It's a new year so it must be time for renewed debates over the future of the federal Toxic Substances Control Act (TSCA). In late February, the House Subcommittee on Commerce, Trade, and Consumer Protection of the Energy and Commerce Committee held a hearing specifically to revisit TSCA. With chemical policy reforms occurring in Europe with REACH and at the state level in California, Washington and Maine, there is increasing interest in taking action at the federal level. A new administration and a Democratically-controlled Congress don't hurt such efforts.

The usual suspects testified at the hearings, with a slate of business leaders, labor representatives, and environmentalists and the Government Accountability Office (GAO). The American Chemistry Council (ACC), the Synthetic Organic Chemical Manufacturers Association (SOCMA), and the National Petrochemical & Refiners Association (NPRA) all made appearances. Their representatives strategically acknowledged the benefits of limited changes to the statute, but characterized the appropriate level of tinkering as "modernizing," "revisiting," and "updating," respectively. They all agreed that adoption of comprehensive reform based on a REACH model-generally defined as a precautionary approach incorporating mandatory default testing and placing the burden of establishing safe use on the manufacturer-was unnecessary and unwise. The deeper push for fundamental reform came, as one would expect, from the remaining witnesses. For example, the GAO, known for its widely-cited indictments of TSCA over the years, raised the call for wide-ranging changes to the statute along the lines of REACH and Canadian chemical policy. Likewise, Richard Denison of Environmental Defense described a set of comprehensive reforms focused on overcoming what he described as "structural flaws" of the statute.

There is no doubt that TSCA needs to be fixed, particularly with respect to its testing authority which is administratively cumbersome and fails to reflect advances both in the chemical industry and in the science of toxicological testing. Yet the well-reasoned case made by those in favor of serious meaningful reform may be focusing to some significant degree on the symptoms rather than the ultimate cause of TSCA's failure. Take EPA's failed attempt to ban all forms of asbestos products under TSCA almost 20 years ago. The *Corrosion Proof Fittings* case (947 F.2d 120 (5th Cir 1991)) is often offered as proof of the insurmountable evidentiary and substantive burdens that EPA faces under TSCA in demonstrating the existence of an "unreasonable risk," the trigger for regulatory action. The decision was nuanced, bouncing the case back to EPA for a number of reasons, including the agency's failure to explain why regulations short of a total ban would not be adequate and for inadequacies in the cost/benefit analysis.

Reasonable people can argue whether TSCA should require consideration of regulatory

alternatives or cost/benefit analysis or whether the court interpreted those requirements too broadly. Yet the more pressing question here is why didn't EPA go back and do the additional evaluation? Why did the agency essentially roll over and die in this case and fail to exercise its authority with respect to other chemicals? One potential answer is resource allocation. By 1991, most folks within and outside the agency were focusing on other matters such as implementation of the Clean Air Act Amendments, the Land Disposal requirements in the hazardous waste arena, and Superfund. TSCA was and is under-funded and under-staffed, and the paucity of resources and attention might explain why we didn't see more aggressive activity in the courts from this program. Even under the current structure of the statute, creative and persistent efforts in the courts could have supported a more effective chemicals program. We have seen such a scenario in the evolution of the EPA's authority to regulate solid waste in the *American Mining Congress* cases (*see* 947 F.2d 1201(1987)), in Superfund litigation, and elsewhere.

Of course, enhancements through legislative reforms are preferable, but in seeking such reform, advocates can learn an important lesson from TSCA: a program is only effective as its funding. Without securing a stable and sustainable funding base through an industry fee (such as the European Union adopted to partially fund REACH), legislative reform achieved today may ultimately prove to be illusory. Ironically, the only written testimony in the latest TSCA reform hearing discussing the lack of resources came from industry, in an apparent attempt to forestall structural change in the statute.