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TSCA reform bill includes expected changes, with some surprises

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Industry experts say draft bill could speed new chemical reviews, but lacks bipartisan support

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Proposed revisions to TSCA unveiled by House Republicans last week would likely speed the new chemicals review process and usher in other major shifts to the nation's chemicals law, according to industry experts.

However, while some attorneys interviewed by Chemical Watch News & Insight saw few surprises in [the bill](#), others said the breadth of changes outlined in the 37-page 'discussion draft' could hinder the [bipartisan support](#) needed to secure passage of any legislation.

Months of behind-the-scenes negotiations went into developing the legislation, which was spurred by industry calls for [focused changes](#) to address long-standing issues such as the drawn-out timelines for new chemical reviews. The discussion draft released on 15 January envisions potentially sweeping changes to multiple provisions of TSCA.



Judah Prero, a partner at Arnold and Porter, said the draft largely matched what he expected to see. "I'm sure there are other people who would characterise this as earth-shattering and turning TSCA on its head," but the changes contemplated in the draft "are not radical", he said.

"They're not throwing everything out. I think there was an effort to be at least somewhat balanced, and to make [targeted changes](#) that go after [lynchpin issues](#)," Prero added.

David Fischer, a partner at Keller and Heckman who served as deputy assistant administrator for the chemicals office during the first Trump administration, offered a similar view.

He said the changes in the draft "try to address ongoing frustrations with both the new and existing chemicals programmes at EPA, especially with regard to timing of new chemical reviews and the need for more transparency and interaction with submitters".

All the same, some industry attorneys said the breadth of changes contemplated in the draft was unexpected, particularly for provisions outside of the new chemicals programme.

Ryan Schmit, of counsel with Bergeson & Campbell, said the bill was "somewhat surprising, given that it seemed like most in the industry stakeholder community were supportive of a more [narrow set](#) of changes coupled with the reauthorisation of TSCA fee collection authority".

By contrast, "the discussion draft would amend nearly every major section of the law," said Schmit, a 15-year veteran of the EPA's chemicals office.

Faster new chemical reviews

Industry experts said the planned changes to the TSCA section 5 new chemicals programme were among the most significant in the discussion draft.

Notable among the proposed changes is a requirement for the EPA to factor in the likelihood of a chemical's unreasonable risk, and to confine its reviews to those uses identified by a new chemical submitter.

The legislation would also limit the length of voluntary suspensions, give the EPA more flexibility to forego TSCA section 5(e) orders in some cases, and provide a new exemption pathway for substances already approved in another OECD member country.

Michael Boucher, a partner at Steptoe, said the net effect of these envisioned changes "would be to [speed up](#) EPA's processing of section 5 notices, make the outcomes of reviews more predictable for all stakeholders [and] minimise or avoid the unnecessary [regulation](#) of use scenarios that are not likely to occur".

Furthermore, the changes could "reduce the current [statutory bias](#) against new chemical technologies developed to replace legacy chemicals" that have comparatively worse safety profiles, he said.

Schmit agreed that the section 5 changes in the draft bill would be among the most "immediately impactful" and would speed the [historically slow](#) review process.

Still, the envisioned amendments "are also certain to invite controversy", he said, pointing to plans to limit the scope of reviews to only intended COUs and to give the EPA more risk management discretion.

'Minimise', not eliminate, risk

For existing chemicals, Schmit said the proposed changes to the EPA's risk management standard would be "a big shift".

Under the draft legislation, the EPA would be directed to "minimise, to the extent reasonably feasible" any unreasonable risk it identifies in a risk evaluation.

This change would allow the agency "to consider technical and economic feasibility of risk management measures in deciding both whether and how much to regulate a chemical", Schmit said. That is in contrast to today's process, where the EPA must [eliminate](#) the unreasonable risk and consider costs and other non-risk factors only when selecting among options that meet that mark.

For Prero, the proposed changes to the risk management standard seem to reflect the drafters' intent to make clear that "we're not trying to get to zero risk" when regulating existing chemicals.

OSHA realignment

Other notable changes proposed for the existing chemicals programme are provisions that could shift workplace risk responsibilities from the EPA back to the Occupational Safety and Health Administration (OSHA), Prero said.

For example, the draft legislation would prohibit the EPA from enacting a restriction "that is inconsistent with another requirement" in a federal law managed by another agency.

That directive could be interpreted to mean that an OSHA permissible exposure limit (PEL) would prohibit the EPA from imposing a differing existing chemical exposure limit (ECEL) of its own, experts said.

Richard Engler, director of chemistry at Bergeson & Campbell, said the intent behind that measure could be to force EPA to work with other authorities, such as OSHA, to impose the protections necessary.

If "EPA identifies a lower exposure limit supported by the best available science, is the best course of action to impose a TSCA ECEL" that only applies in TSCA-regulated workplaces, Dr Engler asked. Or would it be more appropriate for the EPA to work with OSHA to lower an existing PEL for all workplaces?

"The proposed changes seem to force EPA towards the latter option," he said.

Risk evaluation judicial review

Several attorneys also flagged a proposed change that would allow judicial review of TSCA risk evaluations, versus the existing requirement that generally restricts legal challenges until after a final risk management rule is issued.

Environmental groups [said](#) this shift would allow companies to delay risk management action for years by tying up risk evaluations in the courts.

Dr Engler, however, said the change could make the process "more, not less, efficient".

"If the risk management rule is based on a flawed risk evaluation and the rule is vacated based on it not being based on the best available science, [then] EPA has to redo the risk evaluation and redo the rule - a process that takes more time than just redoing the risk evaluation," he said.

Rocky road ahead

With environmental groups quick to label the draft legislation a non-starter, some experts predicted a difficult path ahead for the bill.

"I don't think the Democrats are going to go for any of these things" outlined in the draft, Prero said.

Bergeson & Campbell attorneys agreed: "While many of the ideas outlined in the discussion draft are interesting and laudable, this 37-page rewrite of many of the major compromises in the 2016 TSCA amendments is not likely to gain much traction" with Democrats or environmental health organisations, they said in a blog post.

There are only a handful of months left for lawmakers to strike a deal before the EPA's TSCA fee collection authority lapses at the end of September, and Bergeson & Campbell said the clock is ticking on that process.

If a deal cannot be reached and Congress does not otherwise renew the EPA's authority to collect fee payments, that "could exacerbate the TSCA programme's ongoing resource and workload challenges", Bergeson & Campbell attorneys said.

Notable omissions

Industry experts also noted provisions not included in the initial draft of the legislation, including some issues that have been the subject of years of [debate](#) and [legal disputes](#).

These include issues such as making risk determinations on a '[whole chemical](#)' basis; the amount of discretion the EPA has in [scoping](#) a risk evaluation; and considerations around how personal protective equipment ([PPE](#)) use should factor into evaluations, Schmit said.

While some of the proposed changes touch on these issues, Schmit said, "it was surprising that the discussion draft didn't weigh in more definitively on these topics".

"Clear legislative direction could help to avoid or minimise the ambiguities and [debates](#) that keep EPA from focusing on its core responsibilities," he said.

Also largely absent from the discussion draft were changes to key definitions, with the exception of a change to how the agency would define a substance's "conditions of use".

Boucher said that although some stakeholders in the past have pushed for "extensive additions and changes" to the definitions set out in TSCA section 3, those amendments appear to have largely been left on the sidelines.

Fischer similarly flagged that the draft - like the law already on the books - does not include a definition of 'unreasonable risk'. But, he said, it does address "the [overly conservative](#) approach to risk management" employed by the EPA to date by seeking to require the agency to ensure its rules are feasible.



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