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TSCA “Reform” Is Likely to Do More Harm than Good Proposed Changes Threaten to Undermine Solid Risk Standard

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According to news reports, congressional aides from both houses of Congress are currently engaged in private meetings to work out differences between two bills (S. 697 and H.R. 2576) designed to reform the nation’s chemical safety law, the Toxic Substances Control Act (TSCA). Rather than form an official conference committee, where members of Congress are appointed and charged with the responsibility of reconciling differences, bill sponsors apparently prefer to allow staff to informally work out differences between the two versions and develop a bill both houses can pass into law this year.¹ With just a few important issues left to hammer out, even a quick overview of the topic shows that the final result is likely to do more harm than good.²

Background. Congress originally passed TSCA in 1977 to ensure safe use of industrial chemicals. The law granted the U.S. Environmental Protection Agency (EPA) authority to review both new and existing chemicals, collect data where warranted, assess risks, and issue rules and regulations where necessary to protect public health. TSCA covers any chemicals in commerce that are not regulated under other federal laws, excluding chemicals regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (which covers pesticides) and the Federal Food, Drug, and Cosmetic Act.

TSCA created two broad programs for regulating chemicals. One program covers “existing chemicals,” those in commerce when the law was passed originally. The other covers “new chemicals,” those introduced after the law passed. The law requires the EPA to keep an inventory list of all chemicals legally permitted for use under TSCA. Existing chemicals were placed in the inventory automatically, and new chemicals are added following EPA approval for each “new use.” Despite claims to the contrary by environmental activists, the agency has issued a significant number of regulations under these two programs.

For new chemicals, manufactures must provide the EPA with a pre-manufacture notice (PMN) for any new chemicals or uses. Then, the agency can approve or issue a “significant new use rule,” known by its acronym, SNUR, for the chemical or regulate it via a consent agreement with the manufacturer. According to the EPA: “Approximately 10 percent of the 39,000 total PMN submissions have resulted in various restrictions, additional testing requirements, and notices withdrawn in the face of regulation.”³

While the law did not mandate costly testing for the tens of thousands of existing chemicals, it provides ample power for the EPA to collect data on them. Specifically, under Section 4,

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the agency can demand data if it finds that a chemical “may present an unreasonable risk of injury to health or the environment”⁴ or if a chemical is—or will be—used in a high volume that leads to high exposures to humans or the environment. The EPA must also show that data is insufficient to address any such concerns.

In both cases, the law does not require EPA to *prove* risk or demonstrate excessive exposure. Instead, it says the agency can act if the chemical “may” pose a risk—not a particularly difficult standard to meet.⁵ The EPA lists 266 chemicals that have been subject to a Section 4 test rule, and has demanded data under numerous other rules.⁶ The agency is also reviewing an additional 90 existing chemicals under its TSCA Work Plan, which it updated in 2014.⁷

The EPA may regulate existing chemicals or any chemical placed into the inventory, if it finds that a chemical poses an “unreasonable risk of injury to health or the environment.”⁸ The agency explains on its website: “[U]nreasonable risk involves the balancing of the probability that harm will occur and the magnitude and severity of that harm against the effect of a proposed regulatory action on the availability to society of the expected benefits of the chemical substance.”⁹ If the EPA finds that a chemical does in fact pose such an unreasonable risk, it may prohibit its use, impose regulations limiting its use, mandate recordkeeping, set disposal regulations, and require posted warnings related to use, among other actions. The law states further that the agency must apply such restrictions “to the extent necessary to protect adequately against such risk using the least burdensome requirements.”¹⁰

This is a solid standard. It allows the agency to regulate where significant risks are present, while reducing the possibility of regulatory excesses that can do more harm than good. For example, when the EPA tried to issue a regulation banning the use of asbestos in automotive brakes—where they are safely contained and pose negligible risks even to workers—a federal court overturned the rule, because it could have produced a net increase in highway deaths due to potential brake failures. While activists point to this case as a reason for reforming TSCA, *preventing the agency from passing a deadly rule is actually a good thing.*

Why “Reform” is Not Necessary. Environmental activists and others claim TSCA should be modernized because it has accomplished very little in terms of regulatory activity. That is not true, as the agency has issued thousands of rules, consent orders, and other regulations.¹¹ They also cite concerns that existing chemicals pose significant risks that demand greater regulation. Yet, there is no evidence to support assertions that trace exposure to chemicals through consumer products pose substantial risks, such as for cancer or other adverse health effects.¹² In fact, people are living longer, healthier lives than ever before, even as chemical use has increased. TSCA reform has nothing much to do with public health, as it focuses on risks that are too small to measure.¹³

The chemical industry supports reform with the hope of preempting a growing patchwork of burdensome state-level chemical laws and regulations.¹⁴ Both bills include some form of preemption, but the scope of these provisions is very limited, and likely to be weaker in the

final bill. In any case, TSCA reform is unlikely to stop state regulators, even if the state lawmakers pass fewer new chemical laws. Former California Department of Toxic Substances Control (DTSC) head Maureen Gorsen, now with the law firm Alston & Bird, explained at a recent industry conference: “TSCA reform is not going to have too much of an impact on the state agencies. ... They’re going to find ways to regulate, regardless of what happens in their legislative bodies,” she noted. For example, state policies that simply list chemicals on priority lists, rather than regulate them, create enough market pressure to force products off the market, something that will likely continue with or without federal preemption. “[T]he pressures to deselect those chemicals will be very high,” Gorsen noted.¹⁵

Serious TSCA Reform Flaws. The proposed TSCA reform will undermine the law’s current standard for evaluating chemical risks, which is perhaps the best risk standard on the books. In particular, it eliminates the provision that requires the EPA to pursue the “least burdensome” rules, which has worked to prevent the agency from issuing regulations that are likely to do more harm than good. Yet both House and Senate TSCA reform proposals would eliminate the “least burdensome” requirement.

The most unfortunate part of the proposed TSCA changes is the potential for real harm. TSCA reform promises to empower the EPA to go after valuable chemicals that have important public health and safety benefits, which could be lost. For example, if regulators undermine the use of BPA-based resins for food cans used to prevent pathogen development, we might see increased food borne illnesses.¹⁶ If regulators ban certain flame retardants, we could see more fire-related deaths.¹⁷ And potential bans on preservatives in cosmetics can lead to more product spoilage and increased skin irritation and infections.¹⁸

In addition to changing and weakening TSCA’s very strong risk standard, reform will create more unnecessary and expensive bureaucracy that will undermine technological development. For example, giving the EPA more power to mandate industry data collection and submission simply means costly research mandates that translate into higher consumer prices. And the demand for increased “prioritization of chemicals” essentially means placing chemicals on “concern lists” largely based on political priorities and agendas, rather than on serious health risks. Such listings will have adverse market implications for many valuable chemical products, causing retailers to pull products from store shelves, while facilitating activists’ fear campaigns. The final result will be reduced consumer choice and higher prices for inferior products.¹⁹

Conclusion. As congressional staff cut deals during closed-door meetings, any potential benefits that industry expected from the current proposals will likely be watered down and rendered useless. Members of Congress, largely unaware of the details, are likely to simply ratify whatever results from these informal negotiations with quick floor votes in each chamber. Consumers will be the ones to suffer—with less choice, inferior products, and higher prices—as “reforms” undermine TSCA’s currently strong risk standard and empower EPA to ban valuable products or force them off the market by adding more and more chemicals to “concern lists.”

Notes

¹ Sam Pearson, “TSCA Reform Could Become Law by Midyear,” *E&E Reporter*, March 23, 2016; and “House leaders Start Work on Reconciling TSCA Bills: Lawmakers May do Away with Formal Conference Committee,” *ChemicalWatch*, January 11, 2016,

<https://chemicalwatch.com/44455/house-leaders-start-work-on-reconciling-tsca-bills>.

² This paper provides an overview of some key issues related to TSCA. For a more detailed analysis of the law see: Angela Logomasini, “The Real Meaning of TSCA Modernization,” *Issue Analysis* 2012 No. 2, Competitive Enterprise Institute, March 2012, <http://cei.org/sites/default/files/Angela%20Logomasini%20-%20The%20Real%20Meaning%20of%20TSCA%20Modernization.pdf>.

³ Environmental Protection Agency, “Statistics for the New Chemicals Review Program under TSCA,” webpage accessed April 11, 2016, <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/statistics-new-chemicals-review>.

⁴ §2603(a)(1)(A)(i)

⁵ See 15 USC §2603 and Logomasini, “The Real Meaning of TSCA Modernization,” pp. 13-14.

⁶ EPA, “Sunset dates of chemicals subject to final TSCA section 4: test requirements and related section 12(b) actions,” accessed April 11, 2016, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/sunset-dates-chemicals-subject-final-tsca-section-4-test>, See also Logomasini, *The Real Meaning of TSCA Modernization*, pp. 18-19.

⁷ For more details see EPA, “TSCA Work Plan Chemicals,” accessed April 11, 2016,

<https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/tsca-work-plan-chemicals>.

⁸ 15 USC §2605(a).

⁹ “Making a Finding on Unreasonableness of Risk,” EPA website, page updated August 10, 2010, <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/regulatory-determination-made-under>.

¹⁰ 15 USC §2605(a).

¹¹ See Logomasini, “The Real Meaning of TSCA Reform.”

¹² For example, see the briefs on Safe Chemical Policy.org: “Cancer Risk Factors,” “Cancer Trends,” and Endocrine Disrupters,” (April 2012), <http://www.safechemicalpolicy.org/facts>.

¹³ Angela Logomasini, “TSCA Reform has Nothing to do with Safety,” Competitive Enterprise Institute Blog, April 1, 2015, <https://cei.org/blog/tsca-reform-debate-not-about-public-safety>.

¹⁴ Angela Logomasini and Daniel Murphy, “Green Chemistry’s March of the Ostriches,” *Issue Analysis* 2011 No. 7, Competitive Enterprise Institute, November 2011,

<https://cei.org/sites/default/files/Angela%20Logomasini%20and%20Daniel%20Murphy%20-%20Green%20Chemistry's%20March%20of%20the%20Ostriches.pdf>.

¹⁵ Kelly Franklin, “TSCA reform would have ‘negligible’ effect on state regulatory agencies,” *ChemicalWatch*, March 31, 2016,

<https://chemicalwatch.com/46008/tsca-reform-would-have-negligible-effect-on-state-regulatory-agencies>.

¹⁶ See Angela Logomasini, “Government’s Unfounded War on BPA,” *On Point* No. 210, Competitive Enterprise Institute, October 7, 2015, <https://cei.org/sites/default/files/Angela%20Logomasini%20-%20Government's%20Unfounded%20War%20on%20BPA.pdf>; and “Anti-BPA Packaging Laws Jeopardize Public Health,” *On Point* No. 174, Competitive Enterprise Institute, April 21, 2011,

<http://cei.org/sites/default/files/Angela%20Logomasini%20-%20Anti-BPA%20Packaging%20Laws%20Jeopardize%20Public%20Health.pdf>.

¹⁷ See Angela Logomasini, “Fanning the Flames: How Banning Flame Retardant Chemicals Puts Consumers at Risk,” *Issue Analysis* 2016 No. 1, Competitive Enterprise Institute, March 2016,

<https://cei.org/content/fanning-flames>.

¹⁸ Dana Joel Gattuso, “The True Story of Cosmetics,” *Issue Analysis* 2011 No. 6, Competitive Enterprise Institute, October 2011,

<http://cei.org/sites/default/files/Dana%20Joel%20Gattuso%20-%20The%20True%20Story%20of%20Cosmetics.pdf>.

¹⁹ For example, see Angela Logomasini, “Regulators’ Anti-Chemical Smear Campaigns Will Breed an Unsafe World,” *Forbes*, May 23, 2012, <http://www.forbes.com/sites/realspin/2012/05/23/regulators-anti-chemical-smear-campaigns-will-breed-an-unsafe-world/#7c9b903865e7>.