House Energy and Commerce Committee, Environment and Economy Subcommittee
Hearing on Chemical Safety Improvement Act
November 13th, 2013

One Page Summary of Testimony for Andy Igrejas, *Safer Chemicals, Healthy Families*

1. The Chemical Safety Improvement Act presents an opportunity for TSCA reform, but it falls short of the critical elements needed for reform to be meaningful and credible. The legislation can be fixed, however. We urge Congress to focus on the critical changes.

2. Overall, the CSIA fails to learn the lessons of TSCA itself. The current program quickly ran aground due to an unworkable safety standard, overly burdensome procedures and litigation. Its only concrete achievement was banning PCBs and its save grace was that it did not unduly restrict states.

3. While the intent of the CSIA is to "fix" TSCA's standard, that intent is not realized in the language. The safety standard should be redefined to clarify that it is a risk-only standard. Section 6 should be redrafted to simplify and clarify the role of cost-benefit analysis and to clearly end the "least burdensome" requirement.

4. Safety determinations for existing chemicals under CSIA do not clearly incorporate protection for vulnerable populations, especially children and pregnant women, nor would they clearly require aggregate exposure assessment. This may be another area where intent and language do not match up, but these are critical elements needed for any reform measure.

5. The ability to require testing by order rather than rule is an improvement, but other provisions on information undermine this improvement. The CBI provisions be amended to remove the grandfathering of existing claims and more work is needed to strike a balance on the issue of chemical identity.

6. The provisions requiring new frameworks and guidance in Sections 4 and 6 will substantially delay the new program and will likely create new handles for litigation. They should be removed or substantially paired down and clarified.

7. The pre-emption provisions would unduly restrict states, ignoring that key lesson of TSCA.

8. The CSIA needs deadlines, minimum requirements, and a funding mechanism to ensure timely implementation.

9. In general, the legislation must be rebalanced to produce timely and clear health and environmental benefits and reduce the risk of a repeating the paralysis of TSCA.

Testimony on the Chemical Safety Improvement Act (S.1009)

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Andy Igrejas, Director
Safer Chemicals, Healthy Families

Thank you, Chairman Shimkus, Ranking Member Tonko and members of the Committee. My name is Andy Igrejas and I'm the Director of Safer Chemicals, Healthy Families, a broad coalition of organizations and businesses[1] dedicated to reforming our nation's chemical policies to better protect public health and the environment. I'm very thankful for the opportunity to address the committee as it considers reform of the Toxic Substances Control Act (TSCA).

The focus of today's hearing is S. 1009, the Chemical Safety Improvement Act (CSIA). The Senate bill has raised hopes that reform can be enacted in this Congress. We share those hopes. At the same time, there are standards that any reform must meet to be credible and meaningful. As drafted, the CSIA does not meet those standards. We offer the following critique of the legislation in a constructive spirit with the hope that it can inform Congress's work.

In previous hearings the committee began the process of understanding what didn't work in TSCA and why and of identifying the critical fixes needed in any reform. Congress can craft a law that will enjoy broad support from the health and environmental community if it focuses tightly on the most critical elements to achieve the clearest possible protections for public health and the environment. I hope my testimony suggests a path forward.

Key Lessons of TSCA

As previous testimony has shown, TSCA failed for a variety of reasons. The standard in the bill proved impossible to meet. Unlike other environmental and public health laws, it was not a strictly risk-based or health-based standard. The standard bound up consideration of the risks of a chemical with the evaluation of its benefits and the costs of any proposed restrictions. The law also required EPA not merely to choose proportional risk management measures, but to demonstrate it had chosen the "least burdensome" of those measures. It made it difficult for EPA to require the development of health and safety information on a chemical. It allowed companies to claim information confidential without justification. It did not set clear deadlines or timelines for EPA action. Its procedures were cumbersome and some of its terminology vague, leading to fatal delays and litigation. In retrospect, TSCA's only clear achievement was the ban on PCBs and its saving grace was that it did not unduly restrict the states. In the 36 years of federal dysfunction the states have stepped forward to fill the gap.

The fundamental problem with the CSIA is that it fails to learn from these lessons. Though the intent may be otherwise, as drafted the CSIA practically invites litigation, delays action on most chemicals, continues to constrain the development of health and safety information, and allows critical information to be hidden from the public. But this time it would also restrict the states even in the absence of meaningful action from the federal government.

The Safety Standard

A core idea of the CSIA is that it "fixes" TSCA's standard rather than imposing a new standard such as "reasonable certainty of no harm" as proposed in previous reform legislation. At its most basic level, fixing the standard means changing it to be a risk-based standard, rather than one that balances the risks and benefits and also requires EPA to choose the "least burdensome" regulatory approach. It is the commingling of these considerations that the court cited in blocking EPA from regulating even asbestos, a substance with devastating health impacts that are beyond argument.

The CSIA has language in Section 6 saying that the safety determination for existing chemicals should be made based on risk, but because of the way it is drafted the cost-benefit considerations are not fully separated and the "least burdensome" requirement is effectively retained for bans and phase outs. While the intent of the bill may be to require a risk-only determination in this section, that intent is not realized. In fact, our reading of the legislation is that EPA would still not be able to ban asbestos under the section as drafted.

But there is the additional problem that the "unreasonable risk" standard is also invoked in Sections 4 and 5 where there is no qualifying language suggesting a new meaning. In Section 4 EPA is directed to identify chemicals as "low priority" based on a determination that they are "likely to meet the safety standard." Those chemicals are set aside for no further action or scrutiny. In Section 5 the EPA is directed to apply the same test to a new chemical before it is allowed on the market. This is one of the bill's major selling points- that it imposes a safety screen of some kind on new chemicals for the first time. However, since "unreasonable risk" has such a clear meaning in the legislative history and case law of TSCA, it would almost certainly have the same old meaning, and therefore the same old problems, in these sections.

The simplest way to avoid these problems is choosing a different standard that signals a clear break with TSCA, such as "reasonable certainty of no harm" which is currently used in the pesticide program. If the legislation continues to use "unreasonable risk" it should be clearly re-defined in the definitions section of the bill to be explicitly health-only. That clear break would end the ambiguity anywhere the term is used in the bill and reduce the risk of litigation. Section 6 should also be redrafted to truly end the "least burdensome" requirement and simplify the cost benefit considerations for risk management measures.

Safety Determinations

Recent National Academy of Sciences[2] reports, the American Academy of Pediatrics[3], and the broad public health and environmental community agree that safety determinations should

protect vulnerable populations and account for the aggregate exposure to a chemical. Though grounded in science, both concepts also make common sense and are relatively easy to understand. They were at the core of the bipartisan reform of pesticide law, the Food Quality Protection Act (FQPA) of 1996. Neither concept is adequately reflected in the CSIA, though they are mentioned in ways that suggest some intent to incorporate them.

Vulnerable populations refers to the fact that a given chemical will affect me- as a relatively healthy 200lb adult male in Washington, DC- differently than it affects a child, a pregnant woman, or someone who lives or works in a heavily contaminated environment. Many chemicals, particularly those that mimic hormones, have substantially more impact on the developing fetus or child than on an adult.[4] The vast body of peer-reviewed science on this subject over the last twenty years has helped put chemical reform on the national agenda. A 1993 National Academy of Sciences study, *Pesticides in the Diets of Infants and Children*, found that a failure to account for vulnerable populations meant that EPA decisions about pesticides did not protect children from exposure to the pesticide residues on food. Congress responded with the FQPA in 1996 to ensure that they did. It would be odd for Congress, after all these years, to reform our chemical policies in ways that did not provide a similar assurance for chemicals. Vulnerable populations should be defined in the legislation. Safety assessments should be required to identify them for a given chemical, and any risk management measure should be required to protect them.

Aggregate exposure is a fancy term for the basic fact that we are often exposed to the same chemical from multiple sources. That means that the dose of the chemical that we receive is bigger than the dose from any one exposure, in the same way that taking three pills of a prescription drug represents a bigger dose than one pill. A pregnant woman, for example, might be exposed to the same chemical from multiple consumer products in her home, a process at her workplace, and- if the chemical is also a pollutant- from the air or water. If safety assessments don't take the aggregate exposure into account, they will simply be wrong. They will not reflect what is happening in the real world and the resulting risk management measures won't make a difference in the real world. The legislation should require EPA to assess the aggregate exposure to a chemical unless it determines that any vulnerable populations it identifies are not exposed to the chemical from more than one source.

Our coalition prefers the "reasonable certainty of no harm" standard in part because it incorporates these concepts automatically given its history in the pesticide law. If Congress retains the "unreasonable risk" standard in the legislation, the safety determinations must include vulnerable populations and aggregate exposure as core concepts. (This also could be done in a new definition of "unreasonable risk.") Otherwise, Congress will not be able to claim that the legislation protects pregnant women and children and heavily contaminated communities from chemicals as they are actually used.

Testing and Information Requirements

The CSIA allows EPA to require testing on an existing chemical by order rather than by the more cumbersome rule-making process. That is a significant improvement for which its authors deserve credit. At the same time this improvement is constrained by the fact that EPA can require testing only for existing chemicals under the bill if it has designated them as high-priority. That creates a few problems.

First, it means that EPA can only prioritize chemicals based on existing information, rather than any new testing data. The information available for most chemicals is relatively limited (a legacy of TSCA's overly burdensome process for testing.) That, in turn, means that a chemical could be designated as low-priority based on inadequate information. Under the bill, these chemicals are then effectively set-aside forever at both the federal and state level, unless new information becomes available. It is unclear where that information would come from. Industry would have no incentive to develop it, and EPA would not be allowed to order it under the bill. In addition, if EPA has to put anything that it thinks needs some testing in the high-priority category it will certainly slow down that process. An obvious solution is to allow EPA to order testing for purposes of prioritization, not just for purposes of a safety determination, and to require adequate information for a low-priority designation.

In addition, the CSIA requires EPA to tier testing requirements in an overly rigid way. A chemical would have to raise a red flag from a screening level test before EPA can order a more extensive test. There are not effective screening level tests that predict some of the health endpoints about which the public is most concerned. Where these endpoints are a concern, the EPA should be able move straight to the more relevant test. The tiered testing requirements in the bill should be eased to ensure that needed tests aren't prevented.

Finally, the CSIA takes away EPA's ability to require testing for new chemicals. The way it is drafted suggests that change may have been inadvertent, but this authority should be restored.

Confidential Business Information

The public interest community and most of regulated industry have agreed for some time that TSCA's provisions for CBI are too often abused. In addition, the burgeoning "secret inventory" of chemicals undermines the transparency of the program. The absurd consequence is that you can see there is a chemical on the inventory that causes cancer, you just can't find out which chemical.

The CSIA creates new rules of the road for justifying CBI claims that are an improvement, but it strangely grandfathers in existing claims, including those whose abuses fueled calls for reform. The grandfathering should be removed. In addition, the CSIA enshrines the concept of a secret inventory in the law for the first time. Further debate and discussion are needed to find a solution on the issue of chemical identity that does not threaten public health and the environment.

"Frameworks" and Science Guidance

There are six subsections in Section 4 and two in Section 6 of the CSIA that require the EPA to develop new "frameworks", policies and guidance on both procedures for the program and scientific questions like evaluating the reliability of data. These policies are also subject to notice and comment and judicial review. Simply completing these frameworks on the most optimistic schedule would take several years. If EPA is prevented from getting started evaluating chemicals until these policies are in place it will lead to substantial delay in the entire program.

In addition, this section of the bill uses various terms of art in ways that are mostly undefined and which will encourage litigation over the ambiguities. In at least one instance the bill takes a

stand on a particular science question that contradicts the National Academy of Sciences recommendations.

These sections of the legislation could simply be eliminated. The EPA already has guidance and polices on most of the questions – like prioritization and assessment methodologies. At the very least these sections should be consolidated with careful attention to avoiding new handles for litigation or unacceptably delaying the start of the new program. If science guidance is needed, it should reflect, rather than contradict, the recommendations of the National Academy of Sciences.

State Pre-emption

One of TSCA's only clear successes is that it allowed states to develop their own chemical policies and restrictions unless they conflict with a federal regulation. Even then, it allowed states to seek a waiver for their own restrictions or to ban a chemical outright. Since the TSCA program never really got off the ground, states have played the leading role in regulating chemicals over the last 36 years. Many states have banned particular chemicals of concern- like mercury, cadmium and bisphenol A- from particular categories of products. A handful - California, Maine, Washington, and Minnesota - have developed more comprehensive policies that address broader classes of chemicals.[5] These policies have improved public health and environmental quality.

CSIA would pre-empt state restrictions on a chemical at the point at which EPA prioritizes the chemical as either High or Low. Low priority chemicals are those that EPA is setting aside based on a review that is, by definition, short of a full safety determination. This more cursory review does not justify that level of protection for a chemical. For high priority chemicals, on the other hand, it could be years between the prioritization of the chemical and the decision that it is either safe, or that it is unsafe and requires risk management measures. In the meantime, states would be prevented from taking action on what are, by definition, the riskier chemicals. The proposed new waiver process for states is overly cumbersome compared to the existing one. The states' ability to co-enforce federal requirements is removed. Finally, while an attempt has been made in the bill to preserve state warning and information requirements, which have been some of the most effective, the language ultimately does not protect them.

The more protective approach to states' rights in the current TSCA largely worked as intended. States were allowed to move forward even as the federal program became bogged down in ways that surely none of its authors intended. Congress should apply that lesson to the CSIA.

Deadlines, Minimum Requirements, and Funding

One of the lessons of TSCA is that it lacked deadlines or goals for how many existing chemicals should be reviewed or how long assessments should take. The new chemicals program, on the other hand, had clear deadlines for how quickly EPA had to respond to a pre-manufacture notice. As a result, most of the activity at EPA under TSCA has been in the new chemicals program. Also, other laws administered by the EPA generally had deadlines for listing pollutants or making decisions, pushing TSCA's existing chemicals program to the back of the line in a bureaucratic environment of limited resources.

The CSIA repeats this mistake. It should be amended to add deadlines for critical policy decisions and for the minimum number of chemicals assessed, either per year, or over some

longer timeframe. Reform should also contain a new source of dedicated funding for the program, such as a user fee. Appropriate deadlines and work requirements would drive action at the agency and help both Congress and the public to hold the agency accountable.

The Low Priority Category

Finally, we would urge the Committee to consider whether the legislation should have a low-priority category at all. The goal of reform should be to protect public health and the environment from the risks posed by chemicals. Public confidence will follow if that goal is being met and benefits to the business community will follow on top of that. A modest but credible program will still produce tangible results.

The low-priority category in the bill adds a level of murkiness to the program that will likely undermine its credibility. For high priority chemicals- if all the appropriate fixes are made- the public will know that a chemical is either safe or that its risks are being adequately controlled. Low priority chemicals, however, are effectively being treated as safe even though they haven't really been found to be safe. Furthermore, EPA resources will be diverted into deciding what goes into this murky category rather than focused where they should be: taking action on the riskiest chemicals.

Earlier, I proposed changes that limit the damage from this category- requiring adequate information, breaking the link to pre-emption, clarifying the standard, etc. But with limited resources likely to be the norm for the foreseeable future, Congress should consider focusing those resources on a single category of priority chemicals.

Conclusion

This is not an exhaustive list of either the problems with the CSIA or its positive attributes, but it does provide the committee with the areas of the bill that we believe require the most attention. In general, the bill needs a substantial reworking and rebalancing in favor of delivering clearer health and environmental benefits sooner and reducing the risks of paralysis and delay. There are provisions from previous reform proposals, such as expedited action on persistent bio-accumulative toxins (PBTs) and "hot spot" communities that would help effect such a rebalancing if incorporated. I've focused my testimony instead on the core areas within the framework of the CSIA and where we see them falling short of the critical elements needed for reform to be meaningful and credible. We hope Congress will consider these recommendations and craft legislation that provides the public with the appropriate oversight of chemicals that is long overdue.

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[1] Saferchemicals.org/about/who.html

[2] National Research Council, *Science and Decisions- Advancing Risk Assessment* (2009), National Acadamies Press

[3] "Policy Statement Chemical-Management Policy: Prioritizing Children's Health," April 25th, 2001, *Pediatrics*, American Academy of Pediatrics.

[4] https://www.endocrine.org/~/media/endosociety/Files/Publications/Scientific%20Statements/EDC_Scientific_Statement.pdf

[5] http://www.saferchemicals.org/PDF/reports/HealthyStates.pdf