

ONE HUNDRED FOURTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
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**MEMORANDUM**

**April 13, 2015**

**TO: Subcommittee on Environment and the Economy Members and Staff**

**FR: Committee on Energy and Commerce Democratic Staff**

**RE: Legislative Hearing on H.R. \_\_, the “TSCA Modernization Act of 2015”**

On Tuesday, April 14, 2015 at 10:15 a.m. in room 2322 of the Rayburn House Office Building, the Subcommittee on Environment and the Economy will hold a legislative hearing on a discussion draft of the “TSCA Modernization Act of 2015.”<sup>1</sup> The discussion draft was circulated by Chairman Shimkus on April 7, 2015, following bipartisan discussions. Continued discussions are expected following the legislative hearing, which will include testimony from the Environmental Protection Agency (EPA) and other stakeholders.

**I. BACKGROUND**

The Toxic Substances Control Act (TSCA) was enacted in 1976 to address risks to human health and the environment from chemicals manufactured in the United States and distributed in commerce. TSCA requires EPA to review new chemicals for risk and authorizes EPA to restrict or ban the use of new or existing chemicals that pose an “unreasonable risk” to public health or the environment.<sup>2</sup>

There is broad agreement that TSCA has failed to effectively achieve Congress’ goals.<sup>3</sup> Since 2009, the Government Accountability Office included EPA’s oversight of toxic chemicals

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<sup>1</sup> H.R. \_\_, the “TSCA Modernization Act of 2015” (online at [democrats.energycommerce.house.gov/sites/default/files/documents/Discussion-Draft-EE-HR\\_\\_TSCA-Act-2015-4-14.pdf](http://democrats.energycommerce.house.gov/sites/default/files/documents/Discussion-Draft-EE-HR__TSCA-Act-2015-4-14.pdf)).

<sup>2</sup> 15 U.S.C. §2601 *et seq.*

<sup>3</sup> Subcommittee on Commerce, Trade, and Consumer Protection, *Hearing on Revisiting the Toxic Substances Control Act of 1976*, 111th Cong. (Feb. 26, 2009).

in its High Risk Series, concluding that it “limits the agency’s ability to fulfill its mission of protecting human health and the environment.”<sup>4</sup>

Many stakeholders have laid out principles for TSCA reform, including EPA,<sup>5</sup> the American Chemistry Council (ACC),<sup>6</sup> the Environmental Council of the States, the National Council of State Legislatures, environmental groups, public health groups, and consumer advocacy groups.<sup>7</sup>

Congressional efforts to reform TSCA have been significant and ongoing. Last Congress, this Subcommittee held a series of hearings on TSCA, including two legislative hearings on a prior proposal, the “Chemicals in Commerce Act.” TSCA reform proposals have also been introduced in the Senate by Senators Boxer and Markey<sup>8</sup> and Senators Udall and Vitter.<sup>9</sup>

## II. OVERVIEW OF THE TSCA MODERNIZATION ACT OF 2015

The TSCA Modernization Act discussion draft differs significantly from the Chemicals in Commerce Act discussion draft. Unlike past legislative proposals, the “TSCA Modernization Act of 2015” amends only a small subset of provisions in the existing TSCA statute. The included changes address many, but not all, of the significant problems in current law that have been identified in past hearings. The limited scope of the discussion draft avoids some areas that have proven difficult to resolve in other proposals. Problems in current law and other proposals are described below, along with an explanation of whether and how they are addressed in the discussion draft.

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<sup>4</sup> Government Accountability Office, *High-Risk Series: An Update* (Jan. 2009) (GAO-09-271).

<sup>5</sup> U.S. Environmental Protection Agency, *Essential Principles for Reform of Chemicals Management Legislation* (Sept. 29, 2009) (online at [www.epa.gov/oppt/existingchemicals/pubs/principles.html](http://www.epa.gov/oppt/existingchemicals/pubs/principles.html)).

<sup>6</sup> American Chemistry Council, *Ten Principles for Modernizing TSCA* (online at [www.americanchemistry.com/s\\_acc/sec\\_article\\_acc.asp?CID=2178&DID=9939](http://www.americanchemistry.com/s_acc/sec_article_acc.asp?CID=2178&DID=9939)); Consumer Products Specialty Association, *Modernizing the Toxic Substances Control Act* (online at [www.cspa.org/advocacy/our-issues/122.html](http://www.cspa.org/advocacy/our-issues/122.html)).

<sup>7</sup> Safer Chemicals, Healthy Families, *A Platform to Reform the Toxic Substances Control Act* (online at [www.saferchemicals.org/PDF/SCHF\\_Campaign\\_Platform.pdf](http://www.saferchemicals.org/PDF/SCHF_Campaign_Platform.pdf)); Business NGO Working Group for Safer Chemicals and Sustainable Materials, *Principles for Safer Chemicals* (Apr. 4, 2013) (online at [www.bizngo.org/pdf/BizNGO\\_Principles\\_for\\_Safer\\_Chems\\_endorsers\\_updated\\_2013\\_04\\_04.pdf](http://www.bizngo.org/pdf/BizNGO_Principles_for_Safer_Chems_endorsers_updated_2013_04_04.pdf)).

<sup>8</sup> S. 725, the “Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act (online at [www.congress.gov/bill/114th-congress/senate-bill/725](http://www.congress.gov/bill/114th-congress/senate-bill/725)).

<sup>9</sup> S. 697, the “Frank R. Lautenberg Chemical Safety for the 21st Century Act” (online at [www.congress.gov/bill/114th-congress/senate-bill/697](http://www.congress.gov/bill/114th-congress/senate-bill/697)).

## **A. Challenges Managing Risks from Existing Chemicals**

EPA has faced two primary challenges in managing “unreasonable risks” from chemical substances and mixtures that are not new (these are often referred to as “existing chemicals” though that term is not used in the statute). The standard for action under section 6 of TSCA requires EPA to find a reasonable basis to conclude that a chemical substance or mixture presents, or will present, an unreasonable risk of injury to health or the environment.<sup>10</sup> The section 6 standard has long been interpreted as a cost/benefit standard, as opposed to a purely risk based standard. EPA must also choose the “least burdensome” requirements that will adequately protect against the identified unreasonable risk.<sup>11</sup> The combination of these provisions has prevented EPA from using this regulatory authority to manage risks from existing chemicals, including asbestos.<sup>12</sup>

The discussion draft maintains the “unreasonable risk” standard in section 6.<sup>13</sup> This standard is less protective than the “reasonable certainty of no harm” standard that environmental and public health groups have sought. However, the discussion draft explicitly excludes consideration of costs and other non-risk factors during the risk evaluation stage.<sup>14</sup> Thus, the determination of whether or not a chemical substance presents an unreasonable risk would have to be made without consideration of cost, though cost could be considered in connection with risk management.

The discussion draft also removes the problematic “least burdensome” language, and replaces it with a requirement that EPA select regulations and requirements that are “cost-effective.”<sup>15</sup>

## **B. Challenges in Requiring Testing**

EPA has faced two challenges in exercising its testing authority under section 4 of TSCA. The first challenge stems from the requirement that EPA demonstrate that chemicals may pose an unreasonable risk before requiring testing.<sup>16</sup> Many have called this a *catch-22*, because EPA’s lack of data is an obstacle to making a demonstration necessary to require data. The second challenge flows from the requirement that EPA engage in notice and comment rulemaking to require any testing, even for a single chemical.<sup>17</sup>

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<sup>10</sup> Toxic Substances Control Act § 6(a); 15 U.S.C. 2605(a).

<sup>11</sup> *Id.*

<sup>12</sup> *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

<sup>13</sup> H.R. \_\_\_, the “TSCA Modernization Act of 2015,” at 4-12.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.* at 9-10.

<sup>16</sup> Toxic Substances Control Act § 4(a).

<sup>17</sup> *Id.*

The discussion draft addresses this second challenge, by allowing EPA to require testing through orders.<sup>18</sup> The first challenge, however, has not been addressed in the draft. The discussion draft creates new grounds for requiring testing – to carry out a risk evaluation under section 6 – but EPA must make the equivalent of a “may present” finding before initiating a risk evaluation.<sup>19</sup> The hurdle to requiring testing is therefore preserved.

### **C. Funding Challenges**

Funding for current TSCA efforts comes through the appropriations process and from user fees collected under sections 4 and 5. Section 26 of current law limits user fees to \$2500 or, \$100 for small business concerns.<sup>20</sup> These amounts have not changed since 1976.

The discussion draft removes the outdated caps on user fees, and adds additional authority for EPA to collect fees to defray the costs of manufacturer-requested risk evaluations under section 6.<sup>21</sup> While these are positive improvements, the user fees collected by EPA would still be deposited in the U.S. Treasury, and remain subject to appropriations. The amounts of funding that will actually be made available to EPA is therefore unclear.

### **D. Challenges to Transparency**

Under section 14 of TSCA, EPA is prohibited from sharing information that would qualify as confidential business information (CBI) under the Freedom of Information Act, except under narrow circumstances.<sup>22</sup> Preventing abuse of the CBI process is important to ensure that the public has access to information on the safety of industrial chemicals that end up in their workplaces, communities and consumer products.

Under current law, submitters of information can designate that information as CBI without substantiating their claim.<sup>23</sup> At a hearing before this Subcommittee in the 113th Congress, the Government Accountability Office (GAO) testified that due to constraints on resources, EPA has not routinely challenged companies’ CBI claims.<sup>24</sup> It is therefore unclear to what extent CBI claims have been warranted.<sup>25</sup>

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<sup>18</sup> H.R. \_\_, the “TSCA Modernization Act of 2015,” at 3.

<sup>19</sup> *Id.* at 5.

<sup>20</sup> Toxic Substances Control Act § 26.

<sup>21</sup> H.R. \_\_, the “TSCA Modernization Act of 2015,” at 17-18.

<sup>22</sup> Toxic Substances Control Act § 14(c).

<sup>23</sup> *Id.* at § 14(a); 15 U.S.C. 2613(a).

<sup>24</sup> Testimony of Alfredo Gomez, U.S. Government Accountability Office, Committee on Energy and Commerce Subcommittee on Environment and the Economy, *Hearing on Title I of the Toxic Substances Control Act: Understanding Its History and Reviewing its Impact*, 113th Cong. (June 13, 2013).

<sup>25</sup> *Id.*

The discussion draft requires up-front substantiation of all future CBI claims, and periodic re-substantiation of those claims every 10 years.<sup>26</sup> It does not apply retroactively to CBI claims made in the past, although EPA has recently made progress in reviewing and overturning some unwarranted claims.<sup>27</sup> The discussion draft also grants additional authority to share CBI for purposes of responding to environmental releases and for health diagnosis or treatment.<sup>28</sup>

#### **E. Challenges Identifying Chemicals in Commerce**

There are approximately 84,000 chemicals currently on the EPA TSCA inventory.<sup>29</sup> Although approximately 700 new chemicals are added every year to the list, no chemicals have been removed since the inventory was created following adoption of the 1976 statute. This diminishes the utility of the inventory because it is not clear which chemicals on the inventory are still manufactured or used in commerce.<sup>30</sup>

The discussion draft would address this issue by giving EPA authority to collect information “necessary to remove from the list any chemical substance that is no longer manufactured or processed in the United States, and revise the list accordingly.”<sup>31</sup>

#### **F. Heightened Standard of Judicial Review**

EPA actions taken under TSCA must be “supported by substantial evidence in the rulemaking record.”<sup>32</sup> This standard is significantly higher than the “arbitrary and capricious” standard common to most other environmental laws and the Administrative Procedure Act. TSCA’s heightened judicial review standard played a critical role when a federal appeals court decided to overturn EPA’s section 6 rule to ban and phase out asbestos.<sup>33</sup>

The discussion draft does not change the “substantial evidence” standard in TSCA section 19.

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<sup>26</sup> H.R. \_\_, the “TSCA Modernization Act of 2015,” at 14-15.

<sup>27</sup> U.S. Environmental Protection Agency, *Declassifying Confidential Claims to Increase Access to Chemical Information* (online at [www.epa.gov/oppt/existingchemicals/pubs/transparency-charts.html#progressreview](http://www.epa.gov/oppt/existingchemicals/pubs/transparency-charts.html#progressreview)).

<sup>28</sup> H.R. \_\_, the “TSCA Modernization Act of 2015,” at 14.

<sup>29</sup> Government Accountability Office, *High-Risk Series: An Update* (Jan. 2009) (GAO-09-271).

<sup>30</sup> Congressional Research Service, *The Toxic Substances Control Act (TSCA): Implementation and New Challenges* (July 23, 2009) (RL34118).

<sup>31</sup> H.R. \_\_, the “TSCA Modernization Act of 2015,” at 13.

<sup>32</sup> Toxic Substances Control Act § 19.

<sup>33</sup> *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

## **G. Lack of Protections for Vulnerable Populations**

Currently, TSCA does not require consideration of risks to vulnerable subpopulations. Children, pregnant women and the elderly may be more susceptible to adverse health effects from harmful chemicals. Others, like those who live near chemical manufacturing or processing facilities, may suffer greater exposures. Even if a chemical presents serious risks to one of these subpopulations, EPA may not be able to show an “unreasonable risk” under current law and would therefore be unable to regulate. The National Academies of Science, in their 2009 report *Science and Decisions*, recommended that vulnerable populations should receive special attention in all stages of the risk assessment process.<sup>34</sup>

The discussion draft adds a new definition to TSCA section 3 for “potentially exposed subpopulations,” defined as those who “due to either greater susceptibility or greater potential exposure, are at greater risk than the general population of adverse health effects from exposure to a chemical substance.”<sup>35</sup> Importantly, the discussion draft also revises section 6 to bar EPA from making a finding that a chemical does not present an unreasonable risk if it presents an unreasonable risk for one or more potentially exposed subpopulations.<sup>36</sup>

## **H. Lack of Expedited Action for Persistent, Bioaccumulative, and Toxic Chemicals (PBTs)**

Exposure to PBTs have been associated with cancer, neurotoxicity, reproductive and developmental toxicity, and genetic mutations. Examples of PBTs include polychlorinated biphenyls (PCBs); certain brominated flame retardants and some perfluorinated compounds; metals such as lead, mercury and cadmium; and fragrances such as musk xylene.

Environmental advocates have long called for expedited action to manage risks from PBTs because traditional risk assessment does not accurately capture the risks they pose. Even with controls to restrict or eliminate their use, they can remain unchanged as long-lasting contaminants in the global environment. The discussion draft does not currently provide expedited action for these chemicals.

## **I. Challenges Contained in Other Proposals**

Section 18 of TSCA currently preserves all authority of states and political subdivisions to regulate chemical substances, mixtures, and articles, except in narrowly identified circumstances.<sup>37</sup> Specifically, if EPA has promulgated a test rule for a chemical under TSCA section 4, a state is preempted from establishing or continuing a testing requirement for the same

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<sup>34</sup> National Academies of Science, *Science and Decisions: Advancing Risk Assessment* (2009).

<sup>35</sup> H.R. \_\_, the “TSCA Modernization Act of 2015,” at 2.

<sup>36</sup> *Id.* at 8-9.

<sup>37</sup> Toxic Substances Control Act § 18(a)(1); 15 U.S.C. 2617(a)(1).

chemical for the same purpose as the Federal rule.<sup>38</sup> Similarly, if EPA has taken action to restrict a chemical substance or mixture under sections 5 or 6 of TSCA, a state is preempted from establishing or continuing a requirement on that chemical substance or mixture that addresses the same risk.

Current law allows states to adopt or continue in effect requirements that are identical to the federal requirement, are adopted under other federal authority (such as the Clean Air Act), or are outright bans on the use of the chemical substance or mixture.<sup>39</sup> This allows states to go beyond federal regulation in cases where such action is warranted. Current law also exempts states from preemption if complying with both the state and federal requirements is possible and the state requirement does not unduly burden interstate commerce.<sup>40</sup>

Debate over past proposals has included a focus on preemption of state authority. Recent proposals have expanded the circumstances leading to state preemption considerably. For example, S. 697 would: (i) preempt state authority when EPA designates a chemical as “low priority,” which occurs without a full risk evaluation, and (ii) when EPA has designated a chemical as “high priority” but not yet taken any action to assess or manage its risks. S.697 would also eliminate the ability of states to co-enforce EPA rules by adopting identical requirements.<sup>41</sup>

The discussion draft adds only one additional circumstance in which state authority is preempted. Under the draft, if EPA conducts a risk evaluation and determines that a chemical is safe (i.e., that it does not pose an unreasonable risk), a state will be preempted from establishing or continuing a requirement on that chemical substance.<sup>42</sup> However, EPA’s determination of no unreasonable risk is deemed final agency action and therefore subject to judicial review.<sup>43</sup> The discussion draft also expands the scope of preemption by eliminating the ability of states to prohibit the use of the chemical substance or mixture where EPA has already taken action.<sup>44</sup>

Authority to regulate articles has also been a focus of past proposals. S. 697 would create new analytical requirements before EPA can restrict articles.<sup>45</sup> Jim Jones, Assistant Administrator of the EPA with responsibility for TSCA, testified before the Senate Committee on Environment and Public Works in March, that those requirements fail to comport with EPA’s

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<sup>38</sup> *Id.* at § 18(a)(2); 15 U.S.C. 2617(a)(2).

<sup>39</sup> *Id.* at § 18(a)(2)(B).

<sup>40</sup> *Id.* at § 18(b).

<sup>41</sup> S. 697, the “Frank R. Lautenberg Chemical Safety for the 21st Century Act” at § 18 (online at [www.congress.gov/bill/114th-congress/senate-bill/697](http://www.congress.gov/bill/114th-congress/senate-bill/697)).

<sup>42</sup> H.R. \_\_\_, the “TSCA Modernization Act of 2015,” at 16.

<sup>43</sup> *Id.* at 9.

<sup>44</sup> *Id.* at 18.

<sup>45</sup> S. 697, the “Frank R. Lautenberg Chemical Safety for the 21st Century Act” at 17 (online at [www.congress.gov/bill/114th-congress/senate-bill/697](http://www.congress.gov/bill/114th-congress/senate-bill/697)).

principles for TSCA reform.<sup>46</sup> The discussion draft is intended to express a preference for upstream regulation of chemicals over articles, but does not create additional burdens for EPA. The draft also provides an exemption for existing stocks of replacement parts manufactured prior to the date of enactment, unless those articles contribute significantly to the identified risk.

### **III. WITNESSES**

The following witnesses are expected to testify:

#### **Panel One**

**The Honorable Jim Jones**

Assistant Administrator  
Office of Chemical Safety and Pollution Prevention  
U.S. Environmental Protection Agency

#### **Panel Two**

**Dr. Beth Bosley**

President  
Boron Specialties, LLC  
*On behalf of the Society of Chemical Manufacturers and Affiliates*

**Andy Igrejas**

National Campaign Director  
Safer Chemicals, Healthy Families

**Jennifer Thomas**

Senior Director, Federal Government Affairs  
Alliance of Automobile Manufacturers

**Michael P. Walls**

Vice President of Regulatory and Technical Affairs  
American Chemistry Council

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<sup>46</sup> Testimony of Jim Jones, U.S. Environmental Protection Agency, Committee on Energy and Commerce Subcommittee on Environment and the Economy, Hearing on S. 697, the Frank R. Lautenberg Chemical Safety for the 21st Century Act, 114th Cong.(Mar. 18, 2015).