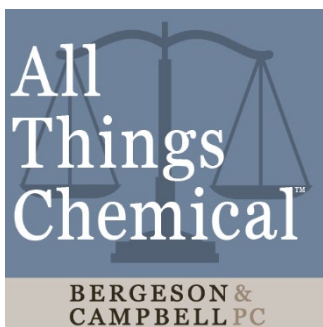




Episode Title: 2026 Forecast: TSCA Reform Developments -- A Conversation with Richard E. Engler, Ph.D. and Ryan N. Schmit

Episode Number: 20260205

Publication Date: February 5, 2026

All Things Chemical® is a podcast produced by Bergeson & Campbell, P.C., a Washington, D.C., law firm focusing on chemical law, business, and litigation matters.

This podcast transcript has been lightly edited for accuracy. It is an approximation of the podcast audio, and the audio recording remains the definitive record.

Let us know about any topics you would like to hear about in future episodes at podcast@lawbc.com.

A full recording of the podcast is available at <https://www.lawbc.com/2026-forecast-tsca-reform-developments-a-conversation-with-richard-e-engler-ph-d-and-ryan-n-schmit/>.

Lynn L. Bergeson (LLB): Hello and welcome to *All Things Chemical*, a podcast produced by Bergeson & Campbell (B&C®), a Washington, D.C., law firm focusing on chemical law, business, and litigation matters. I am Lynn Bergeson.

This week, I had the distinct pleasure of speaking with Dr. Rich Engler, Director of Chemistry for B&C and The Acta Group (Acta®), our consulting affiliate, and Ryan Schmit, Of Counsel with B&C and Senior Regulatory Consultant with Acta, about the recent release of the House Energy and Commerce Subcommittee on Environment's discussion draft of suggested amendments to the Toxic Substances Control Act (TSCA). Unsurprisingly, this document has inspired spirited debate over the questions "Should TSCA be amended?" and "If so, how?" The subcommittee also convened a hearing on January 22 seeking stakeholder comment on the discussion draft and other topics relating to Lautenberg's [the Frank R. Lautenberg Chemical Safety Act] implementation.

As listeners know, I suspect well by now, Rich Engler has been an advocate for change of EPA's [U.S. Environmental Protection Agency] Interpretation of TSCA Section 5 new chemical provisions for years. Rich discusses the subcommittee's attempt to fix these problems and other topics as well. Joining Rich is Ryan Schmit, Of Counsel and former EPA TSCA attorney, who was detailed to the House of Representatives when Lautenberg was under consideration. Both of our guests offer unique insights into the broader topic of TSCA reform. We discuss a discussion draft, the wisdom of TSCA reform, stakeholder response, and what the future may hold for this important topic. Now, here's my conversation with Dr. Rich Engler and Ryan Schmit.

Gentlemen, thank you for joining me. The circulation a week or so ago of the House Energy and Commerce Subcommittee on the Environment's discussion draft was then and is now big news. At least I think it's big news here in TSCA World.

Richard E. Engler (REE): It's very exciting.

LLB: Maybe just to get things started on this very, very important topic, you can each give me your initial take on the discussion draft. Rich, you first.

REE: Yes. I was a bit surprised by some of the changes we saw in Section 4. I'm not sure what -- we've been kicking this around, like, what problem is that trying to solve? My initial read of that is it seems to give EPA *more* authority, not less. So where was that coming from? Or if it was looking to limit EPA's authority, what was the purpose? I don't really understand that. I was a bit surprised that there's really no hard end to the 90-day review period. One of the things that industry has been looking for is, "Look, EPA, the statute says 90 days plus an additional 90. But when you get to the end of that, something has to happen." What we saw here was the Administrator has to explain why, and it's non-delegatable. The Administrator, in this case *himself*, would have to write a thing saying, "This is why it's not done." That's not really a hard end. EPA still has to review; it still has to do the job. To me, those are the two biggest surprises, the tinkering in Section 4 and that lack of the end of a shot clock.

LLB: -- which has been the subject of considerable discussion over the last umpteen years.

REE: Absolutely.

LLB: Ryan, what say you?

Ryan N. Schmit (RNS): Yes, I agree with Rich. I was also a bit surprised, maybe for different reasons, but mainly on the scope and extent of the changes that we saw in the discussion draft. I mean, I know that we've heard for a number of years now the desire for some minor tweaks around the edges for TSCA, and that has always been characterized, at least as I've heard, as changes that would be targeted and measured, and so I was really -- I was not expecting the bill text that was released to be 37 pages long, touching all of the major sections of the law.

And it's not 37 pages of TSCA; it's 37 pages of *amendatory* text to TSCA. From a substantive standpoint, I think Rich mentioned many of the changes are aligned with a lot of the concerns that were raised by industry stakeholders over the years, but in my mind, there were three areas that kind of stood out. There were changes that were just not on my radar, including those Section 4 changes that Rich mentioned. There were some issues that were notably missing, things that were not addressed that I've always felt were worth doing, and then changes that, at least in my view, probably go a bit too far to withstand some of the bipartisan scrutiny that is sure to come.

LLB: Yes, for what it's worth, I share all of your views. It was a bit of a surprise to me -- 37 pages is not necessarily targeted, which is a term that's been used over the last year or so as we look at the expiration of the fees provision in September of this year. But it's a decent start, and we're going to talk a little bit more about it. I suspect many of our listeners are very, very sophisticated, but for those of you who do not do TSCA 24-7, as we do here in TSCA Land, you may not appreciate the inside-the-Beltway drama of TSCA legislative reform that has been building for a while.

Rich, maybe can you summarize the run-up to this moment in time? You have been working with Congress for two years now, easily, to talk about some of the glitches, some of things that we wish EPA had done differently, and some of the inherent ambiguities in the law. But let's give our listeners your insights and then on to you, Ryan.

REE: The reason this discussion is happening is because of the fee expiration. The fees expire at the end of September of this year, and so the thinking was Congress has to act anyway. You need a reason for Congress to act. Congress has a lot to do, so if there's not a compelling reason, Congress is not going to mess with the law. But there is this fee expiration, so it was seen -- certainly by our clients -- as an opportunity to go in and, as Ryan said, make some targeted changes. We're not trying to rewrite the whole thing. We're trying to make some tweaks or get Congress to weigh in on some interpretation questions.

Most of the work that we've done has been related to new chemicals. I think, certainly among industry, there is a view that new chemicals have been especially problematic since 2016, that there's been quite a departure from what we thought Congress intended. And certainly some of the discussion that we've heard around how was Lautenberg supposed to change new chemicals. The biggest concern about new chemicals in 2015 and the run-up to 2016 was, was EPA reviewing all cases? Certainly, when I was at EPA, we reviewed them all. The statute said EPA must review them all, fine. Keep doing what you're doing; make sure you review all the cases. But the big change was write down the answer, because before the reports were all generated, but it wasn't necessarily summarized in a nice tidy work product. So now produce a work product and publish that work product, whether it's an order or a not likely finding. So great, keep doing what you're doing; write down the answer.

That's not what happened. As we've discussed extensively, EPA has very much moved the bar on when they view it's necessary to issue a restriction, whether it's a consent order or a significant new use rule (SNUR), or both. And we've seen that, certainly our clients have felt that in the marketplace, that those restrictions have very much undermined their ability to commercialize their new products, especially new, more sustainable products. It's been a problem, and so that's what we've been talking about for a couple of years. Long review times, EPA has been -- 90 days is meaningless anymore. As you know, when clients come in and ask us how long, we're like, "On average, EPA is taking a year to review a PMN [premanufacture notification]."

LLB: -- or so.

REE: Yes, or more. LVEs [low-volume exemption], it's not 30 days, the average in 2015 was *down* to 163 days. You need to -- but it's also very unpredictable, and that's a problem for a client -- so there's been a drive to try to get to clarify what Section 5 means and to make both the outcome more predictable and make the timeline more predictable. Those are two, a couple of the big drivers.

And then on existing chemicals, there's been, of course, a huge disagreement over the scope. I mean, you look at the risk evaluation rule, 2017 to 2024 to what was proposed last year, there's been a lot of change in what EPA includes within the scope of a risk evaluation and how EPA conducts its risk evaluation. So those were the two biggest issues, in my view, that were driving -- and it's not a -- I certainly view the changes that we've been seeking as targeted, although if you break it out into the formal text, the way this is written, it may end up being a lot of pages, but we're looking for relatively small text inserts in relatively few places to help clarify Congress' intent and put some limits around --

LLB: -- or just to hasten the review.

REE: Make it more efficient, make it more predictive.

LLB: Right, exactly. Ryan, what are your thoughts?

RNS: I was engaged in the TSCA reform efforts from ten years ago, and so that journey certainly remains a highlight of my career. But if you'll --

LLB: Yes, I was going to ask you, Ryan, if this was like a triggering event, but then the really intense drama when Lautenberg was finally enacted, very bipartisan, a good deal of consensus, which is kind of the opposite of what's going on now, so the reflections on ten years ago offer favorable memories, right?

REE: Important perspective.

LLB: Right.

RNS: Yes, it's certainly nostalgic. At that time, it felt like we were all working together on something big, something very important. And as you mentioned, Lynn, it feels different now, in terms of -- in 2016, or the years prior to that, there was this overwhelming recognition that the 1976 law was broken and a consensus that Congress needed to do something about it. There were certainly differences of opinion about what needed to be done, how to do it, but there was that unity, that common goal of trying to establish a strong federal framework for chemical regulation. At least now, this time around, I'm not getting that vibe, not yet, at least. The discussion draft struck me as mostly partisan. The hearing from a few weeks ago was also mostly partisan, and the conversation just hasn't gelled around a common purpose or problem that needs solving.

LLB: In that regard, maybe you gentlemen can tag team a little bit to help our listeners who haven't yet had an opportunity to read this 37-page document or contextualize it within the context of Lautenberg amendments and EPA's implementation of them. What are some of the key amendments in [Sections] 4, 5, and the other provisions that have been addressed? 21? I mean, there are a lot of provisions that are impacted here. It's definitely not just new chemicals and existing chemicals.

REE: Yes, in [Section] 4, the change is largely around not just insufficient information, but EPA does not have sufficient information that meets the scientific standard. To me, that seems to make it easier for EPA to order testing, because EPA not only -- as it's currently written, EPA has to have insufficient information to issue an order. Now, if the information is not of sufficient quality, EPA can order testing for that less than perfect quality, so it could be read to say, "You might have information, but if it's not good enough, you can go ahead and order that again."

LLB: Right, which is giving EPA a great deal more discretion.

REE: That's the way I read it. Again, I don't know where that came from. I don't know what the issue is that they're trying to solve. But going back to Ryan's point, there's not necessarily bipartisan consensus that there need to be all these fixes. One of the -- what's missing from this discussion draft, for me, is the context for the changes, like why are we -- Some of them, it's sort of obvious. The replacement parts, I understand. That's a -- complex replacement parts are a big deal, and so if EPA is going to issue restrictions on substances that are used in complex replacement parts, it can be extraordinarily economically disruptive and not necessarily providing much environmental or health benefit, so there is a higher bar, I think now, for EPA to issue phaseout in complex replacement parts.

Certainly, we've heard about that with the PIP [phenol, isopropylated phosphate (3:1)] rule -- PIP and deca [decabromodiphenyl ether (decaBDE)] rules both -- and the replacement parts, how that affected articles, and to a lesser extent, it's come up in some of the [Section] 6(a) rules. Those drivers are obvious, the Section 4 less so. The Section 5 I understand. Well, there's still -- both [Sections] 5 and 6 -- there's some question about what does "reasonably foreseen" mean. This discussion draft doesn't get into that. Instead, it tacks on the term "more likely than not."

LLB: Right, which we're going to get to.

REE: Which is, yes, we can talk more about that, but is that the best way to get at the meaning -- to have Congress -- In my view, this is an opportunity for Congress to weigh in on "What does "reasonably foreseen" mean?" I see this as an attempt to say there has to be a basis for Congress to foresee it. But then there was the question -- this came up in the hearing -- about how quantitative does that have to be? That's certainly a question that would come up in any implementation questions. So the question about reasonably foreseen, there's a fix. Is it the right fix? I don't know. One of the things that's in here that I *do* think is a good idea is the [Section] 6(a) risk evaluation is final agency action that can be challenged.

LLB: Yes, I think many stakeholders were delighted to see that.

REE: Yes, and I think it's actually better, regardless of where you sit with your perspective, because if EPA is going to issue a risk management rule, you need to make sure they've got the science right. You may disagree on the science, but the way it is now with the current statute and the current rule, the 2024 rule, that if you think EPA is being not sufficiently protective in a risk evaluation, you have to wait until the final rule is published --

LLB: -- which is years.

REE: -- which you have wait the additional year for the final rule to be published before you can sue, and so the concern that those protective measures are going to be delayed is -- if you disagree with the science right now and that the risk evaluation is too permissive, you're going to have to wait those extra years for the rulemaking and the extra years for the litigation. So isn't it better if we get the science right, and then we only have to go through the rulemaking? We don't have to argue about the science and the rulemaking, we only have to argue about the parameters of the rulemaking.

LLB: Right. Ryan, let me ask *you* about that, because you were detailed to the House when Lautenberg was being considered. What is the rejoinder to that argument? Because many people have expressed over the years concern with kind of putting the cart *after* the horse. Why are we engaging in final agency action litigation on the underlying risk assessment *after* EPA has implemented a final rule implementing measures to address those risks? It did strike me then, and it continues to strike me now, as being a little counterintuitive, but what was the thinking about that at the time?

RNS: Yes, that's a great question. My recollection is that there was an awful lot of emphasis on establishing a new TSCA process for existing chemicals that could actually get to the finish line. There was a concern about adding too many process steps for EPA that could be challenged at every step. So the term of art at that time was a *litigation hook*. There was a desire to try to minimize the litigation hooks. On risk evaluations, I think certainly part of the new established TSCA process for evaluating the risks associated with existing chemicals is going through that public process of publishing a scope document, taking

public comment, publishing a draft risk evaluation, taking public comment, getting independent peer review from the SACC [Science Advisory Committee on Chemicals] committee folks, and ultimately publishing a final risk evaluation. At least some of the thinking was that there were a lot of debates and opportunities to weigh in on the science aspects of TSCA risk evaluations before you ever would get to the risk management phase.

REE: Yes, but what if you go through all of that and it's still not right? I mean, there are cases where EPA's departed from SACC recommendations and has dismissed comments without a substantive response. If EPA does not do a credible job in their scientific review despite all these opportunities, and you seek to challenge that, right now, you have to wait for the rule. I totally understand we're trying to reduce the litigation hook, and that makes sense. I think from experience now -- and we'll see how the litigation plays out in the "First 5." There are a number of these challenges. What happens if the courts disagree with EPA science on one of those "First 5," and then EPA has to go and redo the risk evaluation, and therefore delay those risk management rules? That's, to me, the problem that I think this current construction represents. But we'll see what happens with the courts. In fact, the outcome of the cases that are pending -- the asbestos case, methylene chloride case, the other litigation that's going on --

LLB: -- yes, all five of them --

REE: -- that may change the political environment. If those come out in a way that the unions or the NGOs [non-governmental organization] disagree with, they may want to come to the table now and put some guardrails on EPA's ability, or *their* ability to make sure that EPA is getting the job done correctly.

LLB: In addition to the point that you raise, Rich, and Ryan's very astute rejoinder to it, there is also a provision relating to the TSCA Inventory: nomenclature, citizen petitions, and of course the TSCA fee collection. Any quick thoughts on any of those provisions?

REE: I think Section 21 -- I think we've already seen the potential there with some of the recent Section 21 petitions, in particular, Food & Water Watch on the fluoride case where the judge ordered EPA to issue a rule. The outcome of the case was EPA must issue a [Section] 6(a) rule. But there is no underlying risk evaluation on which to base that rule. So what is EPA's --

LLB: There's a risk evaluation, but not one conducted under TSCA Section 6.

REE: Yes, so if EPA is supposed to regulate to the extent necessary for the risk identified in the risk evaluation, then the rule would have to be very narrowly constructed to only respond to what the court ordered. But that very much departs from the whole chemical, single determination approach, which is a lot of people's interpretation of Section 6. The key change -- and I think it's a sensible one -- is if you prevail on a -- you may not petition for a [Section] 6(a) rule. You would petition to have something added as prioritization. So you put something in the beginning of the queue. You don't skip prioritization, risk evaluation, and go straight to rulemaking. That does protract the protective measures, but it works better with the construction of Section 6.

LLB: It seems to align more closely with what Congress may have intended in Lautenberg. The end run around Section 6 was disturbing to a lot of people, and probably somewhat -- Ryan -- burdensome for EPA? It was a way of interjecting an element of uncertainty within the

entire regime of Lautenberg and what Congress intended, but did EPA have a view on that when you there?

RNS: There were certainly a number of Section 21 citizen petitions that came in that presented that very question. How could the agency agree to take action on a risk that a member of the public had identified without, as Rich described, doing the actual work to understand the hazards and exposures associated with that chemical, where the unreasonable risks are and how best to craft a Section 6(a) risk management rule to the extent necessary to address those risks? It was just a befuddling concept for many folks at the agency. Ultimately, we denied -- when I was there -- many of the Section 21 petitions that came in for [Section] 6(a) rules for that reason. But to your point, Lynn, also, there's a question of managing the agency's workload. Years of process precede [Section] 6(a) rules under the normal course of order for prioritization and risk evaluation, and it's a very carefully planned sequence of events. As currently drafted, Section 21 gives the public the opportunity to swoop in and disrupt the agency's planning for how it will spend its resources on tackling some of the concerns about existing chemicals.

LLB: I'm sure that can be very challenging from just a management perspective, like where do we get the money, and the time, and the resources to address these? And there has been an uptick in Section 21 petitions.

REE: Yes, seems like it.

LLB: We would remiss if we didn't at least touch upon the fee authority. The provision would allow EPA to seek fees. It wouldn't address the amount of fees that EPA is now assessing. I think there's been some conflation on that point. But what if nothing happens?

REE: I'm the non-lawyer on the call, but my read of the statute is that if nothing happens, the fee authority expires at the end of the fiscal year. So EPA could no longer collect TSCA fees on October 1 of this year.

LLB: But the world as we know it wouldn't end, right, Ryan? It just -- those fees would not be part of the budget.

RNS: Right, now, if the authority expires, then EPA's collection of fees would also necessarily stop, and so that means no collection of fees for new chemical reviews, or test orders, or existing chemical risk evaluations. The program would still be supported through congressional appropriations, but the appropriated dollars that go to EPA take into account EPA's current collection of fees, so the overall budget for the program would likely take a hit, at least initially.

LLB: Agree.

REE: Question about fees: One of the things that we kicked around -- actually, it was around the time that EPA issued the fee rule was, the statute says EPA can collect 25 percent. Is that 25 percent of the current costs? Is it 25 percent of the costs of how much EPA *thinks* it should cost, but isn't -- they aren't actually costing because EPA doesn't have the FTEs (full-time equivalent)? What is that 25 percent of? I think that was a question that we discussed internally. So that would be, if Congress is going to reauthorize fees, I think would be an important place to weigh in is "25 percent of this number," so it's much clearer to EPA which number that applies to.

LLB: One question a lot of people are asking is, why is new legislation needed? Why can't stakeholders, for example, wait for the courts -- Rich, you mentioned the litigation. All five final risk management rules are being litigated right now. Many of the key issues that seem to separate stakeholders are being litigated. Why not just wait for courts to rule?

RNS: Litigation takes time. The five risk management rules that you mentioned that are currently in litigation have been in litigation now for quite some time. Certainly any opinions -- any judicial opinions -- that are coming out of those cases could be extremely helpful in providing greater clarity, or they could be framed in more narrow ways that don't provide that elucidation on some of these key issues here. Of course, a key issue that comes out of one circuit and one litigation context can also, to the extent it's not satisfactory to a certain set of stakeholders, can also be relitigated in another.

LLB: Right.

REE: Yes, and in the new chemicals context, if you've got a product that's not yet commercial, our clients have been very reluctant to bring lawsuits. Lawsuits are --

LLB: -- costly.

REE: They're costly; the timeline is unpredictable.

LLB: As is the result.

REE: And the result is unpredictable. And so, I think companies are just reluctant to spend money on such an unlikely outcome. Section 5 just is less likely to be litigated. I mean, this is something that we've certainly been talking about for some time.

LLB: For literally years.

REE: Because we disagree with EPA's interpretation of TSCA Section 5, but how do we get at that? And there really hasn't been a lot of incentive to go to court.

LLB: Agree. Speaking of courts, we're all familiar with *Loper Bright*, the Supreme Court decision overturning the *Chevron* deference document. Do you gentlemen think it will significantly influence the outcome of the decisions that are pending before the courts? Because what is at issue in these litigations is EPA's interpretation of Lautenberg and how it should apply in the facts that are present in each of the cases before the courts. My own view is, yes, absolutely. And some even speculate that Republicans who offered this slate of legislative amendments to TSCA are seeking an opportunity to be more emphatic about what they intend TSCA to mean, which plays into, I think, the whole *Loper Bright* end of *Chevron* discretion. I mean, it might ultimately fortify a more conservative reading of the statute, or at least a reading of the statute that is clearer or more defensively based on the legislative history and the provisions in the law. What is your sense of that, Ryan?

RNS: Yes, absolutely agree, and it's hard to imagine an area of federal regulation that *Loper Bright* won't impact. In the TSCA context, there's already this established record of inconsistent EPA views on interpreting and applying the statutory provisions in TSCA. I think, to your point, Lynn, I think that will certainly embolden litigants to challenge final agency decisions. It will encourage arguments that EPA's interpretation of the moment in TSCA is not the best interpretation and then push those courts to jump into the fray with

their own independent conclusions. I think we're absolutely likely to see more challenges, and that's frankly a trend that we're already observing.

REE: Yes, right, so it comes down to how much discretion does EPA have?

LLB: Right.

REE: How much flexibility is there? How much has Congress given EPA? Go look at the details and figure this out, so that's part of it. But there's also -- related to that are the specific interpretations. What is "extent necessary"? What is "reasonably foreseen"? What is "best available science"? I think *Loper Bright* -- this is a great opportunity for Congress to say, "The Supreme Court told us, Congress, to be more explicit. Let's do that, and let's make sure that we're giving EPA -- here's where you have discretion, and here's where you don't. Make sure you're doing these things. Make sure you're doing these things in these ways." To me, that is another -- not only do we have the expiring fee authority, but we have this Supreme Court telling Congress, "Be clearer to the agencies" -- various agencies -- "when you write these statutes about what you mean." This is an opportunity to do so.

LLB: I tend to agree. I know a lot of people question that. Actually, some people have speculated that, "Golly, Lautenberg is only ten years old." It seems that most would think that in a ten-year period, there might be opportunities to tweak, fine-tune, revisit, get it right. That's been the history of legislation involving environmental regulations and environmental acts -- the Clean Air Act, the Clean Water Act, RCRA (the Resource Conservation and Recovery Act), the Endangered Species Act -- all have been the subject of multiple legislative iterations within a ten-year period of time.

To my mind, a ten-year period of times is not necessarily too quick to revisit the underpinnings of a law that is very technical, very sophisticated, and would benefit from clarification, but I know there is a strong view, certainly in the NGO community, that "Leave it alone, let these play out, let the courts do their job, and there's no need for legislation right now." But that will continue to be, I'm sure, a topic of hot discussion throughout this process.

REE: I think it goes back to the question of, is there agreement that there are things that are broken that need to be fixed? And I'm not sure that there is. That's part of the discussion, I think, part of bipartisan discussion. There was -- as Ryan mentioned -- prior to 2016, there was bipartisan agreement that there were things that needed to be fixed. What needed to be fixed and what were the best ways to fix them? At this point, I think the question is: Are those fixes doing what they were supposed to do? And those questions, I think, are still pending because we have these Section 6 litigations. We need to see the outcome of that, and that's why I think some of those court cases might change the political environment.

LLB: No, I agree.

REE: But in Section 5, we heard in the hearing, and in the hearing last year, that, "Oh no. Section 5 is working right. EPA was supposed to regulate all these things, and that was what Congress intended." There's clearly disagreement over people's recollection of what happened in 2014, 2015 in the run-up, but I also -- I personally disagree with EPA's approach because it leads to, I think, an unintended outcome, that things at the low end of the hazard scale -- I mean, I understand that people are like, "We really don't want the next PFAS (polyfluoroalkyl substance)." Okay, I agree. We don't want any problematic PFAS going to market where it's not thoroughly tested and thoroughly restricted. But what about

the other end of the scale, where you have things that barely present any hazard at all, are much greener, much more sustainable? And they're being treated the same way. They're subject to the same recordkeeping, the same -- all the things that are triggered when an order and a SNUR are issued. To me, that's, I think, the unintended consequence of the way Section 5 is being interpreted by EPA. As a green chemistry proponent, it pains me to see very green chemicals, objectively green chemicals being subjected to the same level of market disincentive as things that are highly problematic.

LLB: Or just even having their delayed commercialization to the point where people are taking them, commercializing them offshore and abandoning the process here in the United States, which is really, really regrettable. Ryan, what are your thoughts?

RNS: I certainly agree that ten years seems to be more than enough time to understand what's been working, what hasn't been working with TSCA. In the existing chemicals context, for example, we've seen chemicals go through the entirety of that new contemplated process all the way from prioritization to risk management now. Certainly, we've borne witness to many years of implementation challenges for the new chemicals program as well. I think there's enough to go off of in terms of finding the right fixes, so to speak.

The expiration of the fees authority provides, I think, a convenient vehicle to discuss the broader changes, and certainly Congress can reauthorize the fees without making a single other change, but that doesn't appear to be something that, for example, the industry stakeholders are supportive of. They are supportive of TSCA fees; they were supportive of fees in 2016 and I think continue to be, but I think we've heard that they want some accountability, some improved results for those fees that they're contributing.

On the other side, I think the public health community is definitely more skeptical. We've heard some NGOs posture that they'd rather let the fee authority expire than to fund the actions of the Trump EPA and rather than allowing the 2016 bipartisan TSCA amendments to be weakened in exchange for re-upping that fee authority. There's just a lot to work through yet to get the legislative process, I think, on the right track.

LLB: Let me burrow down into the weeds here a little bit, and for those of you who don't follow TSCA as much as we do, forgive this nerdiness, but I think, Rich, you've counted that the phrase "more likely than not" is used some 22 times in the discussion draft. Let me give you an example. The term "conditions of use" (COU) would be revised to be defined as, quote, "the circumstances under which a chemical substance is intended or known to be or reasonably foreseen as more likely than not to be manufactured, processed, distributed in commerce, used, or disposed of." To my eye, this is intended to limit what is "reasonably foreseen" to a new standard of "more likely than not." Do you agree with that? Is it inherently ambiguous or as unclear as what is reasonably foreseen? Does it help the situation, or is it just adding more confusion to the mix?

REE: I agree with the thinking that there needs to be some limit on what is reasonably foreseen, right?

LLB: Give our listeners an example of why that is a statement that we believe to be crystal clear.

REE: The counterexample is, certainly in New Chemical World, if EPA finds any hazard other than low hazard for health and environment, then EPA concludes that that substance cannot be "not likely to present unreasonable risk." It *may* present unreasonable risk, so the line between proceeding to market without a restriction is "not likely to present unreasonable

risk.” Above that line is “may present unreasonable risk.” What we hear from EPA, when EPA identifies one of these hazards is, “Somebody *might* do something” and “Somebody *might* exceed this” and “Somebody *might* do the thing that could be problematic,” and EPA doesn’t know because they haven’t evaluated it yet.

I understand that perspective. I don’t think that matches with “not likely.” They say -- or effectively EPA needs a high degree of certainty to let a chemical go to market without a restriction. But the difference between that “high degree of certainty to avoid may present” does not align with “not likely to present.” How do we make that line more clear? When I testified last year, I suggested the change “may present unreasonable risk” to “more likely than not to present unreasonable risk.” Here, that term is embedded in the definition -- or it’s really adjacent to the definition of “reasonably foreseen.” So I think it’s a different way of getting at that, trying to put some limits on what’s reasonably foreseeable, and I do think that’s needed. I’m not sure that it needs to appear as many times as it does, because it seems to appear every time unreasonable risk shows up.

LLB: Right. Pretty reflexively.

REE: And so I understand that perspective, I think, and we certainly heard this in the hearing, I think that opened up the changes to some significant criticism, that there’s a significant weakening of the standard here. Okay, maybe this isn’t the correct way to get at the problem, but then it certainly highlights the problem as what is within the --

LLB: It provides a basis for further discussion.

REE: Exactly. And “reasonably foreseen” appears in [Sections] 5 and 6. So it’s important that we get that right because it is so -- it underlies so much of what’s in Lautenberg.

LLB: Right. I think we’ve discussed over the years that the term “reasonably foreseen” seems to have been kind of sometimes written out --

REE: What is reasonable?

LLB: -- of the equation. It’s not any darn thing anyone thinks, untethered from reality or testing the bounds of credulity. But my sense is that it was intended to kind of circumvent that area a little more precisely. Ryan, what are your thoughts?

RNS: I agree with both of you. I mean, the application of this phrase, “more likely than not,” occurs in two different contexts. I think it’s important to try to distinguish those. One’s in the context of reasonably foreseen and the conditions of use definition. Like you mentioned, the other’s in reference to unreasonable risk, and they’re different. I mean one seems to suggest in the context of COUs that EPA should be more limited in identifying a future circumstance as a COU unless it’s demonstrated to be more likely than not to occur. The impact of that would be to limit the COUs that make it into an assessment or a risk evaluation. I completely agree with Rich and you, Lynn, that there’s just been this strong feeling that EPA is reading “reasonably foreseen” too broadly, that it’s being too speculative, and that the scope of assessments should be tied more closely to real-world exposure scenarios.

But I’m not sure how EPA would operationalize this language exactly. I mean, when EPA talks about it --

LLB: That's challenging.

RNS: Yes, when the agency has talked about uncertainties, for example, in its assessments, there's no specific quantification of those uncertainties. Uncertainty is discussed in terms of confidence levels -- like high, medium, and low -- and I wonder if "more likely than not," would a medium confidence suggest that circumstance will occur or high confidence?

LLB: I'm sure there's going to be an AI (artificial intelligence) app for this at some point soon. Let artificial intelligence determine whether it's reasonably likely or not.

RNS: Yes, there are so many wonderful applications of AI, but in the vein of trying to craft some legislative solutions that reduce ambiguity for the agency and reduce ambiguity for stakeholders, I'm not sure whether these changes move the program forward in that regard.

LLB: In that regard -- and I know we're fast approaching running out of time here -- just with regard to Sections 5 and 6, do you think these revisions fix what we believe to be the fundamental problems with these sections, just very generally?

REE: Yes, I think generally they're trying to limit what's reasonably foreseen, trying to get EPA to be more predictable in their timing. They're similar to but not what the Coalition for Chemical Innovation suggested in some text that we thought would be more targeted to get at some of the key issues. Would this fix the problem? I don't know. Is this the best way to fix the problem? I think we might disagree.

LLB: Ryan?

RNS: I agree with Rich. I mean, certainly if the problem, for example, in the new chemicals program is the pace of new chemical reviews, will the discussion draft make new chemical reviews go faster? I think it will. Will the draft as written find some bipartisan support and become law? I think that's less clear, but certainly the discussion draft seems to try to focus on some of those root problems, like the scope of the assessment that Rich has discussed here, and creative ways to try to better distinguish between the "not likely" and the "may present" determinations and find ways for EPA to review actual intended uses, rather than the theoretical and speculative ones.

LLB: It is entitled a discussion draft. I think the hope -- and this may be naive on my part -- the hope is that it will invite discussion, thoughtful consideration so there *might* be a coalescing around core problems and key fixes. The problem is, as I see it, it's now early February. The window for legislative action is probably shorter this year because it's an election year. People a lot smarter on legislative activity tell me that if things don't happen by May, the likelihood of anything sticking later in the year diminishes quickly. How do you see -- what is your best guess, both of you gentlemen, as to next steps and what's likely to happen before, say, the summer of 2026 with regard to TSCA reform?

REE: We're going to have a lot of meetings and a lot of discussions.

LLB: Right, a whole lot of work.

REE: Right, can we use this as a starting point for what's broken -- or what various stakeholders think are broken, right? Because not all stakeholders are going to agree, even within industry, I think not all the stakeholders are going to agree. What's broken, and are these changes going to address what's broken?

RNS: Certainly a lot of meetings. The discussion draft -- as you mentioned, Lynn -- is just a discussion starting point here, but for actual -- a bill to become a law, there has to be a bill that's introduced. There probably needs to be more legislative hearings or roundtable discussions with stakeholders on what that draft looks like. There'd have to be subcommittee markups and votes, and full committee markups and votes. And, to the extent it can pass the House, it also needs to be considered in the Senate. Just thinking back to 2016, the Senate introduced its own bill and went through their own process before the House and Senate came together to resolve their differences. And it was just a very long and complicated process. My thought here is that -- and this is probably not what industry stakeholders want to hear necessarily -- but I think if folks want to get serious about making something happen legislatively within or close to the timeframes that we're talking about here, I think it will require a significant narrowing of the issues on the table, a "TSCA Lite."

LLB: Yes, I think you're right, because it was difficult ten years ago, and that's when there was broad bipartisan agreement that "There are some serious problems here, and we have to fix them."

REE: Yes, but there were a lot more things that needed to be fixed. I mean, if you look at the changes between old TSCA and Lautenberg, there's a lot of more changed. And here, yes, it touches a whole bunch of sections, but it's making relatively narrow changes in --

LLB: Right, I would agree.

REE: -- five, ten sections instead of all the major ones.

LLB: I think that's all the time we have for today. For our listeners, we have a lot of information up on our website. We did a memorandum on January 17 where everything can be found with regard to the discussion draft. We have further memos summarizing the hearing that occurred on January 22, which was a spirited discussion of what's good and what's not so good about the discussion draft. For those of you who are so motivated, take a look. Work with your trade associations, work with your legislative committees, and see if you can make the world a better place by fixing some of these issues.

Rich, Ryan, I want to thank you for joining me today. Great discussion on TSCA, and more to follow, I'm sure.

REE: I'm sure.

RNS: Thanks for having us.

LLB: My thanks again to Rich Engler and Ryan Schmit for speaking with me today about TSCA reform, whether to amend TSCA, what needs adjusting, and what is expected to happen going forward.

All Things Chemical is produced by Jackson Bierfeldt of Bierfeldt Audio LLC.

All materials in this podcast are provided solely for informational and entertainment purposes. The materials are not intended to constitute legal advice or the provision of legal services. All legal questions should be answered directly by a licensed attorney practicing in the applicable area of law.