The Chemicals in Commerce Act:

Undermining Public Health and Safety in the Name of Reform

On February 27th, Representative Shimkus, Chair of the House Energy and Commerce Subcommittee on Environment and the Economy, released a discussion draft of chemical reform legislation titled the "Chemicals in Commerce Act." The legislation shares many elements with the Chemical Safety Improvement Act (S.1009) introduced in the Senate, which is broadly opposed by health and environmental experts in its current form. Though it is more clearly drafted than the Senate bill, the House bill also goes further in several areas, making clear policy choices that undermine public health and environmental protection in the name of reform.

Scientific and medical research constantly points to a stronger link between unregulated chemicals and the health problems that plague millions of American families. Public concern about that link has driven positive change in state policies, in the marketplace, and among America's trading partners. Instead of addressing such concerns, the Chemicals in Commerce Act appears to be an attempt to deny them. It is not a credible reform proposal and should be strongly opposed by anyone concerned about public health and environmental protection. This paper discusses several of the major problems.

CICA Does Not Create a Health-based Standard for Reviewing Chemicals

The most fundamental failure of the Toxic Substances Control Act (TSCA) is that it placed a nearly insurmountable burden on EPA before it could reduce risks to health or the environment posed by an "existing chemical" - defined as any of the 62,000 chemicals already on the market at the time the law passed in 1976. EPA tried to use this authority on asbestos and was defeated by an industry-backed lawsuit in 1991, effectively signaling the end of meaningful regulation. The court found that the EPA had not met its burden under the law to demonstrate that asbestos posed an "unreasonable risk to human health or the environment" and that it had not shown that it had chosen the "least burdensome" method for addressing that risk. Remarkably, CICA retains the "unreasonable risk" standard without reforming or redefining it. This means that cost-benefit analysis, and not assurance of safety, will have to continue to drive EPA decisions. While the bill removes the phrase "least burdensome," it retains the substance of that provision and even adds new hurdles before EPA can act. The result is that EPA would still not be able to ban or restrict asbestos under the proposed law, and would be even more unlikely to restrict existing unsafe chemicals than it is now.

CICA Fatally Weakens Oversight of New Chemicals

While inadequate from a public health perspective, the current process for "new" chemicals (defined as any introduced after TSCA passed) has at least allowed for limited testing and oversight at the critical stage before a chemical enters the marketplace. Under current law, a chemical manufacturer must file a pre-manufacture notice (PMN) describing the structure of the chemical and its potential uses. The EPA has 90 days to review the chemical and decide whether or not to stop it from entering commerce or place safeguards on its manufacture and use. The burden is entirely on the EPA. The manufacturer need not provide a single health and safety study to help EPA in its review and few do. Nevertheless, under current law, EPA can block or limit the chemical if it finds that it

"may present" an unreasonable risk or is likely to have substantial exposure or environmental release. It can also order testing on the chemical and can put conditions on any potential changes in its use pattern that could affect public health or the environment (through a mechanism called a Significant New Use Rule or SNUR).

Remarkably, the CICA would undermine even these few critical tools. EPA would be unable to block or restrict the chemical or require testing unless it could meet the higher standard of "likely" to present an unreasonable risk. Without any data from the manufacturer, meeting this higher burden would often be impossible. Yet if the manufacturer did not agree to conduct testing, EPA could not compel such testing and at the end of 90 days the manufacturer could put the chemical on the market. Moreover, in a new twist, states would now automatically be preempted from restricting the chemical or ordering testing merely because the EPA review period had expired. The CICA would therefore fatally weaken oversight of new chemicals at both the federal and state level.

CICA Undermines Restrictions on Toxic Chemicals in Consumer Products

Multiple revelations of dangerous chemicals in consumer products have been a primary source of increased public concern and action by legislatures and in the marketplace. Most state chemical policies address products in some way, including bans on BPA in baby bottles, lead and cadmium in jewelry, as well as laws requiring the disclosure of specified chemicals of concern in products (ME, WA, CA).

Photo: Michelle Martin

EPA has recently begun to apply the SNUR mechanism to certain toxic flame retardants and stain treatments to prevent widespread public exposure to new uses of these chemicals in furniture and carpets.

CICA undermines even this incremental progress by making it harder for EPA to use SNURs on products (as opposed to free-standing chemicals). It takes away the federal government's authority to restrict imported products containing toxic chemicals. It explicitly preempts state product regulation, including all information collection requirements and disposal restrictions.

CICA Undermines Mainstream Scientific and Medical Recommendations

While the science and assessment methodology provisions of the CICA are less sprawling and confusing than the provisions in the CSIA, the bill still contains many requirements and terms that are undefined or that require the EPA to turn away from the most recent recommendations of the National Academy of Sciences (NAS). Similarly, the NAS, along with the American Academy of Pediatrics has called for assessing the risk of a chemical "in aggregate" – adding up the different exposures – and also for explicitly protecting vulnerable populations. CICA requires neither.

CICA Undermines Toxicity Testing for Chemicals

Under current law the EPA can require toxicity testing on an existing chemical through a rule-making after demonstrating that the chemical "may present" an unreasonable risk or is produced in large quantities and may have substantial human exposure or environmental release. EPA has managed to use this authority only 200 times, (a relative drop in the bucket with an inventory of 84,000 chemicals) and there is broad recognition that the available data on numerous existing chemicals is inadequate. Like CSIA in the Senate, CICA purports to improve EPA's testing authority by allowing EPA to use administrative orders, a less cumbersome process than formal rulemaking. However, CICA greatly limits the universe of existing chemicals that can be tested by limiting orders and rules to those substances on which EPA is required to perform a safety determination (because they have been listed as high-priority). But this is a Catch-22: EPA can't require the information needed to tell if a chemical is high-priority, and if it labels a chemical high-priority anyway, it will have to slow the review process by asking for testing that could have been completed earlier. Even where testing is allowed under the bill, the Administrator must first require screening level hazard and exposure information before mandating more meaningful studies for specific end-points and must provide an elaborate and detailed justification for using the order authority in lieu of rules. The net result of these constraints is to substantially reduce the possibility of meaningful and effective testing for existing chemicals.

CICA Shields Many Chemicals from Review Indefinitely

In a departure from current law, CICA (like CSIA) requires EPA to use its limited resources not only to identify chemicals that are high priorities for assessment but also to designate low-priority chemicals. This designation need not be based on a full examination of a chemical's risks but only requires EPA to conclude that it is "unlikely" to present an unreasonable risk, a concept that takes into account the chemical's economic benefits as well as evidence of adverse effects on public health. Yet a low priority designation puts a chemical beyond the scope of further review by EPA or any state government, potentially forever. The EPA can revisit the designation only based on "new information," but since neither EPA nor states could require testing of a low priority chemical, it is unclear where that new information would come from; manufacturers would surely have no incentive to develop it. With the many obstacles CICA creates to assessing, restricting or requiring testing on chemicals that do or may pose real health or environmental concerns, this disproportionate attention to low-priority chemicals suggests that CICA is more about insulating chemicals from government scrutiny than assuring that chemicals of concern receive the attention that public health demands.

CICA Rolls Back State Health Protections

CICA imposes unprecedented restrictions on state chemical programs. Under the bill, states are blocked from: collecting information or requiring testing on any chemical for which EPA has made a safety determination; imposing any requirement on a new chemical that has completed pre-manufacture review; restricting or even assessing a chemical designated low-priority; and limiting uses of a chemical that EPA has in any way regulated in the past. The bill even pre-empts state actions that were taken prior to the passage of the Act. There are no explicit exemptions for action under state laws to protect air, water or soil or for warning and labeling programs like well-established Proposition 65 requirements in California. And in contrast to existing law, states have no ability to ask EPA for waivers of preemption, even where their programs meet compelling local needs. The overall effect is a sweeping rollback of existing state oversight and regulation of toxic chemicals as well as of authority for future state action, in exchange for a federal system that is significantly weaker than the current broken law -- a law under which EPA is unlikely to take action on even the most well-studied and toxic substances.

CICA Hides more Safety Information from the Public

The current law has been faulted for requiring EPA to withhold too much information from the public based on dubious claims of business confidentiality. CICA, remarkably, makes the situation even worse. It bars EPA from disclosing broad categories of information, such as the identities and levels of chemicals in mixtures, whether or not they meet the legal requirements for protection. And it "grandfathers" all the information claimed confidential during the 35 years of implementing the current law, with little or no ability by EPA to require industry to document the continued need for confidentiality protection.

Conclusion: Congress Must Go Back to the Drawing Board

These are only some of the many problems with the Chemicals in Commerce Act. Overall, the legislation would result in a major reduction of government oversight of chemical safety in the United States and would undermine protection of public health and environmental quality. The Energy and Commerce Committee should start over and craft a new and credible reform proposal.

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