

U.S. Congress May Simplify TSCA Regulation of Articles

June 2015

With similar House and Senate bills now referred out of committee for full floor votes, Congress is closer to amending key provisions of the Toxic Substances Control Act (TSCA) than at any other time in the statute's nearly 40-year history. These amendments could notably impact not just chemical manufacturers but also product manufacturers and importers, because both the House (H.R. 2576) and Senate (S. 697) bills, among other things, attempt to narrow EPA's authority to regulate products (referred to as "articles" under TSCA) containing chemicals on the TSCA inventory.

Overview

The core of TSCA has not been updated since it was first enacted in 1976. Its provisions are widely considered inadequate or otherwise inappropriate for protecting human health and the environment from current chemical hazards. After many years of unsuccessful attempts at reauthorization, it looks like there is a real chance that the law will be amended in 2015 or 2016. The similar House and Senate bills have been referred out of committees to the full House and Senate for vote, putting them only a few steps away from conference for harmonization. If passed by Congress, President Obama is expected to support the legislation.

This legislation has moved this year primarily because the pending bills have bipartisan support. This reflects the support of both the chemical industry and several major environmental interest groups. Product manufacturers also generally supported the reform.

Practice Areas

Environment & Product Regulation

In the past, companies that manufacture or import only articles containing TSCA-regulated chemicals sometimes have overlooked—to their detriment—that TSCA can and sometimes does apply to those articles, as well as to raw chemicals. Importantly, the pending bills would limit EPA’s authority under TSCA to regulate chemicals contained in articles.

Bill History

On April 28th, the Senate Environment and Public Works Committee passed a markup version of the “Frank R. Lautenberg Chemical Safety for the 21st Century Act” (S. 697), sponsored by Tom Udall (D-NM) and David Vitter (R-LA). In the House, the “TSCA Modernization Act of 2015” was passed by the House Energy and Commerce Committee on June 3rd.

The House leadership has committed to bring H.R. 2576 to the floor for a vote in late June. Although the Senate has not yet publically committed to a floor vote, it may happen before the August recess. If so, time would remain in 2015 for a conference committee to reconcile the two bills and final legislation to be sent to the President for signature.

The overall goal of these bills is to revise EPA’s authority to assess and regulate chemicals, making TSCA more similar to the framework of the European Commission’s *Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals* (REACH).

The differences between the House and Senate bills are sufficient to assure a contentious conference. And there are not only differences between the bills; in addition, interest groups are unhappy with the parallel provisions in both bills. For example, some states are seeking to further narrow the state preemption language, even though a robust grandfather clause is already included for existing state rules. Other groups want to modify the House bill to make it easier for EPA to require chemical safety assessments for unstudied chemicals.

Safety Assessments and Regulation

Both the Senate and House bills would require EPA to conduct safety assessments for all new and existing chemicals in commerce, including the tens of thousands of substances that were grandfathered onto the “TSCA Inventory” in 1978. To prioritize review of these chemicals, EPA must identify higher priority substances, based on their potential hazard and exposure under the intended conditions of use. A certain subset of the high priority chemicals must be drawn from EPA’s “TSCA Work Plan” chemicals list, with preference given to persistent and bioaccumulative toxic substances (PBTs). However, the House bill does not require “PBT” metals and metal compounds to be prioritized by EPA. The metals industry will seek to have the House version included in the final legislation.

If a substance fails to meet a safety standard by posing an unreasonable risk, EPA would impose corrective regulatory controls. The schedules for assessment and regulation are similar, but not identical, in the House and Senate bills. The agency would have the option to apply a range of controls, such as monitoring, labeling, restrictions on certain uses, or a total phase out. In deciding which restrictions to impose, EPA would

be required to consider the costs and benefits of the proposed restriction and the availability of substitute chemicals. But the bills also would eliminate language under Section 6 of TSCA that currently requires EPA to use the “least burdensome” means of regulation. In the past, that language has constrained EPA’s ability to impose restrictions.

Additionally, both of the proposed bills would provide EPA with broad authority to assess fees on industry to help EPA implement the law. Only the Senate bill, however, currently proposes to increase civil and criminal penalty ceilings (money and imprisonment) for TSCA violations.

New Approach to the Regulation of Articles

As noted above, TSCA also can be applied to articles containing chemicals, in addition to raw chemicals. Historical examples include PCB transformers and some asbestos-containing products.

More recently, articles produced with chemicals subject to some Significant New Use Rules (SNURs) under Section 5 of TSCA also have been regulated. For example, a final December 2014 rule covering certain dyes, phthalate plastic additives, and alkane lubricants did not include EPA’s typical article exemption for importers. EPA also proposed last January to amend one of its existing chemical SNUR rules to remove the rule’s exclusion for imported articles. Under both rules, importers of articles containing covered chemicals (such as carpets and non-stick pans) would be obligated to notify EPA at least 90 days prior to importation and give EPA the opportunity to consider regulation. With these rules, EPA is trying to level the playing field for domestic manufacturers as well as protect the American public from harmful chemicals in imported products.

Domestic manufacturers of articles also can be covered by current TSCA regulations as “processors” who incorporate regulated chemicals into products. For example, battery manufacturers have been subject to some SNURs due to their use of certain regulated nanocarbon chemicals.

The pending TSCA bills could significantly benefit article manufacturers and importers. For the first time, the Senate bill would establish parameters for EPA’s TSCA authority to regulate chemicals contained in articles. EPA currently has poorly delineated (and thus arguably very broad) authority to regulate articles under Title I of the law. But the pending bills would limit EPA’s authority, allowing regulation of articles only when a chemical of concern poses an exposure hazard in the article itself.

Furthermore, under Section 5 in the Senate bill, EPA would be precluded from using SNURs to regulate importation or processing of articles—even when a chemical substance in the article fails the safety standard—unless EPA finds by rule that “the reasonable potential for exposure to the chemical substance through the article or category of articles subject to the rule warrants notification.” Moreover, the Senate bill would allow EPA to regulate articles “only to the extent necessary to address the identified risk.” The committee-reported House bill contains similar limiting language.

Next Steps

It is never possible to predict whether this will finally be the year that TSCA reform legislation is adopted, but the stage has certainly been set.