Testimony of Andy Igrejas

Director
Safer Chemicals, Healthy Families

on the

April 22nd Discussion Draft of the
Chemicals in Commerce Act

before the

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

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Summary of Testimony

I direct Safer Chemicals, Healthy Families, a non-partisan coalition of 450 public health, labor, and environmental organizations and businesses. The coalition was formed to promote meaningful reform of the Toxic Substances Control Act (TSCA).

I appreciate the opportunity to testify on the revised discussion draft of the Chemicals in Commerce Act and hope the testimony can inform the committee in taking a different approach before it pursues formal legislation.

Though the revised draft has some improvements over the previous draft, they do not, in our analysis, alter the bottom line. The Chemicals in Commerce Act, as drafted, would represent a significant step backwards from the status quo of chemical regulation in the United States, something I did not think was even possible a year ago.

The reason is that the rollbacks of existing federal authorities in the draft, combined with the rollback of state authorities, outweigh the limited improvements made to this draft over the previous version. The result remains a bill that is unbalanced in the direction of regulatory relief for the chemical industry against improvements to public health protection.

The concerns include:

- EPA will still be unable to impose risk management measures.
- The standard for risk evaluations is unclear, and the safety of pregnant women and children is not assured.
- EPA authority over new chemicals is reduced, rather than improved.
- States rights to implement their own protections are unduly violated.
- Chemicals will be set aside without a full safety review.
- The public's Right to Know about toxic chemicals is undermined.

I encourage the committee to either take a more balanced approach to comprehensive reform or to focus on a less ambitious approach that would at least assure credible progress in protecting the public from existing chemicals. The current draft is overly ambitious in its regulatory relief and fails to provide public health improvements.

Introduction and Overview
Thank you, Chairman Shimkus and Ranking Member Tonko for the opportunity to testify on the April 22nd revised discussion draft of the Chemicals in Commerce Act.

Safer Chemicals, Healthy Families is a coalition of 450 public health, environmental, and labor organizations and businesses[i] that was formed to promote meaningful reform of the Toxic Substances Control Act. We believe such reform is vital to enhancing the protection of public health and the environment and that, if done correctly, will also benefit American business by promoting innovation and restoring consumer confidence in American manufacturers.

We recognize and appreciate that some changes have been made to the revised draft that address concerns raised by the public health community. Regrettably, our analysis is that these changes do not alter the bottom line. As proposed, the ***draft still represents a significant step backward*** from the status quo of chemical oversight in the United States, which itself falls short of the minimum safeguards that the public deserves. Neither public health nor the environment will be protected by the proposed draft and consumer confidence in the chemical marketplace will not be restored. The simplest explanation is that the provisions in the draft that roll back current EPA authority, combined with the rollbacks of current state authority, substantially outweigh the improvements in the draft. The result is a bill that is unbalanced in the direction of regulatory relief for the chemical industry over public health protection.

The positive changes to the draft include removing the problematic definitions of Best Available Science and Publicly Available Information as well as allowing EPA to require testing for purposes of prioritization.

However, the most problematic provisions in the CICA remain. I would like to highlight several of these and then suggest a possible path forward.

1) EPA will still be unable to impose common-sense restrictions on unsafe chemicals.

The new draft clearly separates the assessment of the chemical – now called a risk evaluation- from the rulemaking EPA must undertake to impose any restrictions. The assessment is now appropriately risk-based. The rulemaking, however, is not. It uses the term "unreasonable risk" from the current law, which requires EPA to demonstrate that the benefits of addressing the risk outweigh the costs. Furthermore, without using the phrase "least burdensome" the draft effectively recreates its meaning with the provisions that require EPA to choose the most cost-effective remedy and demonstrate the availability of alternatives for particular uses before it can restrict them.

The combined effect is to reinforce the unworkable status quo of TSCA. The bottom line is that EPA will still be unable to impose the restrictions that are needed to ensure that a chemical is used safely.

EPA should instead be required to impose the restrictions needed to ensure the safe use of the chemical in question. If particular uses of the chemical are essential and the manufacturer can demonstrate that technically and economically feasible, safer alternatives are not available, then EPA should have the ability to grant limited, renewable exemptions from its rule.

The analytical and legal burdens placed on EPA by cost-benefit and "least burdensome" provisions are at the heart of TSCA's failure.[ii] To be successful, any legislation must decisively break with that history.

2) "Safety Determinations" have been changed to "Risk Evaluations" and the standard for evaluation is unclear.

The draft drops the term "safety determination" in favor of "risk evaluation" in Section 6. While at first this appears to be a cosmetic change, when combined with other provisions the effect may be to significantly undercut the idea of safety in the bill, which should be central. The draft also introduces the phrase "significant risk" for the first time as the standard for EPA to evaluate risks. (Though not, as noted above, as the standard for EPA to act on those risks.) While "significant risk" may be preferable to "unreasonable risk" its precise meaning is unclear. The draft needs substantial work to clarify what "safety" means and to place it at the core of the bill.

As Dr. Landrigan's earlier testimony noted, chemical reform is fundamentally about identifying which chemicals are contributing to chronic disease and disability (or environmental damage) and then devising appropriate policy interventions so that they don't. It is therefore vital that the safety assessments accurately capture the way people experience chemicals in the real world, in the same way it is vital that your doctor knows your prescriptions and pre-existing conditions before devising a course of treatment.

In their detailed recommendations for how EPA should assess chemical risks, both the National Academy of Sciences[iii] and the American Academy of Pediatrics[iv] said EPA should identify any vulnerable populations (usually pregnant women and children), identify the circumstances under which they are exposed to the chemical (both the amount and timing) and compare that against what the evidence suggests may cause harm. The EPA should then be empowered to prevent the scenario that causes harm with appropriate restrictions.

Pesticide law has incorporated these principles since 1996 under the Food Quality Protection Act. Manufacturers have to produce data sufficient to demonstrate to the EPA that pesticide residues and household exposures when taken together ("aggregate exposure") don't cause harm to pregnant women and children. The EPA

must ensure safety for these groups with appropriate restrictions such as those it placed on organophosphate pesticides. (Reduced organophosphate exposure quickly resulted in measurable public health improvements.[v]) It is because of that track record that our coalition has advocated that TSCA adopt the standard from that law, "reasonable certainty of no harm." It incorporates these principles and it implies a level of safety that the EPA is required to enforce.

It may be possible to assess and assure safety without using that standard, but the current draft does not achieve that goal. The concepts of "aggregate exposure" and vulnerable populations are in the draft, for example, but it does not require EPA to assess whether the populations are safe after taking aggregate exposures into account. Furthermore, "significant risk" must be better understood or further defined if it is to become a new standard. The phrase is used in the law governing OSHA permissible exposure limits and in that context has been interpreted as tolerating a thousand times more risk than what is tolerated for the general public in other statutes. Most Americans would not tolerate such a standard for chemicals used in the products they bring into their homes.

The draft effectively requires EPA to evaluate the risks of a chemical against an uncertain standard, and then authorizes EPA to impose restrictions only where it can prove the costs outweigh the benefits against the current TSCA standard. The bill should instead require EPA to evaluate whether a chemical is safe against a clear health-protective safety standard, and require EPA to impose the conditions needed to ensure that standard is met.

3) The draft continues to weaken EPA authority over new chemicals.

The chemical industry has long argued that TSCA's current new chemicals program works, while public health and environmental advocates have argued that it is inadequate. It is perplexing, therefore, that the draft continues to weaken the new chemicals program as opposed to improving it.

First, the draft eliminates current TSCA authority to require testing or impose requirements on the basis that the new chemical may be produced in substantial quantities and result in significant or substantial human exposure or environmental release.

Secondly, it eliminates the authority to impose workplace safety requirements on manufacture and processing of the new chemical, an important aspect of EPA's new chemicals program that has added to public health protection.

The new draft restores one element of the existing law that was removed in the previous draft, which is welcome, but the net effect of the discussion draft is still to undermine EPA's authority over new chemicals.

Most Americans are surprised when they learn that chemicals can enter the marketplace without having to demonstrate that they are safe. It is unthinkable that, in the name of reform, Congress would undermine the limited oversight authority that currently exists.

4) The "Low Priority" designation still treats chemicals as safe even though they have not undergone a thorough safety determination.

The "Low Priority" category in the new draft continues to be a misnomer. It is not a decision by EPA to postpone or place a "low priority" on reviewing the chemical. It is effectively a decision to treat the chemical as safe for any and all uses and put it beyond the reach of federal or state regulators. The removal of the provision "effects of low priority designation" in the new draft may make the consequences of low priority listing less obvious but it does not change them.

There is no requirement that EPA have sufficient information for an informed evaluation of the chemical. Also, the designation is based on a finding that the chemical is not "likely to" pose a significant risk, rather than a finding that it does not. Thus, without a thorough risk evaluation and in the absence of sufficient information, a chemical could be put off-limits for further testing or restriction and states would be prohibited from regulating it AT ALL from that point forward.

At the time of this designation the chemical may be known to be used in only one or two highly specialized ways (like refining or bomb-making) that have substantial workplace safeguards suggesting a low "likelihood" of significant risk. But after the designation anyone is free to use the chemical however they wish, including in toys or children's pajamas. The EPA is not required to enforce the scenario under which it determined the chemical was low priority.

The first time a low priority chemical that is actually toxic ends up in a cereal box or a teething ring the credibility of the entire program will go out the window overnight, along with the brand equity of any company using it. This is not the way to restore consumer confidence.

The current low-priority category in the bill should be either removed, reformed so that it actually means assessed later, rather than never, or replaced with one of two options. If the goal of the provision is to identify chemicals that are so inherently low in hazard that it doesn't matter how they are used in the future the bill could instead add a "low hazard" category with appropriately tight scientific criteria. If the goal is to create an alternative path for a chemical to be effectively declared as safe, the new provision in the draft- "alternative risk evaluation" could be beefed up to serve this purpose. As it stands, the low priority category muddles the concept of safety and is an invitation to mischief.

5) The draft undermines the public Right-to-Know about toxic chemicals.

The new draft contains the same sweeping and unnecessary restrictions on disclosure as the earlier draft and goes a step further. For the first time, the draft would explicitly preclude treating chemical identity as health and safety information that EPA is authorized to disclose. This would effectively require EPA to hide the identity of a chemical in the context of a health and safety study if the manufacturer has claimed it as confidential. Thus, the public would be able to see that there is a chemical on the inventory that causes cancer, birth defects, infertility, or brain damage, but they would not be allowed to know the name of that chemical. While confidential business information is a sensitive subject, and chemical identity especially so, this is an unbalanced approach. Will consumer confidence really be restored when the American public is told "There is a carcinogen in your home, I just can't tell you what it's called?"

Transparency and forthrightness are more likely to restore public confidence than secrecy. Part of the promise of reform is that even those chemicals that have risks may be able to be adequately controlled. Being straight with the public and having an open process over how that protection is achieved in the context of safety determinations is the way to restore public confidence. Hiding the identity of chemicals with known toxic effects will undermine it.

6) The draft violates states' rights to protect their citizens.

With a few minor adjustments, the draft continues the broad, sweeping and unprecedented preemption of states' authority to protect their citizens from toxic chemicals. Dozens of state laws and programs that have made and continue to make progress in protecting public health and safety will be blocked from addressing chemicals based on even narrow and limited action (or inaction) at the federal level.

The new draft adds the marginal improvement that a low priority designation pre-empts future, but not current, state regulations. As discussed above, the low priority designation is so far removed from a real safety determination that the remaining preemption is wholly unjustified.

Similarly, under the draft, the completion of pre-manufacture review will block states from taking action on new chemicals, a restriction that over time could encompass thousands of substances. Given the lack of data for most new chemicals and the limited scrutiny EPA provides, the decision to let a new chemical on the market is not a safety determination in any meaningful sense and it does not justify putting the chemical beyond the reach of state regulators.

Finally, the pre-emptive effects of a high priority designation in the draft are also unjustified on several grounds. First, because of the afore-mentioned flaws in the risk assessment and risk management process, the states would be pre-empted from acting, even if the EPA has declined to impose the restrictions necessary to

ensure safety due to the difficulty of the required cost-benefit analysis. In other words, the states would be prohibited from ensuring a chemical is used safely, even if EPA identifies unsafe uses that it then declines to address.

Furthermore, the pre-emption is very broad and can include restrictions on environmental releases, warnings, information collection, chemical exposure reduction plans and other measures that are often local and have little bearing on the ability of finished products to move across state lines.

TSCA's current preemption applies only after the EPA has acted to restrict a chemical, but even then it allows states to ban a chemical use outright and to seek a waiver where it wants to provide a higher level of protection for its residents. Since EPA has not restricted many chemicals, states have been largely free to act and many have made important progress in protecting public health. In the context of a program where EPA is making real progress in protecting pubic health, TSCA's pre-emption provision could be clarified, but states' authority to protect their residents must be preserved.

7) The draft does not establish a minimum number of chemicals that will be assessed.

While there are now deadlines for evaluating high-priority chemicals and completing rulemakings, these deadlines will do no good if few or no chemicals are ever listed as high-priority in the first place. Because the draft bill does not incorporate the priority list EPA has already developed, the Agency would need to start over again and re-justify each chemical on that list.

The bill should specify a number of chemicals that would be prioritized, establish an enforceable schedule for updating the priority list, and require a minimum number of chemicals in each update. Adding minimum requirements for prioritization and assuring that EPA has the resources to tackle a larger number of chemicals would be a positive addition to the current law.

Conclusion: An Alternative Path Forward is Needed

Previous TSCA reform efforts in Congress were criticized by many in industry and some members of Congress for being too ambitious in their desire to protect public health and the environment and to make up for lost time. This discussion draft is overly ambitious in the other direction. It represents a swing-for-the-fences program of regulatory relief[vi] for a variety of trade associations. It abandons many of the principles enunciated by the chemical industry itself.[vii] It is simply not credible as a program that protects public health and the environment from the risks of toxic chemicals.

We encourage the committee to take a different path. If you continue to pursue comprehensive reform of many aspects of TSCA, we encourage the committee to

look at the results of the Meridian Institute dialogue undertaken by our coalition and member companies of the American Chemistry Council in 2011. After the request by Ranking Member Waxman at an earlier hearing, the summary of the dialogue was provided to Chairman Shimkus, Ranking Member Tonko, Chairman Upton, and Ranking Member Waxman.

Alternatively, the committee could substantially scale back this effort and focus on a less ambitious but more credible proposal. That proposal would focus on fixing TSCA's existing chemical program and four core elements:

- Safety determinations that everyone agrees mean something, and which more closely reflect the medical and scientific mainstream;
- Unambiguous authority for EPA to impose the restrictions needed to ensure safety;
- A schedule for these determinations that requires modest, but real progress, combined with adequate resources for EPA;
- Authority for EPA to order the collection or the development of information as needed.

Mr. Chairman and Mr. Tonko, I believe it is time to stop swinging for the fences and to focus on a more achievable program that we can actually get done.

Thank you for the opportunity to testify before the subcommittee.

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[i] Saferchemicals.org/about/who.html
[ii] Corrosion Proof Fittings vs EPA, 947 F.2d 1201 –Court of Appeals, 5th Circuit
[iii] National Academy of Sciences, Science and Decisions: Advancing Risk Assessment, August 2009
[iv] http://pediatrics.aapublications.org/content/early/2011/04/25/peds.2011-0523
[v] http://www.ncbi.nlm.nih.gov/pubmed/15967215
[vi] Additional rollbacks identified by my colleague, Mike Belliveau, in earlier testimony and not discussed here, remain.
[vii] American Chemistry Council, 10 Principles for Modernizing TSCA, August 2009.