RESOLVED, That the American Bar Association urges Congress to enact legislation to reform the Toxic Substances Control Act (TSCA) that:

1. Enhances the Environmental Protection Agency’s ability to ensure the safety of chemical substances in commerce by considering developments in the state of science and regulatory policy in the U.S. and abroad that have occurred since the TSCA was enacted;
2. Encourages public confidence in, and broad stakeholder understanding of, federal chemical control authorities and regulatory policies and practices;
3. Recognizes the critical role that chemical substances play in all aspects of contemporary society;
4. Maintains the nation’s international competitiveness;
5. Acknowledges and accounts for the considerable investment of resources required to develop and maintain a world-class regulatory system;
6. Leverages the extensive and growing wealth of governance experience and credible scientific data and information on chemical substances being developed in the European Union, Canada, and other countries;
7. Incorporates U.S. obligations under international treaties;
8. Provides the public with useful and relevant information on chemical safety, product safety, and chemical risk management; and
9. Provides appropriate intellectual property protections to entities investing in new science and innovation.
REPORT

This Report outlines the rationale for the American Bar Association’s Section of Environment, Energy, and Resources (SEER) request to pass a resolution urging the U.S. Congress to encourage a robust debate about U.S. chemical regulatory policies and to enact legislation that provides federal regulators with the legal authority, flexibility, and resources necessary to encourage a safe, sustainable, and commercially competitive chemical industry as well as the many industries that rely on chemical substances. It also identifies specific practical imperatives for any draft bill to consider.

There is bipartisan agreement that preventing and mitigating chemicals-related risks is necessary to maintaining a sustainable chemical industry and a sound environment in the United States, and that the nation’s current chemical control framework, as embodied in the Toxic Substances Control Act (TSCA), may not provide regulators or regulated entities all of the tools needed to identify and manage the risks from an ever-expanding variety of chemical substances and materials used in, or intended for, domestic or international commerce. Title I of TSCA is one of the few environmental statutes never to have been reauthorized since its enactment in 1976. Since that time, there have been significant developments in the sciences related to chemical detection, risk assessment, and chemical control, as well as significant developments at the international, federal, and state level with regard to alternative models for managing risks from chemical and chemical-containing products. The ABA Recommendations encourage Congress to review the current federal chemical control framework in light of this thirty-plus years of scientific, legal, and policy developments, and offers certain practical considerations for lawmakers in crafting new legislation. Each of these practical considerations is discussed in turn below:

1. **Enhance EPA’s ability to ensure the safety of chemical substances in commerce by taking into account developments in the state of science and regulatory policy in the U.S. and abroad that have occurred since TSCA was enacted.**

Since TSCA’s enactment, the domestic and international scientific community has made important advances in the fields of hazard, exposure, and risk assessment. New methods allow the presence of chemicals to be identified in the environment and in the animals, including humans, in minute quantities previously undetectable. Advances in the sciences also allow for certain toxicity end points to be assessed with less reliance on animal testing. Revisions to TSCA should recognize and take into account the continually evolving nature of the sciences while encouraging further advances.

2. **Encourage public confidence in, and broad stakeholder understanding of, federal chemical control authorities and regulatory policies and practices.**

With the American public becoming increasingly aware of and concerned about potential chemical-related risks, various states taking independent and uncoordinated chemical regulatory actions, and the regulated community expressing uncertainty about the U.S. Environmental Protection Agency’s (EPA) implementation of TSCA in the context of internal and external pressures on the EPA to address such risks, guidance from Congress
in the form of new legislation can help set a fresh course for the Agency which will resolve uncertainty and restore confidence in the federal chemical regulatory program.

3. **Recognize the critical role that chemical substances play in all aspects of contemporary society.**

Chemical substances and the many commodities that incorporate and are derived from chemical substances play a central role in the lives of every American. Consequently, that chemicals substances are safely produced, used, reused and ultimately disposed is a critical concern of great public importance. Advances in chemistry and materials technology have helped prolong individual lives and collectively improve the livelihood of society. Developments in new technologies also are expected to contribute to a developing cleaner and more environmental sustainable forms of energy and to pollution control technologies. To leverage the full range of benefits offered by chemicals and chemical innovation, however, U.S. chemical control policy must provide the incentive, oversight, and enforcement mechanisms needed to manage potential environmental and health risks.

4. **Maintain the nation’s international competitiveness.**

The chemical industry sector is central to the U.S. economy. The sector’s history of robust output and innovation help explain why there are hundreds of the leading chemical producing and processing companies located in the United States. These entities also have affiliates with thousands of facilities located in dozens of other countries. The U.S. chemicals industry accounts for hundreds of billions of dollars of the annual economic output of the U.S. economy and provides for large trade surpluses while employing greater than a million people in the United States alone.

5. **Acknowledge and account for the considerable investment of resources required to develop and maintain a world-class regulatory system.**

There are as many as 80,000 substances on EPA’s Inventory of chemical substances that may be in commerce and EPA reviews hundreds of new substance notifications each year. To the extent that Congress expects EPA to take more aggressive steps to assess and mitigate chemical-related risks in the United States, it must ensure the Agency has the proper work force and resources necessary to undertake and fulfill these expectations.

6. **Leverage the extensive and growing wealth of governance experience and credible scientific data and information on chemical substances being developed in the European Union, Canada, and other countries.**

Major trading partners of the United States, such as the European Union, Canada, and Japan are actively updating their chemical risk management regimes, and the efforts in those countries will provide valuable new sources of data and experiences that will be beneficial to lawmakers and regulatory personnel the United States when fashioning constructive improvements to TSCA.
7. **Incorporate U.S. obligations under international treaties.**

The United States is not a party to the Stockholm Convention on Persistent Organic Pollutants (POPs) and the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. The United States has signed treaties, but the Senate has not yet provided advice and consent to ratification of the treaties and implementing legislation has not been passed by Congress. TSCA reform legislation provides a vehicle for Congress to address the needed implementing legislation.

8. **Provide the public with useful and relevant information on chemical safety, product safety, and chemical risk management.**

Information management and information sharing technologies have improved dramatically during the past thirty plus years since TSCA was enacted. Reauthorization of TSCA would allow Congress to provide guidance to EPA on the appropriate use of new technologies to provide public access to chemicals-related data and information that can help the public better understand and make judgments concerning product risks.

9. **Provide appropriate intellectual property protections to entities investing in new science and innovation.**

Businesses that invest in chemicals-related research and development need to be able to protect their resulting intellectual property from misappropriation, theft, and other forms of improper use. The current law recognizes the need for basic intellectual property protections to prevent disclosure of information which constitutes trade secrets and other sensitive confidential business information except in certain contexts. As part of any new TSCA reauthorization legislation, Congress will have to determine the balance between the public’s right to know, the private right to protect intellectual property, and the public’s interests in transparency while also encouraging innovation.

The proposed Resolution is a measured and timely response to the need for TSCA modernization – a position shared in principle by stakeholders from many perspectives. Despite considerable activity on Capitol Hill concerning TSCA modernization during 2009 and 2010, lawmakers appear unlikely to enact TSCA reauthorization legislation during the final days of the 111th Congress. Thus, early 2011 will be critical months during which the new Congress and the Administration are expected to revisit and recalibrate their legislative priorities. Timely action on the ABA resolution will ensure the Association communicates its position while the Administration, federal policymakers, stakeholders, and the new Congress are each reexamining their positions, both politically and logistically, to consider and act on TSCA reform legislation recommendations.

Respectfully submitted,

Steven G. McKinney, Chair
Section of Environment, Energy, and Resources
February 2011
1. **Summary of Recommendation(s).**

The American Bar Association urges the Congress of the United States to promote a robust dialogue on the necessary principles and considerations in any future Toxic Substances Control Act (TSCA) reform legislation and to enact legislation amending TSCA that will reflect developments in the state of science and regulatory developments world-wide and enhance U.S. Environmental Protection Agency’s (EPA) ability to ensure the safety of chemicals substances in commerce while retaining the country’s competitiveness in the international marketplace for chemicals substances and products produced using chemicals.

2. **Approval by Submitting Entity.**

Approved by the Section of Environment, Energy, and Resources Council on November 12, 2010.

3. **Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?**

No.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**

The proposed resolution is fully consistent with, and reaffirms the policies established in the Association’s 1985 Resolution on *Scientific Knowledge* and the 2002 resolution on the *Rotterdam Convention on the International Trade in Chemicals*, reproduced below:

- **Scientific Knowledge.** All appropriate scientific knowledge should be considered when regulating environmental matters, during litigation and ADR and in international matters. The Executive Branch and Congress should develop measures to provide for assessment, expansion and dissemination of scientific environmental information. 8/95

5. **What urgency exists which requires action at this meeting of the House?**

Although amendments to TSCA were introduced during 2010 in both the Senate and the House, Congress is unlikely to enact TSCA reauthorization legislation during the final days of the 111th Congress. Thus, early 2011 will be critical months during which the new Congress and the Administration are expected to revisit and recalibrate their legislative priorities. Timely action on the ABA resolution will ensure the Association communicates its position while the Administration, federal policymakers, stakeholders, and the new Congress are each reexamining their positions, both politically and logistically, to consider and act on TSCA reform legislation recommendations.

6. **Status of Legislation.**

During 2010, there has been considerable activity on Capitol Hill concerning reform of the Toxic Substances Control Act. This has included hearings held in both chambers of Congress and during April 2010, TSCA Reform legislation was introduced in the Senate while a “Discussion Draft” of potential amendments was circulated by House majority staff. Following a series of “stakeholders” meetings, TSCA Reform legislation was finally introduced in House in July 2010. The two bills introduced in the 111th Congress would revise TSCA extensively. The proposals are entitled, the “Safe Chemicals Act of 2010” [S. 3209], as introduced in April by Senator Lautenberg, and the “Toxic Chemicals Safety Act of 2010” [H.R. 5820] as introduced in July by Reps. Waxman, Rush and others. Both bills would make significant changes to core provisions of TSCA concerning new-chemical and new-use notifications, information and data reporting, as well as risk management. The bills would increase EPA’s obligations to make available to the public information about chemical substances and EPA’s risk assessments and to release information that previously has been considered confidential. The bills also would add several new sections to TSCA intended to encourage “Green Chemistry” and International Cooperation and collaboration with the states.

7. **Cost to the Association.**

This resolution does not impose costs on the Association.

8. **Disclosure of Interest.**

The cosponsoring entities engage in activities that address the regulation of pesticides and chemicals substances and right to know laws. The entities routinely provide programming and information resources to practitioners in this field including members of the private bar, government lawyers, NGOs and others. No individual associated with this resolution will benefit personally from adoption of the resolution.
9. **Referrals.** (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)

As it was being developed, this Report with Recommendations was circulated to representatives of the Section of Environment, Energy, and Resources substantive committees. Circulation to many ABA Sections and Divisions, as well as the ABA Standing Committee on Environmental Law, will be made following this submission.

10. **Contact Person prior to the meeting.**

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11. **Contact Person who will present the report to the House.**

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EXECUTIVE SUMMARY


The American Bar Association urges the Congress of the United States to promote a robust dialogue on the necessary principles and considerations in any future Toxic Substances Control Act (TSCA) reform legislation and to enact legislation amending TSCA that reflects advances in the state of science and regulatory developments world-wide and enhances EPA’s ability to ensure the safety of chemicals substances in commerce while retaining the country’s competitiveness in the international marketplace for chemicals substances and products produced using chemicals.

2. Summary of the issue which the Recommendation addresses.

There is bipartisan agreement that preventing and mitigating chemicals-related risks is necessary to maintaining a sustainable chemical industry and a sound environment in the United States, and that the nation’s current chemical control framework, as embodied in the Toxic Substances Control Act, may not provide regulators or regulated entities all of the tools needed to identify and manage the risks from an ever-expanding variety of chemical substances and materials used in, or intended for, domestic or international commerce. Since Title I of TSCA was enacted in 1976, there have been significant developments in the sciences and the regulatory models related to chemical detection, risk assessment, and managing risks from chemical and chemical-containing products. The ABA Recommendations encourage Congress to review the current federal chemical control framework in light of these developments, and offers certain practical considerations for lawmakers in crafting new legislation.

3. An explanation of how the proposed policy position will address the issue.

The proposed policy calls upon the U.S. Congress to encourage a robust debate about U.S. chemical regulatory policies and to enact legislation that provides federal regulators with the legal authority, flexibility, and resources necessary to encourage a safe, sustainable, and commercially competitive chemical industry as well as the many industries that rely on chemical substances. It also identifies specific practical imperatives for any draft bill to consider.

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1 While a number of publications have addressed the need for TSCA reform in recent months, unique insights also appear in a “White Paper” addressing this topic written by a bipartisan group of former senior officials from the U.S. Environmental Protection Agency (EPA) entitled Practical Advice for TSCA Reform: An Insider Perspective, by James A. Aidala, Jr., Charles M. Auer, Lynn R. Goldman, M.D., and James B. Gulliford. The White Paper was prepared under the auspices of the Special Committee on TSCA Reform, Pesticides, Chemical Regulation, and Right-to-Know Committee, Section of the Environment, Energy, and Resources.
4. **A summary of any minority views or opposition which have been identified.**

The proposed policy has been circulated and discussed extensively within the leadership of the Committee on Pesticides, Chemical Regulation, and Right-to-Know. It has also been circulated and discussed within the Section of Environment, Energy, and Resources as well as the Standing Committee on Environmental Law. Changes have been made in the proposal in response to the comments and suggestions received.