Washington Watch

State Chemical Reform Initiatives: Advocates Press for Change

In the absence of federal TSCA legislative reform, many states have decided to act on their own

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The federal Toxic Substances Control Act (TSCA) has remained largely unchanged since its adoption in 1976, some 35 years ago. Congressional inaction has not gone unnoticed by state governments, which are increasingly dismayed by their federal counterpart's seeming indifference to the public's demand for stricter chemical controls and its growing distrust of federal chemical-control measures. As a result, states are taking matters into their own hands by adopting laws, resolutions, and related chemical-control measures.

This "Washington Watch" column reviews the status of state chemical reform initiatives, the probable consequences of continued federal inaction, and the prospects for federal TSCA reform.

TSCA: Its Strengths and Weaknesses

Many factors have contributed to the perception that TSCA, the core U.S. industrial chemical safety law, does not (and at least as currently written, cannot) adequately protect the public. A key reason is that TSCA has changed little since its initial enactment over three decades ago — despite game-changing advances in chemical innovation, detection methodologies, workplace safety, right-to-know legal and regulatory developments, sweeping international chemical control programs, and related changes. To some, further discussion about TSCA's inherent inadequacy is unnecessary; the passage of time tells all.

According to others, this position neglects to give the law its proper due. They argue that, despite its age and unchanged core provisions, TSCA should not be seen as *per se* irrelevant. Supporters of TSCA see it as a powerful statute that gives the United States Environmental Protection Agency (US EPA) enormous authority to regulate chemical substances. In their view, the fact that Congress had the foresight to enact the law decades ago should not now be used against it. These supporters claim that key TSCA provisions are sufficiently nimble to address innovations, and that they have done so admirably.

TSCA Specifics

Key TSCA provisions include the following:

- TSCA Section 4: Authorizes US EPA to promulgate rules requiring manufacturers, importers, and processors to test existing chemical substances or mixtures for their effects on human health and the environment.

- TSCA Section 5: Authorizes US EPA to regulate new chemical substances prior to their manufacture, import, processing, or distribution for commercial purposes, and to regulate existing chemical substances for "significant new uses."

- TSCA Sections 6 and 7: Authorize US EPA to regulate and/or ban the manufacture, processing, distribution, use, or disposal of an existing chemical

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substance or mixture if the Agency determines that it poses an unreasonable risk to human health or the environment. In the case of a chemical substance or mixture that US EPA determines will present an unreasonable risk of serious and widespread injury to health and the environment before a final TSCA section 6 rule can be published, the statute authorizes the Agency to seize the imminently hazardous chemical substance or mixture.

- TSCA Section 8: Authorizes US EPA to promulgate rules requiring manufacturers and processors to collect, maintain, and submit data on certain chemical substances; maintain records regarding allegations of significant adverse reactions; submit health and safety data on certain chemical substances and mixtures; and report any information indicating that a chemical substance or mixture presents a substantial risk of injury to health or the environment.

- TSCA Sections 12(b) and 13: Authorize US EPA to require notification by persons intending to export certain chemical substances; authorize the Agency to promulgate rules regarding the importation of chemical substances.

Perceived TSCA Failings

Despite the inherent breadth of the statute, TSCA's celebrated "failings" have been the subject of much discussion over the years. Recently, the din of TSCA criticism has reached new heights. Even chemical manufacturers reluctantly acknowledged in 2009 that TSCA needs "modernizing."[1]

- ***Test Rules***

There is a perception that test rules are very difficult to issue under TSCA section 4 — and that even when issued, they are likely to invite time-consuming and costly litigation. To issue a TSCA section 4 test rule, US EPA typically must find that the chemical substance presents an "unreasonable risk" to human health or the environment. The Agency bears a heavy burden in meeting this legal threshold.

Few test rules have been issued on the many existing chemical substances for which US EPA has conducted no independent safety review. Some argue that this paucity of test rules results in part from a history of debate and litigation over what constitutes "unreasonable risk"[2] — and the legal burden imposed upon US EPA to prove it.

- ***New Chemicals***

Another often-noted TSCA deficit involves section 5, which addresses new chemicals entering commerce. Under this section, manufacturers and importers are required to submit data only in specific, narrow circumstances. As a result, approximately half of the new chemical substances reported to US EPA are submitted with no accompanying toxicity data.[3]

In its premanufacture notification (PMN) review process, the Agency attempts to compensate for this lack of data by using structure activity relationships to predict and assess the health effects or environmental fate of new chemical substances. Some argue, however, that this analysis is not enough to ensure that the potential risks of chemical substances and mixtures are fully assessed before the chemicals are distributed in commerce.

- ***Grandfathered Chemicals***

A third much-cited TSCA criticism involves the "grandfathering" of thousands of chemicals that were already in commerce when the TSCA Chemical Substance Inventory was created in 1978. In effect, these chemicals have been more or less presumed to be safe since US EPA has conducted no independent review of them. This has invited the criticism that most chemicals listed on the TSCA Inventory (and still in commerce today) have essentially escaped any kind of Agency safety review.

- ***Barriers to Banning Chemicals***

Another issue routinely identified as a major TSCA failing involves the heavy burden that US EPA must bear when seeking to ban chemicals under TSCA section 6. The Agency must consider whether adequate substitutes exist for any chemical it proposes to ban and must show that banning the chemical is the least burdensome choice for minimizing risks.

The difficulty involved in meeting this standard was demonstrated by *Corrosion Proof Fittings v. EPA*,[4] where the Fifth Circuit Court of Appeals invalidated and remanded US EPA's ban on asbestos. One key reason for the ruling was the court's determination that US EPA had not adequately assessed alternatives to the ban.[5] Some argue that the limitations imposed by this court decision must be eliminated if TSCA is to fulfill its goal of controlling chemicals that have been determined to present an "unreasonable risk."

- ***Confidential Business Information Claims***

Finally, the TSCA provisions that protect "confidential business information" (CBI) from public dissemination have long aroused the ire of diverse stakeholders, including state government agencies. State agencies, which are not allowed access to CBI, have argued that they need this information to do their jobs. Environmental groups have also sought for years to diminish the protections afforded to certain types of information.

The Obama Administration has taken decisive administrative and policy steps in response to the charges regarding CBI. Transparency is an important core principle of the current EPA Administrator, Lisa Jackson. The Agency's TSCA CBI "Declassification Challenge" reflects Administrator Jackson's commitment to change. The Challenge asks industry to (1) review older notices and/or filings containing CBI that have been submitted under TSCA and identify materials that should not be considered confidential, (2) notify the Agency about the particular declassification, and (3) "strictly limit" CBI claims in any future TSCA filings with US EPA.[6]

Other Agency initiatives are also underway in this area. Among them are US EPA's efforts to impose greater transparency on the handling of inert ingredients in pesticide formulations. In addition, the Agency has explicitly stated its presumption that where a chemical is listed on the public portion of the TSCA Inventory, the identity of the chemical substance will not routinely be entitled to "confidential treatment" in a health and safety study submitted under TSCA section 8(e).[7]

Pressure To Change the Law

The issues discussed above are only a few of the concerns that TSCA detractors have long identified in support of their view that the statute is an anachronism that must be "modernized" (or completely re-written, depending upon your perspective).[8]

TSCA and Public Perception

Increasingly, however, the debate over TSCA's core legal merits has given way to an even more urgent fact — namely, the astonishing proliferation of chemical control laws at the state level. These laws have emerged to fill the void left by TSCA's perceived failings. In a world where perception is often reality, many believe for this reason alone that TSCA must be amended — and soon.

The steep rise in state chemical control measures is both a scathing rebuke of TSCA's perceived ineffectiveness in controlling chemical substances and a battle cry for change. The pace of state action has accelerated in response to growing public concerns about chemicals in the environment. According to polling conducted in 2010 by the Mellman Group, the majority of respondents viewed the threat posed by everyday exposure to "toxic" chemicals as serious — with 33 percent stating that it is "very serious."[9]

High-Profile Chemical Campaigns

A string of high-profile campaigns focusing on chemicals in consumer products has heightened the sense of concern about chemical exposures in everyday life. Substances targeted by these campaigns include phthalates in plastic products, bisphenol A (BPA) in plastic products and food and beverage containers, inorganic arsenic and chromium in drinking water, flame retardants in furniture upholstery and other household articles, formaldehyde, lead, and perfluorooctanoic acid (PFOA) in cookware.

State Action on the Rise

The push for more stringent state laws mirrors growing public doubt about TSCA's ability to protect human health and the environment. The statistics speak for themselves.

A Range of Chemical Initiatives

According to the Safer Chemicals, Healthy Families Coalition (a diverse partnership of some 250 environmental groups), 18 states have collectively passed 71 chemical laws since 2003.[10] Most of these initiatives target particular chemicals, such as BPA or lead. Other measures seek to promote green chemistries, ban phthalates in children's products, and/or diminish the quantity of chemicals used in the production of items generally.

The start of the new year saw early action by state advocates seeking change. The Safer Chemicals, Healthy Families Coalition issued a press release on January 18, 2011, noting that 30 states were set to announce chemical initiatives in the form of bills, resolutions, or other legal means to change chemical regulation policies.[11] According to the statement:

- nine states have proposed legislation to change their chemical regulation laws;
- 17 states and the District of Columbia will seek to enact new legislation on BPA;
- eight states will focus on diminishing cadmium in children's products; and
- three states and the District of Columbia will seek legislation intended to remove decabromodiphenyl ether (deca-BDE) from consumer products; deca-BDE is a chemical in the family of polybrominated diphenyl ethers (PBDEs).

Interstate Chemicals Clearinghouse

On January 26, 2011, environmental officials from ten states and local governments announced the creation of the Interstate Chemicals Clearinghouse (IC2), which intends to:

- avoid duplication and enhance the efficiency and effectiveness of state, local, and tribal initiatives on chemicals through collaboration and coordination;
- build agency capacity to identify and promote safer chemicals and products; and
- ensure that state, local, and tribal agencies, businesses, and the public have ready access to high-quality and authoritative chemical data, information, and assessment methods.

IC2 projects will include developing an online, searchable database that combines the lists of priority chemicals developed by individual IC2 members.

Unlike other groups that have sought chemical reform, IC2 includes among its members many state regulatory agencies. This is a critically important distinction. As of January 26, members included the California Environmental Protection Agency; Connecticut Department of Environmental Protection; Massachusetts Department of Environmental Protection; Michigan Department of Environmental Quality; Minnesota Pollution Control Agency; New Jersey Department of Environmental Protection; New York Department of Environmental Conservation; Oregon Department of Environmental Quality; Oregon Health Authority; METRO Regional Government (Portland, Oregon); and Washington Department of Ecology.[12]

That state and local agencies themselves have banded together to share information and streamline access to infrastructure is very progressive, noteworthy, and precedent-setting. The formation of IC2 (which is part of the Northeast Waste Management Officials' Association) represents a significant step forward by state governments in promoting chemical reform.

Failed TSCA Reform and the Business Community

The perceived failure of the federal government to control chemical "exposure" — and the consequent increase in state action — already are having profound commercial consequences for the business community.

Concern About a Patchwork of State Laws

Companies understandably are worried about the creation of patch-work (and potentially inconsistent) state laws that may lead to market disruption and impose unnecessary regulatory burdens, without necessarily improving public health. Manufacturers are ill-prepared to make products on a state-by-state basis. So manufacturers must either meet the most stringent state requirements or withdraw from the market — a fact not lost on chemical-reform advocates.

Private-Sector Chemical Initiatives

In addition to state action, private-sector commercial chemical stewardship initiatives have proliferated in the void left by TSCA reform inaction. These programs are generating significant change in the marketplace.

One of the most prominent initiatives is Walmart's Chemical Intensive Products (CIP) Sustainable Value Network, which employs a chemical screening mechanism. The CIP screen seeks to diminish and/or prevent the marketing of products containing chemical substances that could potentially adversely affect human health and the environment (these substances are deemed inconsistent with the retailer's commitment to sustainability).

The CIP and similar sustainability codes and practices are having (and will continue to have) a profound impact on the design and marketing of consumer products, particularly in the food and beverage, durable goods, and personal-care sectors of the economy.

What Business Needs from TSCA Reform

The growth of CIP and similar private-sector sustainability initiatives makes it clear that if TSCA reform is to be commercially relevant to the retail community, reform measures will need to address the concerns that are motivating the development of these initiatives. At the same time, TSCA reform will need to provide commercial comfort to manufacturers, who are increasingly concerned about the apparent erosion of federal government standards in favor of unpredictable and inconsistent state and private-sector requirements. Exactly how (and when) these business goals are to be accomplished is unclear, as discussed below.

Prospects for TSCA Reform

During the first two years of the Obama Administration, there was much discussion about potential TSCA reform.[13] In 2010, far-reaching legislative changes to TSCA were proposed in both houses of Congress.[14]

The 2010 mid-term election profoundly affected the prospects for TSCA legislation, however. Given the outcome of that election, the various suggestions for TSCA reform offered over the past two years are largely moot at this point.

The Congressional Landscape

In the United States House of Representatives, the replacement of Henry Waxman as chair of the Committee on Energy and Commerce will have radical implications for any possible TSCA legislation. Mr. Waxman's proposals for TSCA reform have been actively discussed over the past two years, but these proposals will now need to be reduced greatly in scope and detail if they are to have any realistic chance of enactment in the current Congress.

In the United States Senate, the leadership and majority remain largely the same as they were before the mid-term election. Senator Frank Lautenberg (D-NJ), a long-time advocate of TSCA reform, has continued his strong support for extensive changes to the law. His subcommittee held a hearing on the effectiveness of chemical safety laws on February 3, 2011,[15] early in the new Congressional session. By this action, Senator Lautenberg telegraphed his renewed commitment to pursuing TSCA legislation, notwithstanding changes brought about by the mid-term election.

Even in the Senate, however, more members can now be expected to oppose any legislation (including TSCA reform) that is perceived to "expand government." Many senators may be particularly sensitive about legislation that could be branded as "job-killing" — an epithet some opponents have sought to attach to TSCA reform proposals.

The recent Senate hearing did introduce some new elements into the TSCA debate, including a list of six "principles" for TSCA reform offered by Senator David Vitter (R-LA). Senator Vitter is perceived as favorable to chemical industry interests, and his remarks (especially on the need for critical scientific studies to be "reproducible") offer a more detailed articulation of what "sound science" will be taken to mean, at least by Republican members of the Senate subcommittee.

Also new was the subcommittee's discussion of those TSCA elements that appear to be working effectively. This represents a change from prior Congressional hearings, which have seemed to suggest that virtually every aspect of TSCA is broken.

Lack of Leadership from the Business Community

Perhaps the most interesting questions surrounding TSCA reform involve the response of the chemical industry and its allies. Industry organizations claim to agree with TSCA reform in principle. Notwithstanding this rhetoric, no legislative reform proposal has been forthcoming from industry trade groups or any of their members. This lack — coupled with the notable absence of any specific proposal for TSCA reform from the Obama Administration — has left a void in the political debate over the past two years.

The TSCA reform proposals offered in Congress last year were significant, but they advanced little past the introductory stage. Advocates of significant TSCA overhaul were left talking largely to themselves as industry trade groups continued to "agree in principle" with TSCA reform while criticizing specific reform proposals. The Obama Administration broadly endorsed the reform proposals (also "in principle"), but offered few specifics.

In part because of this vacuum in leadership, little attention was paid to the specifics of TSCA reform. Few offered substantive ideas on how ambitious changes such as those introduced in both the House and Senate could be managed, the budget that would be required, the likely impacts on the public and the regulated community, or numerous other important elements necessary for a full legislative debate.

Moving Forward with More Modest Changes?

Now that the mid-term election has shifted the political balance, the business community may find friendlier forums in which to discuss potential TSCA amendments. Thus, industry representatives may be more willing to develop specific proposals that they believe will give expression to the stated principles for TSCA reform.

Environmental groups will almost certainly expect (or hope for) more extensive changes than the business community is willing to offer, but the discussion may at least begin in a way that could lead to areas of agreement. At some point, the Administration will have to join the discussion and declare what it can (or would like to) support.

Even if industry representatives and environmental advocates manage to agree on some or all issues, what the new Congress will do is a separate unknown. But there clearly is a growing sense of urgency about the need for change — and perhaps marginally increased optimism that a more targeted "fix" to certain of TSCA's ailments may be possible sooner rather than later.

That said, looming presidential-year politics will inevitably start to eclipse other concerns. This may further diminish the likelihood of bipartisan agreement on just about anything — let alone the elusive goal of meaningful TSCA reform.

Concluding Thoughts

Legal scholars may disagree over the merits of TSCA's core ability to address chemical risks. There is little disagreement, however, that the public's trust in TSCA has eroded, and the law needs to be rehabilitated. The void left by the absence of a robust and compelling federal legislative overhaul will continue to invite state (and even local) TSCA "mini-me's" that will make commercial life uncomfortable, if not intolerable.

Whether a targeted slate of federal-level TSCA fixes can emerge this year or next is unclear. With strong support from industry stakeholders —and a willingness on the part of environmental groups to accept less than what they may wish — there is reason to be optimistic. Politics are anything but predicable, however, so only time will tell.

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Notes

[1] On August 9, 2009, the American Chemistry Council (ACC) issued its "10 Principles for Modernizing TSCA," widely regarded as the trade association's acknowledgement that TSCA reform is needed.

[2] *Chemical Manufacturers Association v. EPA*, 859 F.2d 977 (D.C. Cir. 1988), is the seminal case in this regard. Courts have upheld US EPA's test rules where, for example, the Agency's basis for suspecting the existence of an unreasonable risk of injury to health is "substantial" — that is, when there is a more-than-theoretical basis for suspecting that some amount of exposure occurs and that the substance is sufficiently toxic at that exposure level to present an unreasonable risk of injury to health.

[3] Roe, D., Pease, W., Florini, K., & Silbergeld, E. (1997). Toxic ignorance, at 27-28. Available online at http://www.edf.org/documents/243_toxicignorance.pdf.

[4] 947 F.2d 1201 (5th Cir. 1991).

[5] EPA's equally unsuccessful attempt to ban acrylamide and N-methylolacrylamide grouts (despite its decade-long effort to do so) is another illustration of the legal and procedural challenges posed by TSCA section 6.

[6] *See* TSCA CBI Declassification Challenge, http://www.epa.gov/oppt/tsca8e/pubs/declassification-cbi.html.

[7] US EPA (2010, May 27). Claims of confidentiality of certain chemical identities contained in health and safety studies and data from health and safety studies submitted under the Toxic Substances Control Act, 75 Fed. Reg. 29754-29757.

[8] *See* Denison, R.A. (2009). Ten essential elements in TSCA reform, 39 Environmental Law Reporter 10020-10028.

See also States' Principles on Reform of the Toxic Substances Control Act (2009, December). Available online at http://www.saferstates.com/2009/12/states-principles-on-reform-of-the-toxic-substances-control-act.html

[9] Safer Chemicals, Healthy Families Coalition (2010, September). New polling data indicates overwhelming public support for chemicals regulation, http://www.saferchemicals.org/resources/opinion-2010.html.

[10] Safer Chemicals, Healthy Families Coalition (2011, January 18). 30 states nationwide to announce upcoming bills to protect kids and families from toxic chemicals on Wed. Jan 19. Available at http://www.saferchemicals.org/2011/01/30-states-nationwide-to-announce-upcoming-bills-to-protect-kids-and-families-from-toxic-chemicals-on.html.

[11] Ibid.

[12] More information on IC2 is available at http://www.newmoa.org/prevention/ic2/index.cfm.

[13] A significant number of hearings on TSCA reform took place in 2009 and 2010. *See*,

e.g., House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection hearing on "Revisiting the Toxic Substances Control Act of 1976" (February 26, 2009); House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection hearing on "Prioritizing Chemicals for Safety Determination" (November 17, 2009); Senate Committee on Environment and Public Works and Subcommittee on Superfund, Toxics and Environmental Health joint "Oversight Hearing on the Federal Toxic Control Substances Act" (December 2, 2009); Senate Committee on Environment and Public Works Subcommittee on Superfund, Toxics and Environmental Health hearing on "Current Science on Public Exposures to Toxic Chemicals" (February 4, 2010); House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection hearing on "TSCA and Persistent, Bioaccumulative, and Toxic Chemicals: Examining Domestic and International Actions" (March 4, 2010); Senate Committee on Environment and Public Works Subcommittee on Superfund, Toxics, and Environmental Health hearing on "Business Perspectives on Reforming U.S. Chemical Safety Laws" (March 9, 2010); and Senate Committee on Environment and Public Works "Hearing on the Government Accountability Office's Investigation of EPA's Efforts to Protect Children's Health" (March 17, 2010).

[14] For a detailed analysis of TSCA reform legislation introduced in the 111th Congress, *see* Bergeson, L.L. (2010, Autumn). Washington watch: TSCA reform: Legislative action begins. Environmental Quality Management, 20(1), 85-99.

[15] Senate Committee on Environment and Public Works Subcommittee on Superfund, Toxics, and Environmental Health, hearing on "Assessing the Effectiveness of U.S. Chemical Safety Laws."