

Client Alert

June 2016

TSCA Reform Bill Broadens EPA's Authority

On June 7, 2016, Congress passed the Frank R. Lautenberg Chemical Safety for the 21st Century Act (the "Lautenberg Act") and sent the bill to President Obama for signature. If the bill is signed by the president, as expected, businesses that manufacture, process, distribute, use or dispose of certain chemical substances will be subject to a host of new registration and chemical safety requirements.

The new law significantly overhauls the Toxic Substances Control Act ("TSCA") for the first time in that act's nearly 40-year history by bolstering the Environmental Protection Agency's ("EPA") authority to regulate chemical substances and setting the stage for more aggressive enforcement and oversight of chemical safety. The Lautenberg Act represents the most significant change in statutory environmental law since the turn of the century and, as a result, EPA will promulgate a host of new chemical restrictions on a statutorily mandated schedule. The law will also expand EPA's role in reviewing, testing and approving new chemical substances and new uses for existing substances.

Since its passage in 1976, TSCA has been criticized by industry for failing to provide uniform national regulation of chemical substances. Conversely, environmental groups have expressed disappointment that the original law failed to provide EPA with broader authority over chemical substance manufacturing, importation, processing, distribution and use. Industry's push for a TSCA overhaul has recently been given further urgency due to increasing state legislation seeking to fill the void created by the lack of uniform national chemical substance regulation under the existing TSCA provisions. That trend threatened to create a patchwork of competing standards and requirements that would significantly burden industry in the United States.

The campaign to modernize TSCA began in earnest last year, when the House and Senate each passed competing reform bills. Extensive negotiations were undertaken to reconcile the considerable differences between the more sweeping changes in the Senate bill and the narrower House bill. Environmental stakeholders pushed to strengthen EPA's oversight and authority under TSCA, while industry stakeholders sought to ensure nationally uniform standards for chemical regulation.

The final bill approved by Congress retains many of the Senate's reforms and imposes several substantial changes to the architecture of TSCA. These changes will broaden EPA's authority to review, test, approve and restrict chemical substances and will require EPA to take action on certain high-priority substances within a short time frame. Significant new provisions include:

- EPA will be required to make an affirmative determination for all new chemical substances or significant new uses of existing substances. To do so, EPA will consider whether the substance is, or is not, likely to meet the safety standard or whether more information is necessary. Manufacturing may commence only once EPA finds that the chemical substance is likely to meet the safety standard. Under the previous version of TSCA, a manufacturer was only required to give notice of the new substance or significant new use but could proceed if EPA failed to act within the window provided.
- The new law no longer requires EPA to select the "least burdensome requirements" possible when imposing restrictions on chemical substances. This requirement had been one of the most

significant barriers to more aggressive EPA regulation under TSCA since the Fifth Circuit struck down the agency's ban on asbestos in the landmark case *Corrosion Proof Fittings v. EPA* in 1991. EPA will be authorized to impose whatever requirements are necessary to eliminate a substance's risk to health or the environment, including banning the substance.

- The law will limit consideration of economic cost and burden on industry by bifurcating the process for restricting chemical substances into two distinct steps: a "risk evaluation" phase and a "standard-setting" phase.
 - *Risk Evaluation Phase.* If EPA finds that a substance presents an "unreasonable risk of injury," it is required to set any necessary standards restricting that substance. At this stage EPA is prohibited from considering "costs or other nonrisk factors" and must account for special risks to potentially exposed or susceptible subpopulations.
 - *Standard-Setting Phase.* EPA will take cost into consideration in setting appropriate standards for the chemical but must still impose sufficient restrictions to eliminate any "unreasonable risk."
- EPA is mandated to designate chemicals as either high or low priority and conduct risk evaluations for all high-priority substances. In designating the priority of chemical substances, EPA will consider the hazard and exposure potential with a special emphasis on substances listed in EPA's 2014 TSCA Work Plan. Within 180 days, EPA must begin risk evaluations on at least 10 chemical substances. Within three and a half years, EPA must begin risk evaluations for at least 20 high-priority substances and must designate at least 20 substances as low priority.
- Certain chemicals that EPA has identified as persistent, bioaccumulative and toxic must undergo an expedited review process. Within three years EPA must propose rules prohibiting or otherwise restricting certain of these substances, in order to "reduce exposure to the substance to the extent practicable."
- EPA's ability to require health and safety testing of chemicals is expanded, allowing the agency to issue orders for testing where the information is necessary to prioritize chemicals or conduct chemical reviews. Unlike with current law, EPA will no longer have to make a showing of potential risk to initiate or require testing.
- Claims to protect confidential business information for chemical substances will require businesses to provide greater substantiation and will expire after 10 years unless renewed.
- The issue of preemption of state chemical regulations was one of the major sticking points in negotiations between the House and Senate. The compromise made in Congress will preempt any state laws that: (1) restrict chemicals for which EPA has performed a risk evaluation and adopted restrictions; (2) require notification of significant new uses specified by EPA; (3) require testing already required by EPA; or (4) otherwise conflict with EPA actions pursuant to the statute. States also may not restrict substances that EPA has determined, pursuant to a risk evaluation, do not present an unreasonable risk.
 - In addition, states will be prevented from imposing new restrictions on high-priority chemicals during EPA risk evaluations. However, when the risk evaluation is completed, states may "fill the gap" by imposing restrictions on chemicals that are deemed by EPA to present an unreasonable risk while EPA considers federal restrictions for the substance. Once EPA finalizes its own restrictions for a chemical substance, any state law will once again be preempted.

- The preemption provisions are largely forward-looking and do not apply to state regulations enacted before April 22, 2016, nor will the preemption provisions restrict future actions taken under state laws passed before August 31, 2003, such as California's Proposition 65.
- The Lautenberg Act does not restrict states from requiring additional reporting and monitoring related to any regulated chemical substances.

When signed by President Obama, as is expected, the Lautenberg Act will provide the framework for greater national consistency in the regulation of chemical substances by providing EPA with broad new power to regulate chemical safety. But along with that greater consistency, the new law authorizes EPA to take far-reaching action to collect information about chemical substances and to restrict, and even ban, the use of existing chemicals and the introduction of new chemical substances in the United States. Industry will need to monitor EPA's implementation of the new law closely in the coming years.

Contacts

Prof. Lucas Bergkamp
lbergkamp@hunton.com

J. Tom Boer
jtboer@hunton.com

David Craig Landin
dlandin@hunton.com

Daniel E. Uyesato
duyesato@hunton.com

William L. Wehrum
wwehrum@hunton.com

Samuel L. Brown
slbrown@hunton.com

© 2016 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.
