Could TSCA Reform Be Back on Track?
Bipartisan Bill Brightens Outlook for Reform of the Toxic Substances Control Act

Signaling a potential shift following years of partisan disagreements over environmental legislation on the Hill, on May 22, 2013, Senator Frank Lautenberg (D-N.J.) and Senator David Vitter (R-La.) introduced a bipartisan bill to amend the Toxic Substances Control Act (TSCA), the primary federal statute regulating chemical substances. The bill represents a surprising breakthrough in an area of environmental law where interested parties across the spectrum, from environmental and public health advocates to chemical manufacturers, have all seemed to agree that retrofitting the 37-year old statute was necessary. Heretofore, not a single bill ever hit the floor in the House or Senate that provided a sufficiently centrist foundation for enough of the key players to be able to climb aboard. Is it possible that the Chemical Safety Improvement Act of 2013 might be the right vehicle?

Background on TSCA Reform Efforts
Following the 2008 election, chemical regulation reform was at the forefront of the Obama Administration’s environmental agenda. Early on, Environmental Protection Agency (EPA or the Agency) Administrator Lisa Jackson remarked that Americans had “lost faith” in the government’s ability to regulate chemical substances. Eight months into President Obama’s first term, Jackson announced principles for reform of TSCA. EPA also announced a new approach to its implementation efforts under its existing TSCA authority, including plans to require companies to provide additional information about chemical substances’ risks and increasing public access to such information.

Congress also appeared poised to act on TSCA reform. The Senate and House held hearings on TSCA in 2009 and 2010, and in 2010 Senator Frank Lautenberg (D-N.J.) and Congressman Bobby Rush (D-Ill.) each introduced far-reaching bills to amend TSCA. Senator Lautenberg, who has introduced TSCA reform legislation in every Congress since 2005, tried again with a new bill in 2011. The 2011 bill was finally reported out of the Senate Environment and Public Works (EPW) Committee in 2012 – but the bill appeared

doomed, given the breadth and complexity of the regulatory regime it would impose.

Notwithstanding the Senator’s persistent efforts over the years, more than four years after the first meaningful talk of significant TSCA reform began, and three and one half decades after its enactment, TSCA’s core elements remain the same as when it was enacted in 1976. The Agency’s parallel efforts to ramp up its regulatory and enforcement activities are also widely viewed as having only mixed results.

In March 2013, the Government Accountability Office (GAO) submitted a report to Senator Lautenberg and the chairs of the EPW Committee and its Subcommittee on Superfund, Toxics and Environmental Health addressing EPA’s efforts to strengthen its management of chemical substances. The report was released to the public in April 2013.

The 2013 edition followed a similar report by the GAO in 2009 that designated EPA’s assessment and control of toxic chemicals as a “high risk” program, finding that neither Congress nor EPA had taken action to ensure that EPA had adequate information to assess chemical substances. The 2013 report assessed EPA’s progress in implementing its approach to managing chemicals under its existing TSCA authority, which the Agency summarized in a 2012 Existing Chemicals Program: Strategy. The GAO report found that EPA had made progress towards implementing its new approach but that the strategy failed to establish a framework that would “position the agency to achieve its goal of ensuring the safety of chemicals.” The GAO report noted that EPA failed to identify strategies to address the challenges embedded in the TSCA statute that would impede EPA’s ability to obtain toxicity or exposure data and place limits on or ban chemicals, and that EPA also failed to identify the resources – financial and human – that would be necessary to implement its plan. The report also criticized EPA for its failures to pursue opportunities to obtain chemical data submitted to European regulators and to initiate rulemaking under Section 8 of TSCA to extend periodic chemical reporting requirements to chemical processors. The report noted that processors were often downstream users that were in a better position than manufacturers and importers to understand end user exposure scenarios.

The Lautenberg Bill, Version 2013

Senator Lautenberg has indicated that chemical regulation reform is one of his priorities before he retires from the Senate in 2014. Accordingly, on April 10, 2013, Senator Lautenberg once again introduced a bill to overhaul TSCA.7 Signaling little interest in a move toward the middle, the proposed legislation – the Safe Chemicals Act of 2013 – was identical to the bill that was reported out of the EPW Committee on party lines during 2012.

The Safe Chemicals Act of 2013 would make sweeping changes to the central provisions of TSCA that have remained untouched for more than 35 years. Among other things, the Safe Chemicals Act would leave no section of TSCA untouched, and would virtually gut and replace the statute’s core provisions while adding more than a dozen new sections. Among the sticking points for many observers was the bill’s requirement that before a new chemical substance could be manufactured or processed in the U.S., EPA would have to make an affirmative finding that the new chemical substance would be likely to meet the “safety standard,” i.e., that there is “a reasonable certainty that no harm will result to human health or the environment from aggregate exposure to the chemical substance.” The bill also would impose a chemical certification and revamped inventory system as well as a particularly challenging and rigid structure for evaluating the more than 80,000 existing chemical substances on EPA’s inventory, and would significantly expand EPA’s authority to order companies to submit information about chemical substances.

The chemical industry opposed previous versions of Lautenberg’s TSCA legislation, including the bill that was reported out of the EPW Committee in 2012. Consequently,

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when the Safe Chemicals Act of 2013 reflected no material changes aimed at addressing the chemical industry’s concerns, it became clear that it was unlikely the bill could move forward in the 113th Congress without significant amendments or some other mechanism that would garner support from the other side of the aisle. It was no surprise when following its introduction, representatives of the chemical industry indicated that they had little to say in the media about the Lautenberg bill itself, except to acknowledge rumors that they were waiting for a competing bill to take shape and be introduced by Senator Vitter.

The Lautenberg-Vitter Chemical Safety Improvement Act
In an unexpected twist, however, Senator Lautenberg and Senator Vitter joined forces to introduce their Chemical Safety Improvement Act. The bill embodies significant compromises from both sides. The development most likely to be touted as having the greatest significance to many is the compromise legislation’s requirement that EPA undertake a review of all chemical substances actively in commerce, and on the basis of available data, rank them according to priority for further evaluation based on potential risks to human health and the environment. High priority chemicals are expected to undergo a safety determination, and potentially be subject to regulation to ensure permitted uses are considered to be safe. Also of particular interest are five key areas where Senators Lautenberg and Vitter appear to have made concessions to reach middle ground:

- The “reasonable certainty of no harm” safety standard of the Lautenberg bill is reformulated in the compromise bill to require that “no unreasonable risk of harm to human health or the environment will result from exposure to a chemical substance.” In a nod toward the interest of chemical manufacturers and processors, the compromise legislation requires that safety assessments and risk-management determinations will be made in the context of whether a chemical meets the safety standard according to “its intended conditions of use.”

- Common ground appears to have been found in provisions dictating the amount of information that initially must be submitted to EPA for chemical substances undergoing evaluation and EPA’s authority to demand additional information. While enabling EPA to more easily request testing through administrative orders in addition to the traditional rulemaking mechanisms, EPA will also be expected to establish standards for how data collection, submission and evaluation will occur. In general, the Agency can only request additional information on chemical substances that are in active distribution and use.

- With respect to new substances, the bipartisan bill would create a considerably simplified and streamlined process when compared to the Lautenberg bill’s model. An effort clearly was made by the negotiators to craft a bill that incorporates many features of the Agency’s current new chemicals review process with which few affected parties have complaints. Under the bipartisan bill, EPA would continue to have only 90 days following receipt of a new chemical notification to reach a preliminary determination that would allow the substance to enter commerce or take steps to extend the deadline for review. Thus, during the initial review, EPA must consider the potential for exposure to humans and the environment from the intended uses, and determine whether the substance is likely to meet the safety standard. If EPA determines that the safety standard is not likely to be met, it may prohibit the substance entirely or place limitations on its use, such as labeling requirements; restrictions on the amount of the chemical that can be manufactured, processed, or distributed; or requirements for additional monitoring and testing. Alternatively, the compromise bill also provides that EPA may decide that more information is necessary to make such a determination, and the sponsor must withdraw the notice or agree to provide the needed data during an extended review.

- Another area where compromise was made is the extent to which a person submitting information to EPA can seek to shield proprietary information from release to the public. Whereas the Lautenberg bills have sought...
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A final, and perhaps key difference between the Lautenberg bill and the Chemical Safety Improvement Act that may have enabled agreement on the bill is the preemption provision. Unlike the current law, the bipartisan bill would bar states from requiring data for, or placing additional restrictions on, the use of a chemical substance when EPA has reached certain prioritization decisions or issued a final safety determination. To soften this limitation on states’ authority, the bipartisan bill provides that a state may request a waiver from federal preemption where, among other requirements, a state has a compelling local interest to protect human health and the environment and the proposed state action is “grounded in reasonable scientific concern.”

Prospects for the Lautenberg-Vitter Bill

The Chemical Safety Improvement Act unquestionably breaks a long legislative logjam on reform of the much maligned Toxic Substances Control Act. It remains to be seen, however, whether the Administration will specifically support the bill or other circumstances might arise to provide the impetus to move the bill forward in the face of competing political priorities in the Senate. Assuming favorable action in the Senate, far more difficult to predict is how the bill will fare in the Republican-controlled House of Representatives. During the past two sessions, the House appeared willing to cede negotiations in the chemical regulation arena to the Senate, so it is unclear where leadership in the House stands on the need for legislation on chemical regulations, much less the Lautenberg-Vitter bill in particular. It is possible House Republicans will be looking for a mechanism to moderate their tone on the environment, and a companion version of the compromise bill will get introduced in the House. Given the diversity of interests supporting the new bill, and assuming that EPA and the Obama Administration lend support to the legislation, the Chemical Safety Improvement Act could represent the right vehicle for a significant environmental legislative breakthrough.

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or the following attorneys:

Lawrence E. Culleen
+1 202.942.5477
Lawrence.Culleen@aporter.com

Blake A. Biles
+1 202.942.5836
Blake.Biles@aporter.com

Peggy Otum
+1 202.942.5965
Peggy.OtuM@aporter.com

Shailesh R. Sahay
+1 202.942.5243
Shailesh.Sahay@aporter.com

Also contributing to this Advisory: Margaret Barry