CORPORATE COUNSEL
An ALM Website
corpcounsel.com | June 8, 2016

After Years of Failure, The Toxic Substances Law is Finally Amended

From the Experts

Julie Hatcher

Last night, with a unanimous vote in the U.S. Senate, a compromise bill already passed by the U.S. House of Representatives will amend—for the first time since it passed nearly 30 years ago—the core provisions of the Toxic Substances Control Act (TSCA), the primary federal law governing chemicals. With President Barack Obama's signature expected imminently, the Frank R. Lautenberg Chemical Safety for the 21st Century Act (named in honor of the late senator who for many years of bipartisan effort worked to promote TSCA modernization) will become law.

Some activists and states have disavowed the compromise bill both for not overhauling TSCA enough and for pre-empting state and local authority too much. Yet, a close reading of the amendments calls such criticisms into question. They mandate potentially significant actions by the U.S. Environmental Protection Agency for risk screening to identify "high-priority" chemicals, for risk evaluation of those chemicals and for promulgation of restrictions (including a possible ban) on any chemical deemed to "present an unreasonable risk." Moreover, the amendments appear to allow states and localities to continue enforcement of their existing chemicals laws. They also grant the states some latitude—and, in the event of EPA inaction, wide latitude—to enact new laws.

The Big Issue: Preemption

For nearly the past two decades, a number of states and localities, led by California, have claimed inadequacies in the federal system and pursued their own laws to regulate, restrict or ban chemicals. Therefore, the issue of federal preemption—that is, whether state laws should be allowed to remain in place and whether states and localities should have continuing ability to enact new laws—has long been at the heart of the TSCA modernization debate. When it comes to preemption, these TSCA amendments reflect the complexity and nuance that often come with any compromise. Undoubtedly, the courts will be called upon to parse the full scope of preemption.

In a nutshell, TSCA Section 18, as now amended, expressly excludes four categories of state and local laws altogether from any TSCA preemption irrespective of current or future EPA findings, orders, regulation or other action:

1. "Action taken pursuant to a state law that was in effect on Aug. 31, 2003." This exclusion is understood to have the effect of grandfathering California's Proposition 65 warning law and to allow continued applicability of and new actions under that law; however, this exclusion's full import may be open to debate.

2. A state or local law, regulation or action "relating to a specific chemical substance" in place as of April 22, 2016, "that prohibits or otherwise restricts manufacturing, processing, distribution in commerce, use or disposal of a chemical substance." This exclusion leaves in place state and local restrictions imposed on a specific chemical prior to the

amendments' enactment irrespective of any subsequent EPA action on that chemical. Its scope and applicability, however, depends on whether the state or local law actually "prohibits" or "restricts" a "specific chemical," which arguably means that certain types of existing state and local laws fall outside of this exclusion, such as, for example, a law that mandates information reporting for a specific chemical or product containing that chemical, but does not "prohibit" or "restrict" that chemical.

3. Any state or local "rule, standard of performance, risk evaluation, scientific assessment or any other protection for public health or the environment that … is adopted or authorized under the authority of any other federal law or adopted to satisfy or obtain authorization or approval under any other federal law." This exclusion allows federal environmental laws with a federal-state implementation regime (e.g., Clean Air Act) or laws that otherwise impose obligations on states (e.g., Safe Drinking Water Act) to continue to function independent of TSCA.

4. "Any state or federal common law rights or any state or federal statute creating a remedy for civil relief, including those for civil damage, or a penalty for a criminal conduct … [and specifically including] any cause of action for personal injury, wrongful death, property damage or other injury based on negligence, strict liability, product liability, failure to warn, or any other legal theory of liability under any state law, maritime law, or federal common law or statutory theory." This exclusion, read literally, insulates—from TSCA preemption—lawsuits claiming personal injury, property damage or other torts even in a situation where EPA has completed its risk evaluation and found that the chemical does not "present an unreasonable risk." It is important to bear in mind, however, that other laws may provide a basis for preemption or require dismissal.

In addition to the foregoing exclusions from preemption, Section 18, as now amended, allows new state and local actions on a specific chemical until EPA deems the chemical as "high-priority" and initiates a risk evaluation. Thereafter, new state and local actions on the chemical are pre-empted, but with exceptions for any action (i) implementing a "reporting, monitoring or other information obligation" not required by EPA under TSCA or under any other federal law; or (ii) adopted under a state or local law "related to water quality, air quality, or waste treatment or disposal" that is not inconsistent with an EPA rule to restrict a chemical or that would not cause a violation of EPA requirements. Notably, these exceptions may allow current laws not covered by the exclusions—including, in particular, reporting and notification laws for particular chemicals—to continue indefinitely unless and until EPA were to take action to usurp those laws.

Once EPA completes its risk evaluation and decides either that the chemical does not "present an unreasonable risk" or that it does and restricts the chemical, then the new state and local restrictions adopted prior to the time EPA deemed the chemical "high-priority" and initiated the risk evaluation also will be pre-empted, unless the state and local restriction is "identical," in which case such restriction can remain in place and be enforced by the state or local authorities if EPA has not "assessed an adequate penalty." These TSCA amendments also would allow a state or locality to petition EPA for a preemption "waiver" and for judicial review of EPA action on such a petition.

The Targeting of 'High-Priority' Chemicals for Risk Evaluation and Restriction

These amendments have been criticized by some for not replacing TSCA's "unreasonable risk" safety standard, but they may effectively alter that standard by explicitly requiring EPA to evaluate "unreasonable risks" to any "potentially exposed or susceptible subpopulation" under a chemical's "conditions of use" and to do so "without consideration of costs or other nonrisk factors." Moreover, although these amendments do not—as some activists and states had urged—institute a registration and authorization scheme akin to the European Union's REACH regulation, they mandate a series of new and potentially significant EPA actions in the near term that will draw heavily from

EPA's TSCA Work Plan for Chemical Assessments: 2014 Update. Here are the highlights:

- ***Within six months,*** the initiation by EPA of a risk evaluation process for 10 initial "high-priority" chemicals selected from the Work Plan to determine whether any "presents an unreasonable risk"
- ***Within one year,*** the development and initiation by EPA of a risk screening process to designate low- and high-priority chemicals
- ***Within one-and-a-half years,*** the classification by EPA of the tens of thousands of existing chemicals on the TSCA Inventory as either "active" (manufactured or imported during the 10-year period ending the day before the amendments' enactment) or "inactive," with notice then required prior to future manufacture or import of any "inactive" chemical
- ***Within three-and-a-half years,*** the completion by EPA of risk screening of at least 40 chemicals and the initiation of a risk evaluation of at least 20 additional "high-priority" chemicals
- ***Within four-and-a-half years,*** the promulgation by EPA of a final regulation to restrict (and possibly phase out and ban) certain persistent, bioaccumulative and toxic (PBT) chemicals selected from the Work Plan and not required to go through the risk screening and evaluation; and also the proposal by EPA of a regulation to restrict (and possibly phase out and ban) any of the initial 10 "high-priority" chemicals that "presents an unreasonable risk" as determined by the risk evaluation
- ***Within five-and-a-half years,*** the promulgation of a final regulation to restrict (and possibly phase out and ban) any of the initial 10 "high-priority" chemicals that "presents an unreasonable risk" as determined by the risk evaluation
- ***Within six-and-a-half to eight-and-a-half years,*** the completion of the risk evaluation for at least 20 additional "high-priority" chemicals and the promulgation of a regulation to restrict (and possibly phase out and ban) any of these chemicals that "presents an unreasonable risk" as determined by the risk evaluation

These TSCA amendments would establish a mechanism to fund at least 25 percent of the costs (up to a $25 million ceiling, adjustable for inflation) to carry out the foregoing risk screening, evaluation and rulemaking actions through fees from chemical manufacturers and processors. EPA also would have expanded authority to order companies to develop any "information" necessary to support these actions, as well as to review and restrict "new" chemicals and "significant new uses" of chemicals.

The Bottom Line

These TSCA amendments are historic by any definition. For over 15 years, bills were introduced to "reform" TSCA. The efforts became more bipartisan about five years ago, but wide divides continued to thwart compromise. The passage of the compromise bill during this divisive presidential election campaign reflects a genuine legislative accomplishment. Whether the amendments will generate significant new federal regulation may depend heavily on the next administration's agenda, funding from Congress and resolution by the courts of key interpretive issues raised by the preemption provisions. All will bear watching.

Julie Hatcher *is a partner in the Washington, D.C. office of Latham & Watkins, focusing on environmental, health, safety and product defense. Ms. Hatcher currently chairs Latham's Chemical Regulation & Contaminated Properties Practice. She possesses deep experience in laws that control chemicals at every life cycle stage, including the Toxic Substances Control Act (TSCA); Resource Conservation and Recovery Act (RCRA); Superfund law (CERCLA); Emergency Planning and Community Right-to-Know Act; Federal Hazardous Substances Act; Safe Drinking Water Act; Clean Water Act; federal transportation statutes; the Occupational Safety and Health Act; and related state laws, as well as the intersection of these laws with toxic tort liability.*