March 16, 2015

The Honorable James Inhofe
Chairman
Committee on Environment & Public Works
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Barbara Boxer
Ranking Member
Committee on Environment & Public Works
456 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Inhofe and Ranking Member Boxer:

The undersigned are 25 law professors, legal scholars, and public interest lawyers from across the country who have years of collective experience in the fields of administrative, public health, and environmental law, with particular focus on state and federal toxics policy. We write to express serious reservations with a proposal before your committee to reform the Toxic Substances Control Act (TSCA), which essentially preserves the same inadequate "safety standard" used in current law. There is widespread agreement that TSCA is broken, and reform is due. The more important discussion is the discussion around why and how it is broken.

In order to truly reform TSCA, Congress must focus on the "safety standard." Since the passage of TSCA in 1976, the Environmental Protection Agency (EPA) has only been able to regulate or ban five chemicals under TSCA's section 6 authority to protect against unreasonable risk. To insure that chemicals pose no harm to the health and safety of the people and the environment, it is imperative that any reform legislation include a "reasonable certainty of no harm" health-protective safety standard — the same standard that EPA and FDA apply to chemicals in food and pesticides on produce, respectively.

The Frank R. Lautenberg Chemical Safety for the 21st Century Act, a proposal to reform TSCA introduced March 10, 2015 (the Vitter-Udall Proposal), defines "safety standard" as a standard that "ensures, without taking into consideration cost or other non-risk factors, that no *unreasonable* risk of injury to health or the environment will result from exposure to a chemical substance under the conditions of use . . . " Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, 114th Cong. § 3(16) (2015) (emphasis added).

As interpreted by the courts, TSCA's current safety standard gives EPA the power to regulate "unreasonable risk" posed by a substance only if the severity and likelihood of injury from the substance are determined to be greater than the economic burden the regulation would cause industry and consumers. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1222 (5th Cir. 1991). TSCA's safety standard has thus been read to impose onerous cost-benefit analysis hurdles on the EPA before determining a chemical is unsafe. *E.g.*, John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 Colum. L. Rev. 261 (1991); John S. Applegate, *Synthesizing TSCA and REACH: Practical Principles for Chemical Regulation Reform*, 35 Ecology L.Q. 721 (2008); *see also* Noah M. Sachs, *Jumping the Pond: Transnational Law and the Future of Chemical Regulation*, 62 Vand. L. Rev. 1817 (2009).

Although the Vitter-Udall Proposal incorporates into its safety standard definition a prohibition against considering cost and non-risk factors, the definition remains ambiguous and — notably —completely contradictory to other sections of the Vitter-Udall Proposal.

The weakness of the prohibition on considering cost and non-risk factors raises **serious** concerns. By retaining the term "unreasonable risk," the Vitter-Udall Proposal's safety standard fails to send a clear signal that Congress intends to address the problems arising out of the *Corrosion Proof Fittings* decision. The Vitter-Udall Proposal defines what the safety standard is not, but it fails to define what the safety standard actually is. Because the Vitter-Udall Proposal's safety standard retains the term "unreasonable risk" but leaves the "unreasonable risk" undefined, courts would be likely to interpret Congress' intent, as it has been previously construed in case law, as still requiring a cost-benefit analysis (i.e., according to *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201). The ambiguity in this definition will likely result in costly and extensive litigation, delaying further EPA action to protect people and the environment from hazardous chemicals.

Preserving the term "unreasonable risk" also is deeply problematic from a public health perspective. It requires some balancing of risks to distinguish between those the public must live with and those worthy of regulation. Risks that the public may be compelled to live with may prove to be greater than those that are merely *de minimis*. Without a definition of "unreasonable risk," therefore, the Vitter-Udall Proposal is too ambiguous to be an improvement on the existing statute and interpretive case law. Using a "reasonable certainty of no harm" health-protective safety standard would better protect the public health and eliminate any confusion as to whether EPA must weigh the health benefits of determining that a chemical is unsafe against the costs.

Furthermore, the Vitter-Udall Proposal, in its entirety, has not completely excluded the consideration of cost and non-risk factors when determining chemical harm. While the definition of "safety standard" seems to exclude consideration of costs and benefits, the Vitter-Udall Proposal's requirements regarding EPA's rulemaking analysis explicitly mandate consideration of costs (new Sec. 6(d)(4)(A)). The Vitter-Udall Proposal also explicitly requires a cost-benefit analysis for any exemption to a ban or phase-out (new Sec. 6(d)(5)(D)). Since the purpose of EPA rulemaking under the Vitter-Udall Proposal is to establish "restrictions necessary to ensure that [a] chemical substance meets the safety standard" (new Sec. 6(d)(1)), the contradiction between these sections and the definition of "safety standard" adds another layer of confusion to the Vitter-Udall Proposal.

Given the contradictions around consideration of costs and benefits throughout the Vitter-Udall Proposal and the ambiguity of the safety standard, it is deeply problematic from a public health perspective. To ensure that this Congress's TSCA reform efforts produce a statute that is better than the status quo, any legislative fix must use the truly health-protective safety standard, a "reasonable certainty of no harm."

We are available to provide substantive recommendations as needed.

Sincerely,

Note: Institutions listed for identification purposes only. The signators do not purport to represent the views of their institutions.

Nicholas A. Ashford, Ph.D., J.D.
Professor of Technology and Policy & Director, MIT Technology and Law Program
Massachusetts Institute of Technology

Hope Babcock
Professor of Law & Co-Director, Institute for Public Representation
Georgetown University Law Center

Alejandro E. Camacho
Professor of Law & Director, Center for Land, Environment, and Natural Resources
University of California, Irvine School of Law

David W. Case
Associate Professor of Law & Jessie D. Puckett, Jr. Lecturer
University of Mississippi School of Law

Thomas Cluderay
General Counsel
Environmental Working Group
Adjunct Professor of Law
Georgetown University Law Center

Carl Cranor
Distinguished Professor of Philosophy
University of California, Riverside

David M. Driesen
University Professor
Syracuse University College of Law

Stephen Dycus
Professor of Law
Vermont Law School

Adam M. Finkel, Sc.D.
Senior Fellow & Executive Director, Penn Program on Regulation
University of Pennsylvania Law School
Clinical Professor of Environmental Health Sciences
University of Michigan School of Public Health

Steve C. Gold
Professor of Law & Judge Raymond J. Dearie Scholar
Rutgers School of Law - Newark

Carmen G. Gonzalez
Professor of Law
Seattle University School of Law

Lisa Heinzerling
Justice William J. Brennan, Jr., Professor of Law
Georgetown University Law Center

Albert Lin
Professor of Law
UC Davis School of Law

Thomas O. McGarity
Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law
University of Texas at Austin School of Law

Joel A. Mintz
Professor of Law
Nova Southeastern University, Shepard Broad Law Center

Joseph A. Page
Professor of Law
Georgetown University Law Center

Rick Reibstein
Lecturer, Environmental Law and Policy
Boston University
Faculty
Harvard Extension School

Noah M. Sachs
Professor of Law & Director, Robert R. Merhige Jr. Center for Environmental Studies
Richmond School of Law

Sidney A. Shapiro
Frank U. Fletcher Chair of Administrative Law
Wake Forest University School of Law

Amy Sinden
James E. Beasley Professor of Law
Temple University Beasley School of Law

William J. Snape, III
Fellow & Practitioner-in-Residence
American University Washington College of Law
Rena I. Steinzor

Professor of Law
University of Maryland Francis King Carey School of Law

Robert R.M. Verchick
Gauthier-St. Martin Chair in Environmental Law
Loyola University New Orleans College of Law

Wendy E. Wagner
Joe A. Worsham Centennial Professor
University of Texas at Austin School of Law

Perry E. Wallace
Professor of Law
American University Washington College of Law