suggests that EPA has evaluated approximately 40,000 chemicals through the new chemical program since 1976. Approximately 10% of those chemicals have been identified as having risk concerns warranting action by the Agency. Thus several thousand chemicals have been subject to TSCA actions that vary from Section 5(e) Orders requiring testing and control measures to voluntary withdrawal of the PMN, avoiding manufacture or import of the chemical in the United States.

b. Significant New Use Rules under Section 5: Under Section 5, EPA is able to regulate chemicals through Significant New Use Rules (SNURs) that require notification of EPA and a regulatory review of a chemical whose use is both “new” and “significant”. EPA has used this authority to establish protective conditions for the use and management of specific existing chemicals that will then avoid the notification obligations in a SNUR for those chemicals. Many of these SNURs have been issued to extend the obligations in Section 5(e) Orders to the full range of parties who might manufacture or process a particular chemical. EPA has estimated that it has issued approximately 350 of these SNURs for chemicals that are in commerce in the U.S. Thus, the SNUR authority in TSCA, rather than Section 6, is the dominant tool that EPA uses to regulate existing chemicals.

2. You suggested that the Corrosion Proof Fittings case chilled EPA’s enthusiasm for using section 6. Is your concern with how the Court interpreted the least burdensome requirement or with its inclusion in the statute?

The “least burdensome alternative” language in the TSCA statute is a reasonable, and not historically controversial, consideration for the regulation of existing chemicals. It is a key component of what policymakers call “smarter regulation” – finding effective ways to achieve regulatory objectives with strategies and tactics that minimize cost and social disruption.

EPA’s concern about the Corrosion-Proof Fittings decision was how the court interpreted the “least burdensome alternative” language in Section 6, not the fact that the provision was included in the statute. The surprising part of the court’s opinion was the language indicating that the Agency needed to assess the full costs and benefits of each option that was arguably less burdensome than the approach proposed in the TSCA rule. This requirement to examine each option was potentially an obligation to examine all options proposed by stakeholders, including those opposed to any form of regulation. This appeared to be an analytical morass for the Agency that would require major investments of resources and time to establish a record for a Section 6 rule. Such an approach contrasted with how EPA and other agencies were operating, and are operating today, under Executive Orders guiding regulatory policy. Those Executive Orders allow agencies to identify a finite set of reasonable regulatory alternatives for evaluation.

It should be noted that some commentators on TSCA have suggested that EPA should have tested the Corrosion-Proof Fittings court’s interpretation of Section 6 by initiating other rules that interpreted the “least burdensome alternative” requirement more in line with Executive Order policy. This reflects a misunderstanding of how federal agencies operate, and must operate to maintain their obligations to the public and to taxpayers. When it is acting responsibly, the federal government does not generate regulations to “test legal theories.” EPA

regulations must address and remedy environmental problems, while deploying the resources of the Agency (including the time and energy of EPA staff) in a responsible way.

In the wake of the Corrosion-Proof Fittings decision, it had to be assumed by EPA that opponents of a future TSCA Section 6 rule would try to find every way possible to bring a challenge to that rule in the Fifth Circuit Court of Appeals, where the Corrosion-Proof Fittings case would be the law of the Circuit on Section 6. In addition, there is a natural, and I would say responsible, instinct for an agency to address any arguable defect in the record for a rule, even if that meant taking more time to analyze an additional objection (or in this case option) proposed by opponents of a rule. EPA recognized that these inevitable dynamics would create a prudent path for future regulation under Section 6 that would make EPA more conservative about when it had enough information to support a rule, before facing the judicial gauntlet created by the Corrosion-Proof Fittings decision.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
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COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (202) 225-2927
Minority (202) 225-3641

October 29, 2013

Mr. William K. Rawson
Chemical Regulation, Product Strategy
and Defense Practice
Latham & Watkins, LLP
555 11th Street, N.W., Suite 1000
Washington, D.C. 20004

Dear Mr. Rawson:

Thank you for appearing before the Subcommittee on Environment and the Economy on Wednesday, September 18, 2013, to testify at the hearing entitled "Regulation of Existing Chemicals and the Role of Pre-Emption under Sections 6 and 18 of the Toxic Substances Control Act."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

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Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



John Shimkus
Chairman
Subcommittee on Environment and the Economy

cc: The Honorable Paul Tonko, Ranking Member,
Subcommittee on Environment and the Economy

Attachment

“Regulation of Existing Chemicals and the Role of Pre-Emption under Sections 6 and 18 of the
Toxic Substances Control Act”

September 18, 2013

Questions for the Record for William Rawson

1. Question by Chairman John Shimkus

Why do you think the Toxic Substances Control Act (TSCA) included a pre-emption provision when environmental statutes enacted around that time actually allowed the states to act more stringently than the Federal Government? What is different about TSCA?

The preemption provision in the Toxic Substances Control Act struck a reasonable balance considering the nature of the actions EPA can take under the Act and the purposes of preemption generally. Similar approaches are taken in other federal statutes discussed in my written testimony.

Preemption applies only when EPA takes action under section 4 (testing of existing chemicals), section 5 (approval and regulation of new chemicals) or section 6 (regulation of existing chemicals). States had not historically been active in these areas. It would be burdensome, disruptive and wasteful to have conflicting federal and state chemical testing requirements, and equally problematic to have differing federal and state standards for approving new chemicals. Further, developing such programs would be very costly to the states. Similarly, while EPA has taken few actions under section 6 for reasons addressed at the hearing, once EPA has taken action under section 6 following a public process that gives all interested stakeholders opportunity to participate, it would be very costly and very burdensome to interstate commerce if states could then pursue their own rulemakings and impose different and conflicting requirements. Having said that, the preemption provision in TSCA allows for various exceptions and exemptions described in my written testimony and discussed further below.

In short, the scope of preemption in TSCA was tailored to fit the nature of the actions EPA was authorized to take under the Act, applies to only a subset of those actions, and appears designed to avoid conflicting state standards where such conflicting standards could be particularly burdensome and disruptive to interstate commerce. And as noted, the Consumer Product Safety Act (CPSA)¹, the Food, Drug, and Cosmetic Act (FDCA)², and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)³ contain preemption provisions that operate in a similar manner to TSCA. Three of these statutes' four preemption provisions were enacted at about the same time as TSCA.

¹ 15 U.S.C. § 2075.

² 21 U.S.C. §§ 360k, 379r.

³ 7 U.S.C. § 136v.

2. Question by Chairman John Shimkus

TSCA Section 18 includes exceptions to the general pre-emption accorded to rules issued by EPA under Sections 5 and 6. Please discuss these exemptions to the Section 18 preemption provisions. Do you consider these exemptions to be broad?

I do consider the exemptions and exceptions to be broad enough to serve their intended purposes. Exemptions may be granted if EPA determines the proposed state or local action would provide a higher degree of protection and would not unduly burden interstate commerce. Among the exceptions, state and local laws governing disposal are not preempted, reflecting the local impacts of disposal activities. States also are permitted to enact rules identical to EPA rules, which would make them subject to state as well as federal enforcement. States also are not precluded from adopting rules under authority granted by other federal laws, such as the Clean Air Act, and a state or local law also may prohibit the use of a substance or mixture, other than its use in the manufacture or processing of other substances or mixtures. Finally, the preemption provision does not apply at all to actions taken by EPA under section 8 (various chemical-related reporting and information-gathering requirements), such that states are not preempted from imposing information-gathering requirements of their own.

I consider these various exemptions and exceptions to be quite broad. I also consider them for the most part to be in line with the objectives of TSCA, stated in section 2(b), to prevent unreasonable risks to health or the environment without impeding unduly technological innovation, and with the statement in Executive Order 13563 (January 11, 2011), that "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." However, the ability of a state or local jurisdiction to ban a particular use of a substance even after the responsible federal agency has conducted an open and transparent review and determined that the use is safe, raises obvious concerns. As I stated in my oral testimony, one could argue that preemption should apply to situations where EPA has determined through a public process that no action is needed to protect health and the environment.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

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October 29, 2013

Ms. Jennifer Thomas
Director, Federal Government Affairs
Alliance of Automobile Manufacturers
803 7th Street, N.W., Suite 300
Washington, D.C. 20001

Dear Ms. Thomas:

Thank you for appearing before the Subcommittee on Environment and the Economy on Wednesday, September 18, 2013, to testify at the hearing entitled "Regulation of Existing Chemicals and the Role of Pre-Emption under Sections 6 and 18 of the Toxic Substances Control Act."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Tuesday, November 12, 2013. Your responses should be e-mailed to the Legislative Clerk in Word format at Nick.Abraham@mail.house.gov and mailed to Nick Abraham, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



John Shimkus
Chairman

Subcommittee on Environment and the Economy

cc: The Honorable Paul Tonko, Ranking Member,
Subcommittee on Environment and the Economy

Attachment



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11/12/13

Responses to Questions for the Hearing Record
Jennifer Thomas, Director of Federal Government Affairs
Alliance of Automobile Manufacturers

Hearing entitled: "Regulation of Existing Chemicals and the Role of Preemption under Sections 6 and 18 of the Toxics Substances Control Act"
House Committee on Energy & Commerce
Subcommittee on Environment & the Economy
September 18, 2013

Submitted by the Honorable John Shimkus

Q: Some proposed state laws introduce concerns by how they define "consumer products." Can you give some examples?

Autos are regulated by the federal government separately from other consumer products, because of the complexity and longevity of vehicles and the acknowledgement that as such, they need to be considered differently from other consumer products such as beauty and cleaning products. But there has been a noticeable trend in state legislation and regulation moving towards a more broad definition of "consumer product" that would capture automobiles. An approach which may be feasible for simpler products can be totally infeasible for a complex product such as an automobile, which has thousands of components designed to last many years. Product development and testing times are substantially longer and more extensive for complex products. They should not be treated in the same way.

For example, under California's Safer Consumer Products regulations, the Department of Toxic Substances Control can subject up to 10 components in a vehicle for review in a three year period. Component is defined in such a broad way to even include an assembly, such as a transmission, which is itself a complex durable good consisting of multiple subcomponents, substances, and materials. Having to conduct an Alternatives Assessment for a chemical of concern in an electric motor, for which the likelihood for exposure is minimal to nonexistent, would likely take years and potentially millions of dollars to complete. Now imagine conducting alternative assessments for essentially 10 unique complex durable good assemblies in a three year period (and multiply that by fifty states). It is infeasible and unnecessary.

A federal approach focusing on specific applications related to actual consumer exposure to chemicals of concern would be much more effective.

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Q: Why are effective replacements important to you?

The average automobile has 30,000 unique components and each component is made up of multiple chemicals and mixtures. These complex parts must meet an array of stringent environmental, safety, performance, and reliability standards and be compatible with each other. Potential substitutes or alternatives must go through rigorous testing to ensure the integrity, performance, safety, and durability of the vehicle is not jeopardized. Once a suitable alternative is identified, implementation of alternative materials can take years, as a typical product development cycle in the auto industry is five years.

Additionally our customers require service and replacement parts for the life of a vehicle –10+ years. With the typical car comprising 30,000 parts, and multiple generations of particular models on the road at a time, redesigning service parts is impractical. Regulations need to be forward-looking allowing the focus of chemical replacements on upcoming product.

Q: What have state-specific carve-outs from preemption – like those for California in the Clean Air Act – meant for your members? Please give examples.

State specific carve-outs defeat the goal of a single, national program. The goal should be to create an effective national policy so states do not feel the need to go out and regulate on their own. A patchwork of laws of regulations increase compliance costs and is less effective than a national program protecting all of our citizens.

