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ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

June 1, 2015

To: Committee on Energy and Commerce Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Full Committee Markup of H.R. 2576, "TSCA Modernization Act of 2015," and H.R. 2583, "Federal Communications Commission Process Reform Act of 2015"

On Tuesday, June 2, 2015, at 5:00 p.m. in room 2123 of the Rayburn House Office Building, the full Committee on Energy and Commerce will meet to conduct opening statements for the markup of H.R. 2576, "TSCA Modernization Act of 2015," and H.R. 2583, "Federal Communications Commission Process Reform Act of 2015." The Committee will reconvene on Wednesday, June 3, at 10:00 a.m. in 2123 Rayburn House Office Building.

I. H.R. 2576, THE "TSCA MODERNIZATION ACT OF 2015"

A. Background on the Toxic Substances Control Act (TSCA) and Reform Efforts

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.[1]

There is broad agreement that TSCA has failed to effectively achieve Congress' goals.[2] Since 2009, the US Government Accountability Office (GAO) included EPA's oversight of toxic

[1] 15 U.S.C. Sec. 2601 *et seq.*

[2] Subcommittee on Commerce, Trade, and Consumer Protection, Hearing on Revisiting the Toxic Substances Control Act of 1976, 111th Cong. (Feb. 26, 2009).

chemicals in its High Risk Series, concluding that it "limits the agency's ability to fulfill its mission of protecting human health and the environment."[3]

Congressional efforts to reform TSCA have been significant and ongoing. Last Congress, the Subcommittee on Environment and the Economy held a series of hearings on TSCA, including two legislative hearings on a prior proposal, the "Chemicals in Commerce Act."

This Congress, the Subcommittee on Environment and the Economy has engaged in bipartisan negotiations on the "TSCA Modernization Act of 2015." The original discussion draft was circulated on April 7th and a legislative hearing was held on April 14th. A subcommittee markup was held on a revised discussion draft on May 14th. A further revised bill was introduced on Tuesday, May 26, by Representatives Upton, Shimkus, Pallone, and Tonko. TSCA reform proposals have also been introduced in the Senate by Senators Boxer and Markey[4] and Senators Udall and Vitter.[5]

B. Overview of the TSCA Modernization Act

Unlike past legislative proposals, the "TSCA Modernization Act of 2015" amends only a small subset of provisions in the existing TSCA law. The included changes address many, but not all, of the significant problems in current law that have been identified in past hearings:

- **Challenges regulating existing chemicals** – H.R. 2576 addresses two of the major challenges EPA has faced in regulating existing chemicals by removing the requirement that EPA impose the "least burdensome" regulatory option and by clarifying that the standard for risk-management is not a cost-benefit standard.[6] The bill does not address the heightened standard of judicial review, which has also been a challenge to regulating existing chemicals.[7]

- **Challenges requiring testing** – H.R. 2576 addresses two of the major challenges EPA has faced in requiring testing of chemicals in commerce by allowing EPA to require testing through orders and consent agreements, not just rulemakings, and by authorizing EPA to seek data when needed for a risk evaluation without first demonstrating risk.[8] This latter change begins to address the so-called "catch-22" of current law, which

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[3] Government Accountability Office, *High-Risk Series: An Update* (Jan. 2009) (GAO-09-271).

[4] S. 725, the "Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act" (online at www.congress.gov/bill/114th-congress/senate-bill/725).

[5] S. 697, the "Frank R. Lautenberg Chemical Safety for the 21st Century Act" (online at www.congress.gov/bill/114th-congress/senate-bill/697).

[6] H.R. 2576, pages 4, 6, and 13.

[7] *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

[8] H.R. 2576 at 3.

requires EPA to find that a chemical "may present" an unreasonable risk before requiring testing. [9]

- **Challenges protecting vulnerable populations** – H.R. 2576 provides explicit protections for vulnerable populations that are lacking in current law by ensuring that any chemical that poses an unreasonable risk to a vulnerable population will be subject to risk management and that risk management address any identified risks to vulnerable populations.[10]

- **Resource challenges** – H.R. 2576 removes outdated caps on user fees for the program and deposits those fees in a dedicated trust fund, rather than the general treasury like current law.[11]

- **Transparency challenges** – H.R. 2576 would require future designations of information as confidential business information to be substantiated and renewed periodically.[12] The bill also grants additional authority to share confidential business information (CBI) for purposes of responding to environmental releases and for health diagnosis or treatment.[13]

- **Challenges addressing PBT chemicals –** H.R. 2576 provides a new and separate pathway to regulation for chemicals, other than metals, that are persistent, bioaccumulative, and toxic because the properties of these chemicals make them ill-suited to traditional risk assessment. The pathway would be expedited and would require EPA to minimize likely exposure to the chemicals to the extent practicable.[14]

C. <u>Summary of Changes in TSCA Modernization Act as Introduced</u>

The introduced bill contains several significant changes from the most recent discussion draft:

- **Clarification of the safety standard -** The introduced bill makes clear that the objective of risk management is to apply requirements "the chemical substance or mixture no longer presents or will present an unreasonable risk, including an identified unreasonable risk to a potentially exposed subpopulation."[15] This clarifies current law which requires risk management to "protect adequately" against unreasonable risks without defining adequate protection.

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[9] Toxic Substances Control Act, Section 4(a).

[10] *Id.* at 4, 8-9.

[11] H.R. 2576 at 26-27.

[12] H.R. 2576 at 18-29.

[13] H.R. 2576 at 18.

[14] *Id.*

[15] H.R. 2576, page 4, lines 4-9.

- **Clarification of the role of costs –** The introduced bill clarifies that EPA cannot consider costs at any stage of a risk evaluation, not just while assessing and integrating information about hazards and exposures.[16] The bill also clarifies the requirement to select cost effective regulatory options by making clear that non cost effective options should be applied of necessary to address the identified risk.[17]

- **Clarification of the limitation for replacement parts –** The introduced bill clarifies that regulation of replacement parts should only be limited if the replacement parts do not contribute significantly to an identified risk, including a risk to a potentially exposed subpopulation.[18] This offers greater protection to vulnerable populations, including workers manufacturing replacement parts.

- **Clarification of the scope of preemption –** The introduced bill makes clear that state laws that are adopted under federal authority, as well as state laws to protect air and water quality or relating to waste treatment or disposal, are not preempted when EPA finds that a chemical does not present an unreasonable risk.[19]

- **Recognition of limits on EPA capacity –** The introduced bill recognizes that EPA will not have unlimited capacity to conduct risk evaluations requested by manufacturers and requires EPA to report to Congress on their capacity and resources to carry out evaluations and rulemakings, their schedule for responding to manufacturer requests, and their efforts to increase capacity.[20]

- **Timing of Risk Evaluations –** The introduced bill instructs EPA to complete risk evaluations "as soon as reasonably possible, subject to the availability of resources" with an outside limit of 3 years after they are started.[21]

II. H.R. 2583, THE "FEDERAL COMMUNICATIONS COMMISSION PROCESS REFORM ACT OF 2015"

H.R. 2583 is substantially identical to the FCC Process Reform Act of 2014 (H.R. 3675) from the 113th Congress. After Committee Democrats addressed several concerns with the bill, as introduced, the House of Representatives went on to pass that bill on suspension.

On May 20, 2015, the Subcommittee on Communications and Technology favorably forwarded the discussion draft of H.R. 2583 to the full Committee by a voice vote.

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[16] *Id.* at page 6, lines 11-13.

[17] *Id.* at page 11, lines 15-18.

[18] *Id.* at page 12, lines 10-12.

[19] *Id.* at page 22, lines 3-11.

[20] *Id.* at page 32-33.

[21] *Id.* at page 7, lines 9-11.

A. Summary of H.R. 2583

The major provisions of H.R. 2583 would require the FCC to: (1) complete a rulemaking proceeding to adopt procedural rule changes to maximize opportunities for public participation; (2) complete an inquiry on whether and what procedures the FCC should establish to enable a bipartisan majority of commissioners to place an item on the commission's agenda, as well as other procedural changes including application processing deadlines; (3) provide information on the FCC webpage regarding budget; (4) create a consumer complaint database; (5) modify Freedom of Information Act (FOIA) performance; and (6) release annual performance reports.

H.R. 2583 also includes a four-year extension from the Anti-Deficiency Act for the Universal Service Fund and the text of the FCC Collaboration Act (H.R. 1396), which was introduced by Rep. Eshoo. H.R. 1396 would allow for two or more commissioners to discuss FCC business outside of an FCC Open Meeting, yet provides sufficient safeguards to protect against abuse. Implementation of the FCC Collaboration Act provisions, however, would be delayed under H.R. 2583.

B. Additional Republican Transparency Proposals

Three additional Republican discussion drafts were favorably reported out of the Subcommittee on Communications and Technology on May 20, 2015, notwithstanding Democratic concerns. The following provisions are expected to be offered as amendments to H.R. 2583 at the full Committee markup:

- A discussion draft from Rep. Ellmers that would require the FCC to publish on its website any changes to the Commission's rules not later than 24 hours after adoption;

- A discussion draft from Rep. Kinzinger that would require FCC to publish on its website draft documents to be voted on by the Commission three weeks before the open meeting;[22] and

- A discussion draft from Rep. Latta that would require the FCC to publish information on its website 48 hours before a commission bureau or office could make any decision on "delegated authority."

C. Concerns with Republican Proposals

These proposals are a step backwards from the progress that was made last Congress regarding FCC process reform issues, as outlined below.

[22] This proposal echoes requests made in a letter that House and Senate Republicans sent to FCC Chairman Wheeler in January 2015, asking him to release his draft network neutrality order before other commissioners had an opportunity to review it. *See* Letter from Reps. Fred Upton, Greg Walden, and Senator John Thune to FCC Chairman Tom Wheeler (Jan. 22, 2015).

1. Congress Should Avoid Conflict of Law and Litigation Risk

The discussion drafts from Rep. Ellmers and Rep. Kinzinger potentially conflict with existing statutory provisions under the Administrative Procedures Act (APA) and the Freedom of Information Act (FOIA).

The APA has been a successful bedrock of regulatory law in large part because it reaches and applies across federal agencies. Our subcommittee heard extensive testimony from administrative law experts that removing the FCC from the predictability of the APA could lead to years of litigation.[23] Our committee has heard further and repeatedly over the past few months that litigation can inject uncertainty into the market and deter investment. Case law and precedent interpreting the APA to offer such certainty has benefitted the public and interested stakeholders.

The APA requires an agency to release explanatory text along with any new rules.[24] For each provision that appears in the Code of Federal Regulations, the explanatory text is vital to understanding these rules. The Rep. Ellmers discussion draft would separate the two, creating confusion and uncertainty for stakeholders.

Requiring the release of a pre-decisional draft, as contemplated in the Rep. Kinzinger discussion draft, runs counter to the policy underlying an exemption to FOIA for internal deliberative processes of an agency.[25] By creating a potential conflict of law with FOIA, this bill could increase the risk of litigation with respect to numerous FCC actions.

Posting draft documents could spark an unending cycle of lobbying on successive draft items. Specifically, any new arguments raised in the record in response to the draft text could force the agency to trigger subsequent rounds of notice and comment. These cycles of lobbying could undermine the ability of commissioners, who are in the minority on any given agenda item vote, to negotiate changes in a draft once it has been made public.

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[23] *See* Testimony of Stuart Minor Benjamin before the Committee on Energy and Commerce Subcommittee on Communications and Technology (July 11, 2013) at 2; Testimony of Richard J. Pierce, Jr. before the Committee on Energy and Commerce Subcommittee on Communications and Technology (July 11, 2013) at 2-7.

[24] 5 U.S.C. §553(c) (requiring agencies to "incorporate in the rules adopted a concise general statement of their basis and purpose"); *see also* Federal Register Guidance at www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (instructing agencies to include a number of explanatory sections along with new rules).

[25] *See* Department of Justice Guide to Freedom of Information Act, 366 (online at www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5_1.pdf) (explaining that FOIA protects inter-agency work product to "(1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action").

2. Congress Should Avoid Delay and Confusion for FCC Regulatees

Delegated authority allows the heads of FCC bureaus and offices to make decisions so long as new legal issues are not presented. As a practical matter, delegated authority is overwhelmingly used to conduct routine agency business, like application processing and issuing public notices. Hundreds of thousands of actions are taken on delegated authority on a yearly basis.[26] These actions are not final until they are released by the FCC, and the FCC can decide not to take an action at any time before it releases the item.

The actions contemplated in the Rep. Latta draft bill go far beyond the informal policies and practices in place at the FCC. Under FCC's informal procedures, commissioners are notified 48 hours before bureaus take action on items that the Chairman's office believes may be of interest to the commissioners. This procedure is designed to balance the need to keep commissioners informed while not overwhelming them with notice about the thousands of routine actions that are executed at the bureaus level.

Requiring the agency to post a description of all potential actions before they are finalized could create more confusion than transparency and clarity. Generating public lists and notices of actions the agency may not actually take will impose unwarranted administrative burdens on the commission, and increase uncertainty and unnecessary anxiety among the public and interested commenters. Adding this new notice requirement at the bureaus level could have the perverse effect of slowing down the work of the FCC and dramatically reducing its productivity. Accordingly, stakeholders could also face uncertainty and longer wait times for what have previously been routine decisions.

The Republican drafts would not remedy administrative and procedural problems perceived and articulated by the majority. Although purported to help increase transparency at the FCC, the practical impact of the drafts would result in delays, uncertainty, and confusion.

D. Democratic Alternatives

At the April 30, 2015, legislative hearing in the subcommittee, in addition to raising concerns about the fundamental approach underlying the discussion drafts from Reps. Ellmers, Kinzinger, and Latta, Democrats offered five bills as an alternative. The Democratic bills are designed to keep the FCC fast, efficient, and transparent absent the concerns that Democrats raised about the Republican drafts. The Democratic package includes:

- H.R. 1396, the FCC Collaboration Act, introduced by Rep. Eshoo, that would allow for two or more commissioners to discuss FCC business outside of an FCC Open Meeting, but provides sufficient safeguards to protect against abuse;

- A discussion draft from Rep. Clarke that would require the FCC to report quarterly to Congress – and to post on its website – data on the total number of decisions pending

[26] *See* Testimony of Chairman Tom Wheeler before the Committee on Energy and Commerce Subcommittee on Communications and Technology (Apr. 30, 2015) at 13.

categorized by bureau, the type of request, the length of time pending, as well as a list of pending Congressional investigations and their costs to the agency[27];

- A discussion draft from Rep. Loebsack that would require the FCC chairman, as the head of the agency, to post the Commission's internal policies and procedures on the FCC website and to disclose any modifications within 48 hours; and

- A discussion draft from Rep. Matsui that would require FCC to coordinate with the Small Business Administration to develop recommendations to improve small business participation in FCC proceedings.

The Rep. Clarke, Rep. Loebsack, and Rep. Matsui discussion drafts were favorably forwarded to the full Committee by the Subcommittee on Communications and Technology on May 20, 2015.

Democrats believe additionally that if the true issue is transparency, then Congress should not exempt itself from the dictates of transparency. For that reason, the final piece of the Democratic package includes the introduction of the Keeping Our Campaigns Honest (KOCH) Act. The KOCH Act simply requires the FCC to modify its existing sponsorship ID rules to include disclosure of the significant donors to entities that purchase issue advertisements. However, the majority left out this key provision of the Democratic alternative package when it scheduled the second legislative hearing on May 15, 2015, and did not notice the bill for the subcommittee markup on May 20, 2015. Democrats offered this bill (H.R. 2125) as an amendment at the subcommittee markup, but it was rejected by a 17-13 party line vote.

[27] The Rep. Clarke discussion draft was amended at the May 20, 2015, Subcommittee markup to include a GAO audit of the Congressional investigation cost estimates.