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NEWSLETTER

Regulatory Accountability Act Would Impact AgChem Community and Others

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In response to strong pressure from portions of the business community, a bipartisan group of legislators has introduced the "Regulatory Accountability Act of 2011." (S. 1606/H.R. 3010). Among other things, the Act would make it more difficult for agencies to escape rulemaking requirements by issuing "guidance documents" rather than rules, make agency compliance with the Data Quality Act judicially enforceable by private parties, provide for evidentiary hearings on major rulemaking proposals, and limit deference given to agencies by the courts when rules are challenged.

The legislation is expected to be subject to hearings and markup in the House later this year, and likely will be considered by the full House late in December or early next year. Senate committee attention is likely early in 2012, although action by the full Senate seems unlikely. Even so, the bill and focus on problems with the federal regulatory process signal changes that might be made if the make-up of the next Congress and/or President are more sympathetic to business concerns.

Many aspects of the legislation will be attractive to companies subject to burdensome rulemaking initiatives and frustrated by judicial deference to supposedly expert agencies. But the very scope of the Act means that it could have some unintended effects, which highly regulated entities like pesticide manufacturers and those subject to product stewardship regimes should be considering.

For example, the bill raises interesting issues for companies regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), because it could severely restrict the Environmental Protection Agency's (EPA's) authority to issue Advanced Pesticide Registration

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(PR) Notices, some of which are beneficial to industry. It also could complicate even further pesticide rulemaking, beyond the complexities arising from FIFRA's congressional review provisions.

PR Notices appear likely to fall within the bill's definition of "guidance" –"an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue." (Section 2(17)). But under Section 4 of the proposed legislation, which would amend the Administrative Procedure Act (APA), no agency guidance could be "relied upon by an agency as legal grounds for agency action." In addition, any guidance that would likely lead to major increases in costs or prices for consumers or individual industries or have significant adverse effects on "competition, employment, investment, productivity [or] innovation" would be subject to Office of Management and Budget (OMB) review.

Guidance documents also have been used by the EPA and Department of Energy (DOE) to promote product stewardship activities, as have rules. The Regulatory Accountability Act's amendments to the APA's "informal rulemaking" provision – the foundation of most government rulemaking activities – are likely to have even greater impacts, however, in general product stewardship arenas (such as DOE rulemakings on product efficiency and Department of Transportation (DOT) rulemakings on product transportation).

Sections 3 and 5 of the bill would amend the APA to require full evidentiary hearings, with cross-examination of agency experts, on all "high-impact rules," a term defined to mean a rule likely to impose an annual cost on the economy of $1 billion or more (Section 2(16)). This may sound like a high trigger, but is put in perspective by the fact that DOT's 2010 rulemaking proposal on lithium battery transportation was costed-out by reliable experts at $1.12 billion. Moreover, even less impactive rules would be required to undergo far more rigorous cost-benefit analysis than currently is required.

Finally, the Act would force major reconsideration of current doctrines of deference to agency expertise by reviewing courts. For example, Section 7 of the bill forbids deference if the agency did not comply with required procedures, or failed to comply with risk-benefit guidelines established by OMB's Office of Information and Regulatory Affairs (OIRA), or if the agency adopted an interim rule. It also would apply an "abuse of discretion" standard to some agency decisions. In addition, Section 8 would add to the APA a new definition of "substantial evidence:" "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of the record considered as a whole, taking into account whatever in the record fairly detracts from the weight of the evidence relied upon by the agency to support its decision."

Of course, any final legislation enacted in response to this initiative can be expected to be far different than this initial proposal. But the complexity of the administrative process – and the fact that it at times can work to the benefit of regulated entities – means that attention should be paid as the issues it raises are addressed by Congress.