

House of Representatives Approves TSCA Reform Bill in Near-Unanimous Vote

Tangible reform is finally on the horizon for the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et seq. following a recent vote by the House of Representatives overwhelmingly in favor of a new reform bill. Enacted in 1976, the law has not been amended since its inception despite the widely held view that TSCA needs to change.

TSCA deals with the production, importation, use, and disposal of certain chemical substances. The United States Environmental Protection Agency (EPA) plays a key role in the TSCA arena, having the power to impose testing, reporting, and recordkeeping requirements for the substances covered by the law, and also bearing the responsibility to maintain a list of chemical substances manufactured or processed in the U.S. That inventory currently contains more than 83,000 chemicals.

In March 2015, the Senate saw two bills aiming to reform TSCA introduced: the Frank R. Lautenberg Chemical Safety for the 21st Century Act (S. 697) introduced by Senators Tom Udall (D-NM) and David Vitter (R-LA) along with a bipartisan coalition (the Udall-Vitter Bill), and the Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act (S. 725) introduced by Senators Barbara Boxer (D-CA) and Edward Markey (D-MA) introduced (the Boxer-Markey Bill). Despite early attention to these bills, activity on them has been slow. The Udall-Vitter Bill has been placed on the Senate Legislative Calendar, but no further actions have been taken. The Boxer-Markey Bill is still in committee.

In the meantime, the House of Representatives has surged ahead in TSCA reform. On June 23, 2015, the House passed the TSCA Modernization Act of 2015 (H.R. 2576) in a stunning bipartisan vote of 398-1 (the House Bill). The House Bill would amend TSCA to expand EPA's ability to evaluate and regulate toxic chemicals, making it easier for EPA to request new safety data about chemicals and to regulate those chemicals already on the market. It would also empower EPA with additional authority to impose fees to regulate chemicals. The House Bill takes a more narrow approach to TSCA reform than the bills working their way through the Senate, which may account for the sweeping acceptance it enjoyed.

Under the House Bill, the safety standard for evaluating the risks of a substance would be whether the chemical presents or will present an unreasonable risk of injury to health or the environment. The House Bill eliminates the current requirement under TSCA that EPA consider costs when assessing a chemical's safety and choose the least burdensome way to regulate it. Instead, the House Bill requires that scientific evidence alone forms the basis for an EPA chemical safety assessment and it diminishes the role that cost considerations would play when EPA develops regulations for a substance. In this way, the House Bill is similar to the Udall-Vitter Bill.

Two critical differences between the House Bill and the Udall-Vitter Bill should be noted. First, in its narrower approach, the House Bill would leave the current system for screening new chemicals in place. Under the current system, new chemicals typically enter the market by default unless EPA proves they are unsafe within a limited review timeframe. By contrast, the Udall-Vitter Bill would flip that system on its head, barring new chemicals from entering the market until EPA confirms they are safe.

Second, the House Bill does not contain the controversial state preemption provisions that the Udall-Vitter Bill contains. Instead, the House Bill would provide that if EPA makes a final determination that a chemical will not present an unreasonable risk, then generally no state may establish or continue to enforce any requirement applicable to that chemical. Similarly, if EPA imposes a requirement for a certain substance designed to protect against a risk of injury associated with the substance, no state may enact or continue in effect any requirement for that substance.

The House Bill has been received in the Senate, where further negotiations will likely ensue. If the Senate remains committed to this subject, we could see TSCA reform enacted into law sometime this year.

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