

TSCA Reform: Current Status – Will TSCA’s Fortieth Anniversary Mark its First-Ever Reform?

Enacted in 1976, the Toxic Substances Control Act (TSCA or the Act), 15 U.S.C. § 2601, *et. seq.*, purports to regulate chemical substances that present an unreasonable risk to people and the environment. In the decades since TSCA’s enactment, however, it largely has failed to achieve its stated goal, and numerous attempts to improve the Act by amendment have failed.

2015 marked a change in this trend, with both the House of Representatives and the Senate passing legislation to reform TSCA. [As we reported last year](#), the House of Representatives voted 398-1 in June 2015 to pass the TSCA Modernization Act of 2015 (H.R. 2576). On December, 17, 2015, the Senate responded by passing H.R. 2576 by “substitution amendment,” which means the Senate replaced the entirety of H.R. 2576’s text with the text from its Senate counterpart, known as “The Frank R. Lautenberg Chemical Safety for the 21st Century Act” (hereinafter referred to by its original bill number, “S. 697,” even though it is now the language in H.R. 2576). Like the House, the Senate passed its TSCA reform legislation with overwhelming bipartisan support.

Despite broad bipartisan support, S. 697’s progress through the Senate stalled before finally passing by voice vote at the end of 2015. The reason for the stall was two-fold: (1) Senator Richard Burr (R-NC) sought to add an amendment that would reauthorize the Land and Water Conservation Fund (LWCF); and (2) Senator Boxer objected to certain “preemption provisions” in S. 697. The December 2015 omnibus spending package addressed Senator Burr’s concerns, but Senator Boxer’s objections remain a sticking point.

Senator Boxer’s major objection to S. 697 relates to the bill’s preemption provisions. Under H.R. 2576, preemption would occur once the EPA has made a final determination regarding a chemical’s riskiness, whereas under S. 697, preemption would begin as soon as the EPA has begun to test a chemical’s riskiness. While this difference did not prevent the Senate from passing TSCA reform legislation, it remains a point of contention that must be reconciled prior to sending a final bill to the President’s desk for signature. Indeed, just a few weeks ago, on February 12, 2016, the National Governors Association and the National Conference of State Legislatures sent a joint letter to Senate and House leadership reminding them that states play “an important role in regulation where federal action has been delayed or absent,” and setting an expectation that “[t]he ability of states to develop and impose standards pending final EPA rules on some or all of the substances addressed by TSCA should be maintained.”

In addition to preemption concerns raised by the states and some members of Congress, another important difference between House and Senate TSCA reform is in the way new chemicals enter the marketplace. While H.R. 2576 would maintain the status quo by permitting new chemicals to enter the marketplace as long as the EPA does not determine them unreasonably risky within a ninety-day waiting period, S. 697 would flip the *status quo* on its head by forbidding new chemicals to enter the marketplace unless the EPA has determined them safe.

While members of Congress are divided on how new chemicals should enter the marketplace and when the federal government should preempt state environmental laws and regulations, among other things, the Senate and House TSCA reform bills have a lot in common, including:

- Providing for populations that are more susceptible to the potential exposure or risks of exposure from certain chemical substances and/or mixtures;

- Removing cost as a permissible consideration in determining the riskiness of a chemical substance or mixture and its affiliated regulations; and
- Replacing the “least burdensome” requirement for chemical safety regulations with a higher standard.

These similarities, and others like them, should enable Congress to focus on the real differences between the two bills and craft a piece of legislation that the President can sign into law. Presently, this work has occurred informally, in talks between representatives in the House and the Senate, but reports point to these informal talks evolving into a formal conference committee that will resolve the differences between the House and Senate TSCA reform legislation prior to sending it to the President.

Which President’s desk the legislation will land on, however, has become increasingly questionable as partisan fervor rises to the forefront following the recent death of Supreme Court Justice Antonin Scalia and the ongoing presidential primary season. With most of the year ahead, however, there is potential for 2016 not only to mark the fortieth anniversary of TSCA, but also its first-ever reform.

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