

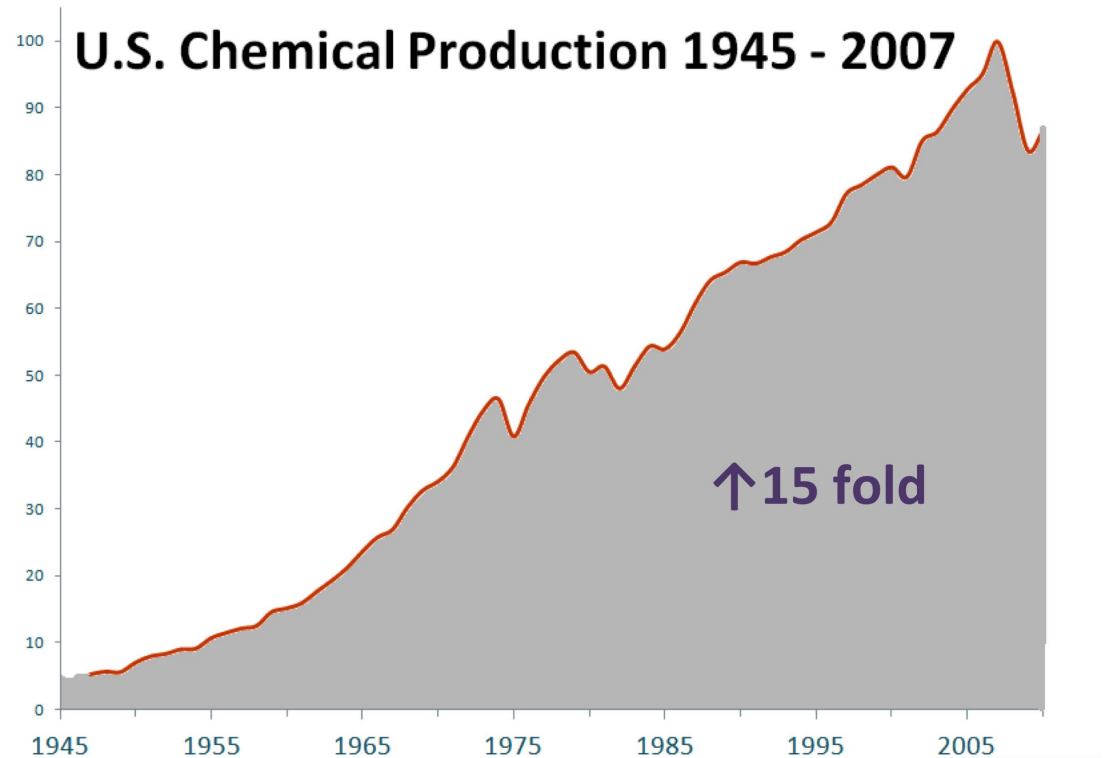
The Toxic Substances Control Act

A Primer on the Law and Current Issues

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Toxic Substances Control Act (TSCA)

- Originally enacted in 1976.
- Intended to provide the Environmental Protection Agency with the authority to regulate existing and new toxic chemicals.
- Amended for the first time in 2016 with overwhelming bipartisan support.
- Abbreviated frequently as TSCA, pronounced “TOSCA”, like the opera.



Data from: U.S. Federal Reserve Board, Division of Research and Statistics

An Overview of TSCA's Structure

- Covers any chemical substance with some exceptions, including pesticides, tobacco, nuclear material, firearms, food, drugs, and cosmetics
- SEC. 2. FINDINGS, POLICY, AND INTENT.
- SEC. 3. DEFINITIONS.
- SEC. 4. TESTING OF CHEMICAL SUBSTANCES AND MIXTURES.
- SEC. 5. MANUFACTURING AND PROCESSING NOTICES. [New Chemicals]
- SEC. 6. PRIORITIZATION, RISK EVALUATION, AND REGULATION OF CHEMICAL SUBSTANCES AND MIXTURES. [Existing Chemicals]
- SEC. 7. IMMINENT HAZARDS.
- SEC. 8. REPORTING AND RETENTION OF INFORMATION.
- SEC. 9. RELATIONSHIP TO OTHER FEDERAL LAWS.



The Original 1976 Law

- Granted EPA the authority to regulate toxic chemicals that pose an “unreasonable risk” to health and/or the environment. The phrase “unreasonable risk” was not defined in the statute.
- The burden was on EPA to show that a chemical posed an unreasonable risk.
- TSCA did not require companies to test any chemicals currently in use for health or environmental effects, totaling tens of thousands of substances.

STATEMENT OF THE PRESIDENT ON SIGNING S. 3149 INTO LAW— OCTOBER 12, 1976

I have signed S. 3149, the Toxic Substances Control Act. I believe this legislation may be one of the most important pieces of environmental legislation that has been enacted by the Congress.

This toxic substances control legislation provides broad authority to regulate any of the tens of thousands of chemicals in commerce. Only a few of these chemicals have been tested for their long-term effects on human health or the environment. Through the testing and reporting requirements of the law, our understanding of these chemicals should be greatly enhanced. If a chemical is found to present a danger to health or the environment, appropriate regulatory action can be taken before it is too late to undo the damage.

The legislation provides that the Federal Government through the Environmental Protection Agency may require the testing of selected new chemicals prior to their production to determine if they will pose a risk to health or the environment. Manufacturers of all selected new chemicals will be required to notify the Agency at least 90 days before commencing commercial production. The Agency may promulgate regulations or go into court to restrict the production or use of a chemical or to even ban it if such drastic action is necessary.

The bill closes a gap in our current array of laws to protect the health of our people and the environment. The Clean Air Act and the Water Pollution Control Act protect the air and water from toxic contaminants. The Food and Drug Act and the Safe Drinking Water Act are used to protect the food we eat and the water we drink against hazardous contaminants. Other provisions of existing laws protect the health and the environment against other polluting contaminants such as pesticides and radiation. However, none of the existing statutes provide comprehensive protection.

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EDITORIALS

Asbestos . . . wins?

It's nice to see a court exercise some sound judgment, even when it rules in favor of a known carcinogen.

What's this? A known carcinogen winning in a case in court? And the Environmental Protection Agency losing?

Yep. That's what happened recently when the U.S. Court of Appeals for the Fifth Circuit in New Orleans tore up part of the EPA's omnibus ban on asbestos products.

While upholding restrictions of asbestos already in effect — an import ban, an end to its use in roofing material and flooring felt, sheeting and tile, and clothing — the court tossed out EPA's attempt to halt asbestos use in brake drum linings and other automotive friction parts in 1993.

For those who have been living in an asbestos-filled attic for the last 10 years, the product is a heat-resistant mineral widely used in building insulation, but now believed to cause cancer and lung ailments in those who inhale the fibers.

With prudent care and caution, however, asbestos can be managed and tolerated in the marketplace, and there is no rational

argument for gutting the asbestos industry in the United States and Canada to suit the tastes of EPA bureaucrats intent on saving civilization.

That is what the unanimous court decision said, if not in so many words.

The court said the EPA failed in many ways, including failure to follow provisions of the law that stipulate "before (the EPA) impose(s) a ban on a product, it first evaluate and then reject the less burdensome alternatives laid out for it by Congress."

In addition, the EPA failed to adopt appropriate estimates of what level of exposure to asbestos is dangerous, and failed to provide "a reasonable basis for the purported benefits of its proposed rule by refusing to evaluate the toxicity of likely substitute products that will be used to replace asbestos goods."

It is always pleasant to learn that reason does prevail from time to time, even in cases where it is the EPA vs. a carcinogen.

Corrosion Proof Fittings v. EPA (5th Cir., 1991)

The decision struck down a 1989 phased ban on asbestos. The court found that EPA had not complied with the statute, which required EPA to issue the "least burdensome" regulation and to consider the economic consequences of toxic chemical controls.

As the court put it, "EPA's regulation cannot stand if there is any other regulation that would achieve an acceptable level of risk as mandated by TSCA."

The opinion also criticized the agency's failure to monetize health benefits of the ban, finding that "[un]quantified benefits can, at times, permissibly tip the balance in close cases. They cannot, however, be used to effect a wholesale shift on the balance beam. Such a use makes a mockery of the requirements of TSCA that the EPA weigh the costs of its actions before it chooses the least burdensome alternative."

These statements in the opinion left attorneys and staff at the agency reluctant to try to re-issue the ban or any other controls on existing chemicals.

CALIFORNIA PROPOSITION

65 WARNING

WARNING: This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm

For more information: www.P65Warnings.ca.gov

State Regulation of Toxic Chemicals in the Absence of Federal Controls

- In the absence of federal regulation, citizens and public interest groups began pressing states to regulate or ban certain chemicals.
- By the 2010s, there were more than 1,100 laws addressing toxic chemical harms at the state level.

2016 TSCA Reforms

- Known as the Frank Lautenberg Act after Senator Lautenberg (D-NJ), a champion of reform who died a few years before the amendments passed.
- Sought to strengthen EPA's regulatory authority by requiring the agency to regulate a chemical if it poses an unreasonable risk, without consideration of costs or other non-risk factors.
- Included new protections for vulnerable populations.
- Provided EPA with new funding and authority to expand testing of chemicals.
- Strengthened the ability to preempt state regulations of a substance if EPA finds a chemical does not pose an unreasonable risk.





TSCA Implementation in the Trump and Biden Administrations

Issue One: Determining a Chemical's "Conditions of Use"

TSCA § 3 (4) The term “**conditions of use**” means the circumstances, as determined by the Administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.

Crews work to remove and replace lead-tainted pipes in Flint, Michigan



Issue Two: Managing Chemical Risks

TSCA § 6. PRIORITIZATION, RISK EVALUATION, AND REGULATION OF CHEMICAL SUBSTANCES AND MIXTURES.

(a) SCOPE OF REGULATION.

If the Administrator determines in accordance with subsection (b)(4)(A) that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents an unreasonable risk of injury to health or the environment, the Administrator shall by rule and subject to section 18, and in accordance with subsection (c)(2), apply one or more of the following requirements to such substance or mixture **to the extent necessary** so that the chemical substance or mixture no longer presents such risk . . .





Issue Three: Regulating under TSCA or Other Federal Laws

TSCA § 9. RELATIONSHIP TO OTHER FEDERAL LAWS.

(a) LAWS NOT ADMINISTERED BY THE ADMINISTRATOR.—(1) If the Administrator determines that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents an unreasonable risk of injury to health or the environment, without consideration of costs or other nonrisk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant by the Administrator, under the conditions of use, and **determines, in the Administrator's discretion, that such risk may be prevented or reduced to a sufficient extent by action taken under a Federal law not administered by the Administrator,** the Administrator shall submit to the agency which administers such law a report which describes such risk and includes in such description a specification of the activity or combination of activities which the Administrator has reason to believe so presents such risk. . .

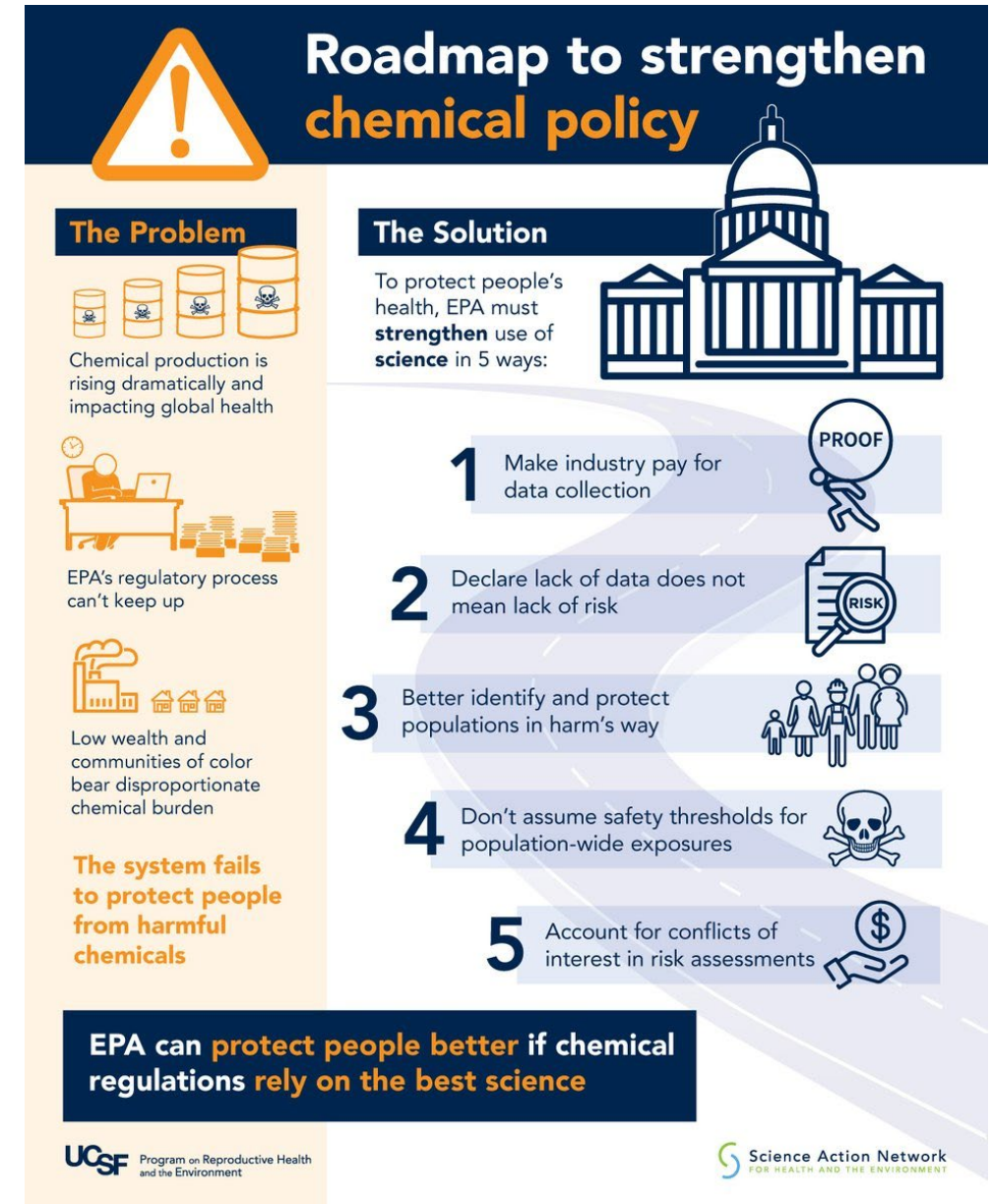
Congress Considers Additional Amendments to TSCA

- Allow third party assessors to assist EPA with making risk determinations for new chemicals.
- Change the standard of unreasonable risk, replacing “will not present any unreasonable risk” with “is not likely to present an unreasonable risk.”
- Change the definition of condition of use to indicate that uses cannot be “hypothetical.” Specifically exclude uses that violate any federal law or represent “misuse of a substance,” and exclude uses for which a submitter demonstrates that “broadly applied and effective exposure control measures are routinely used.”



How EPA can Better Protect Public Health and the Environment under the Existing Statute

- Evaluate whether a substance poses an unreasonable risk under all exposure routes and uses.
- Better quantify and monetize health and ecological harms from toxic chemical exposures.
- Don't assume the use of protective measures when assessing risk. Methods for reducing exposure, such as the use of personal protective equipment, are better assessed at the risk management stage of toxic chemical regulation.





Thank you!

For further reading:

<https://repository.law.umich.edu/facarticles/3096>

<https://repository.law.umich.edu/articles/3102>

<https://repository.law.umich.edu/other/284>