



Authors



Mark N. Duvall
Principal
(202) 789-6090
mduvall@bdlaw.com



Margo B. Ludmer
Associate
(202) 789-6017
mludmer@bdlaw.com

House Subcommittee to Revise Draft TSCA Reform Bill for May 14 Markup

Legislation to amend the Toxic Substances Control Act (TSCA), already introduced in the Senate, has taken a step forward in the House of Representatives as well. On April 14, 2015, the Environment and Energy Subcommittee of the House Energy and Commerce Committee held a hearing on a discussion draft of the TSCA Modernization Act,^[1] which would reform the nearly 40-year-old federal law regulating chemicals.^[2] At the hearing, most of the witnesses and Representatives present indicated at least preliminary support for the narrowly-targeted approach of the discussion draft. Mark-up of the discussion draft is tentatively scheduled for May 14, another indication that TSCA legislation is likely to move fairly rapidly this year.

The discussion draft, captioned the “TSCA Modernization Act of 2015,” was released by Representative John Shimkus (R-IL), Chairman of the Subcommittee, one week prior to the hearing, on April 7. As compared to the sweeping TSCA reform bills before the Senate—the Frank R. Lautenberg Chemical Safety for the 21st Century Act (S. 697) (Udall-Vitter bill)^[3] and the Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act (S. 725) (Boxer-Markey bill)^[4]—the House discussion draft is narrow in scope. It targets several discrete issues under the current TSCA program, but would leave much of the existing framework in place. Notably, the bill would not require EPA to undertake a prioritized review of existing chemicals within a designated time frame, as would the competing Senate bills.^[5]

If enacted as proposed, the TSCA Modernization Act would:

- **Limit state preemption.** The House discussion draft would preempt state regulation of a chemical substance once EPA determines that the chemical will not present an unreasonable risk of injury to health or the environment, or once EPA issues a risk management rule. Distinct from the Udall-Vitter bill, the discussion draft would allow states to establish or continue enforcing a chemical regulation if it is identical to a rule issued by EPA.
- **Authorize EPA to remove chemicals from the Inventory.** EPA would be required to periodically collect information in order to remove from the TSCA Chemical Substance Inventory chemicals that are no longer manufactured or processed in the U.S. The Udall-Vitter bill would keep these chemicals on the Inventory, but would deem them “inactive.”
- **Impose a standard for the regulation of articles.** The discussion draft would amend TSCA section 6(a) to require that EPA apply prohibitions or restrictions to articles on the basis of a chemical substance or mixture

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within that article “only to the extent necessary to mitigate the identified risk.” This differs from the Udall-Vitter bill provision on articles, which would allow regulation only where EPA has “evidence of significant exposure to the chemical substance from such article.”

- **Modify CBI protections.** Under the discussion draft, confidential business information (CBI) claims would need to be resubmitted after 10 years. In addition, CBI could be disclosed upon request to health or environmental professionals employed by state agencies and to treating physicians. While the Udall-Vitter bill requires that state employees and treating physicians keep the disclosed information confidential, the House discussion draft does not impose such a requirement.
- **Remove the limit on fees.** The discussion draft would lift the cap on fees for EPA processing of data submitted under section 4 or 5. Specifically, the discussion draft would remove language limiting fees to \$2,500, or \$100 in the case of a small business concern. It would still ensure “lower fees” for small business concerns. It does not currently have a provision ensuring that the fees collected would go to fund TSCA implementation rather than to the general fund of the Treasury, but Chairman Shimkus said in response to comments that such a provision would be added.
- **Alter the requirements for issuing a risk management rule.** The existing criteria for issuing a risk management rule, which courts have held to require cost-benefit analysis, would be largely preserved. However, the discussion draft would provide that a risk assessment would not consider information on costs and other factors not directly related to health or the environment. Thus, costs and benefits would only be considered in connection with risk management, not risk assessment. The discussion draft would also add the requirement that the risk management rule be cost-effective. Like the Senate bills, current TSCA language requiring that a risk management rule impose the “least burdensome requirements” would be deleted.
- **Require EPA to consider protection of subpopulations.** The discussion draft would prohibit EPA from determining that a chemical substance will not present an unreasonable risk of injury to health or the environment if it determines that such a risk is posed to one or more “potentially exposed subpopulations,” a term defined to include groups that are at greater risk than the general population of adverse health effects from chemical exposure.

Chairman Shimkus said that the discussion draft will be revised and republished prior to a Subcommittee markup scheduled for May 14. Changes to the discussion draft will likely reflect feedback provided by EPA Assistant Administrator Jim Jones during his testimony before the Subcommittee. Jones testified that EPA saw several key issues with the discussion draft, including:

- **The threshold for conducting risk evaluations.** The discussion draft would require EPA to find a reasonable basis for concluding that the chemical has a high enough potential to present an unreasonable risk before EPA can evaluate the potential risk posed by that chemical. According to Jones, this creates a “catch-22,” as EPA must make a finding on risk before undertaking the risk evaluation.
- **The role of costs in promulgating a risk management rule.** Jones noted that the discussion draft is ambiguous on how EPA should incorporate cost when issuing a risk management rule; specifically, it is not clear whether the bill would preserve the existing cost-benefit balancing requirements or merely require the consideration of cost.
- **Unachievable deadlines for EPA action.** Jones explained that EPA would be unable to meet the tight deadlines set by the bill. In particular, EPA would be unable to meet the deadline for completing a risk evaluation requested by a manufacturer (6 months after the request) and for issuing a final risk management rule (6 months after publication of the proposed rulemaking).
- **The omission of language directing fees to EPA.** Jones commented that removing the cap on fees would not assist EPA in administering the chemical management program, as the resources would go to the general fund in the Treasury and not to EPA.

The Subcommittee will also consider input from the panel of witnesses that testified at the hearing. The American Chemistry Council requested further guidance on manufacturer-initiated risk evaluations and on the degree to which state governments may adopt and enforce regulations identical to EPA.^[6] The Society of Chemical Manufacturers and Affiliates asked that the Subcommittee adopt certain aspects of the Udall-Vitter bill—including industry-drafted risk evaluations and the development of a list of inactive chemicals in commerce.^[7] The Alliance of Automobile Manufacturers requested an exemption for replacement parts used to service in-use vehicles that were designed prior to the effective date of chemical restrictions.^[8] Finally, Safer Chemicals, Healthy Families, a coalition of NGOs, raised concerns that cost-effectiveness analysis may limit EPA's ability to issue risk management rules and asked that the discussion draft eliminate the threshold for risk evaluations.^[9]

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[1] [The TSCA Modernization Act of 2015: Hearing Before the Subcomm. on Envt. & the Econ.](#), 114th Cong. (2015).

[2] [The TSCA Modernization Act of 2015](#) [Discussion Draft], H.R. __, 114th Cong. (2015).

[3] [The Frank R. Lautenberg Chemical Safety for the 21st Century Act](#) [Udall-Vitter Bill], S. 697, 114th Cong. (2015).

[4] [The Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act](#) [Boxer-Markey Bill], S. 725, 114th Cong. (2015).

[5] See Beveridge & Diamond, P.C., "[Udall-Vitter TSCA Reform Bill Builds Momentum for Passage: Senators Boxer, Markey Respond with Competing Legislation](#)" (March 25, 2015).

[6] See *The TSCA Modernization Act of 2015: Hearing Before the Subcomm. on Envt. & the Econ.*, 114th Cong. (2015) ([statement of Michael P. Walls, Vice President of Regulatory & Technical Affairs, American Chemistry Council](#)).

[7] See *The TSCA Modernization Act of 2015: Hearing Before the Subcomm. on Envt. & the Econ.*, 114th Cong. (2015) ([statement of Dr. Beth Bosley, President, Boron Specialties LLC, on behalf of the Society of Chemical Manufacturers and Affiliates](#)).

[8] See *The TSCA Modernization Act of 2015: Hearing Before the Subcomm. on Envt. & the Econ.*, 114th Cong. (2015) ([statement of Jennifer Thomas, Senior Director, Alliance of Automobile Manufacturers](#)).

[9] See *The TSCA Modernization Act of 2015: Hearing Before the Subcomm. on Envt. & the Econ.*, 114th Cong. (2015) ([statement of Andy Igrejas, Director, Safer Chemicals, Healthy Families](#)).