

Client Alert

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Federal Toxics Law Grows Up: Congress Strengthens the Toxic Substances Control Act

By Robert Falk and Peter Hsiao

OVERVIEW

President Obama has signed the Frank R. Lautenberg Chemical Safety for the 21st Century Act, which amends the Toxic Substances Control Act (TSCA) for the first time since it was enacted in 1976. The compromise bill passed by Congress is a major accomplishment at the end of President's Obama's administration.

The amendment will add new teeth to TSCA, a federal statute regulating the manufacture and sale of chemicals. The law has long been considered as ineffectual due in part to a requirement that EPA implement the "least burdensome" regulations. By removing that language and giving new regulatory powers to EPA, the Lautenberg Act will significantly change the regulatory landscape for chemical manufacturers, processors, and importers.

IMPLICATIONS FOR CHEMICAL MANUFACTURERS, PROCESSORS, AND IMPORTERS

- The amendment will affect regulatory compliance programs and global supply chains for chemical manufacturers, suppliers, and importers.
- EPA will have broader regulatory authority over new and existing chemicals, including the power to order chemical testing and charge fees.
- Compliance with state requirements will continue to be necessary in some circumstances, depending on the type of state requirements and when they were put in place. The amended TSCA will not preempt lawsuits for civil damages.
- The amendment will create new hurdles to the protection of propriety information and trade secrets.
- The law imposes new reporting requirements, requiring immediate planning by chemical companies as some notification deadlines may occur as soon as a year and a half after the law is enacted.
- Separate compliance efforts will likely be necessary for the European Union's chemical regulations (REACH) and the new TSCA requirements.

EXPANDED REGULATION OF NEW CHEMICALS AND CHEMICAL USES

Under the TSCA amendment, EPA will have increased obligations to review and regulate new chemicals and chemical uses. As with the original version of TSCA, companies must provide a notice to EPA of new chemicals and chemical uses. However, before a company can manufacture or process a new chemical or use an existing chemical for a new purpose, EPA must make an affirmative determination that the chemical does not present "an unreasonable risk of injury to health or the environment."

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If EPA determines the chemical presents such an unreasonable risk, the agency must regulate the chemical or chemical use. In one significant change, the amendment will prevent EPA from considering costs or other “non risk factors,” and require consideration of risks to potentially exposed or susceptible populations. Following the agency’s determination, EPA will then have to publish an order or statement explaining its decision.

REVITALIZED REGULATION OF EXISTING CHEMICALS AND CHEMICAL USES

The TSCA amendment also introduces new risk evaluation, regulation, and prioritization processes for existing chemicals. EPA’s weak regulatory powers to regulate these chemicals is a shortcoming of the original law. The amendment bolsters EPA’s regulatory power by removing the “least burdensome” requirements language in the original law and—similar to the process for new chemicals—prohibiting consideration of costs and requiring consideration of risks to potentially exposed or susceptible populations. The new law also lays out a process for EPA to prioritize the risk evaluation and regulation of existing chemicals. Statutory deadlines will require the agency to publish risk evaluations and regulatory actions on a fairly rigid time frame. After deciding to regulate an existing chemical, EPA will have to consider a range of statutory factors in developing the applicable compliance requirements, including cost-benefit analysis.

UPDATED REPORTING REQUIREMENTS

Chemical manufacturers, processors, and importers may be subject to new reporting requirements as soon as a year and half after the amendment is enacted as part of a TSCA Inventory “reset” process. The new law will require EPA to issue a rule requiring chemical manufacturers and some processors to notify the agency of all chemicals that the company has manufactured or processed for a commercial purpose in the last 10 years. EPA will use that information to designate chemicals as active or inactive. Only active chemicals will undergo the prioritization and risk evaluation processes for existing chemicals.

EPA’S NEW CHEMICAL TESTING POWERS

The amendment also gives EPA more authority to develop chemical toxicity and exposure information through testing. Under the new law, EPA will be able to require testing through rules, orders, and consent agreements. EPA may require testing to develop information for multiple purposes, including the review of new chemical or chemical use notices, the prioritization of existing chemical risk evaluations, and the chemical risk evaluations themselves.

CHANGES TO THE DISCLOSURE OF CONFIDENTIAL BUSINESS INFORMATION

The new law will change TSCA’s requirements regarding disclosure of confidential information. Information not protected from disclosure will include certain types of “general information” such as manufacturing volumes and general descriptions of chemicals. In order to assert a confidentiality claim to protect information from disclosure, companies will have to substantiate the claim according to statutory requirements and regulatory guidance. Some information will generally be exempt from substantiation requirements, including marketing and sales information.

PARTIAL PREEMPTION OF STATE CHEMICAL REQUIREMENTS

The preemption provisions of the amended TSCA are particularly complicated. Rather than preclude all state requirements addressing chemical risks, the new law will only partially preempt state laws and regulations. State

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actions to restrict or prohibit chemicals taken before April 22, 2016 and actions taken pursuant to any state law in effect on August 31, 2003 (including future actions under such laws) will be exempt from federal preemption.

Aside from those grandfathering provisions, the amended TSCA will preempt state laws and regulations that (1) regulate a chemical already regulated under TSCA or currently under EPA review, (2) require information similar to what TSCA requires, or (3) regulate a chemical that EPA has determined does not present an “unreasonable risk.” However, there are some significant considerations and exemptions regarding those general preemption provisions. Notably, the amended TSCA will not preempt any state requirements regarding information reporting and monitoring that are not already required under TSCA. Nor will the new law preempt lawsuits for civil damages. The amended TSCA will also include a process for states to apply to EPA for preemption waivers.

We are carefully studying the impact of these provisions on state regulations including California’s Proposition 65 and California’s Safer Consumer Product regulations (AB 1879 and SB 509) and plan to issue a more detailed follow-up alert with that analysis.

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