

Client Alert

May 2013

Proposed TSCA Reform Bill Has the Potential to Impact California's Proposition 65 and Green Chemistry Laws

On May 22, Senators Frank Lautenberg (D-NJ) and David Vitter (R-LA) announced the Chemical Safety Improvement Act of 2013 (the Act) — a bill to reform the Toxic Substances Control Act (TSCA). This bipartisan effort reflects a compromise between competing visions for TSCA reform. If passed in its current form, it will have significant impacts on the chemical industry. While there are numerous aspects to the Act, after briefly explaining the Act's new TSCA framework, this Alert focuses on preemption and confidential business information (CBI). While the Act's preemption provisions are designed to eventually result in a uniform national program, they may trigger a near-term rush to regulate by states, particularly California, which is in the process of developing its first Green Chemistry regulations. Additionally, although the Act protects CBI, it introduces a significant exception that jeopardizes trade secret protection.

Change in TSCA Framework

If passed, the Act will restructure EPA's framework for regulating chemicals manufactured, imported and used in the United States, with implications for the chemical industry and its entire supply chain, including importers, distributors, processors and retailers, as well as any party that manufactures, imports or retails products that incorporate chemicals or otherwise uses chemicals in its business. The first stage requires EPA to review existing active chemicals (those on the TSCA Inventory and currently in commerce) and classify them as either "high" or "low" priority, using a risk-based screening process. There is no deadline for completion of the prioritization process; EPA is merely required to "make every effort to complete" this "in a timely manner." In the second stage, for each high-priority substance, EPA is required to conduct a "safety assessment," make a "safety determination" and, as appropriate, establish by rule conditions for the manufacture, processing and use of the chemical on a commercial basis, or even phaseouts or bans. The safety determination is a final agency decision on whether no unreasonable risk of harm to human health or the environment will result from exposures to the chemical under the intended conditions of use (referred to in the Act as the "safety standard"). There are no statutory deadlines for EPA's completion of a safety assessment or safety determination. However, EPA is required to establish a schedule for completing all assessments and determinations. The Act empowers EPA to request additional chemical data and information as part of its safety evaluation process.

Preemption and Potential California Impacts

The Act contains a new two-step preemption process of state laws. Absent qualifying for one of the limited exceptions, or obtaining a waiver from EPA, preemption can be triggered by prioritization of a chemical as high or low priority and the completion of a safety determination. Once a chemical has been prioritized, no state can establish or enforce a new restriction on the manufacture, import, distribution or use of the chemical, whereas once EPA completes its safety determination for a chemical, preemption will extend to any state restrictions that were already in effect for that chemical prior to its prioritization. Because it may take EPA years to complete a safety determination, the second type of preemption will probably not take effect for most chemicals in the near-term. In contrast, prioritization is supposed to take place for all active existing chemicals more quickly. Hoping that their regulations could remain in place at

least until EPA completes the safety determination process, states may have an incentive to regulate as many chemicals as possible before EPA completes the prioritization process.

Applying the Act's current preemption scheme to California's Proposition 65 provides an illustration of how the Act's preemption provision might work. California's Proposition 65 law applies to a large list of chemicals that are known to the state of California to cause cancer or reproductive toxicity. Proposition 65 requires a warning before exposing a person to a listed chemical under certain conditions (the "warning requirement"). The Act's preemption provisions could potentially impact the warning requirement as follows:

- Once EPA prioritizes a chemical, if the chemical is not already on the Proposition 65 list, it cannot be added. If a chemical is already on the list, EPA's prioritization will not impact Proposition 65's warning requirement.
- Once EPA completes the safety determination, Proposition 65's warning requirement could no longer apply to the chemical.

The Act's proposed preemption scheme has the potential to either derail or accelerate California's first foray into Green Chemistry, its proposed Safer Consumer Products (SCP) regulations. As drafted, the SCP regulations identify more than 1,200 chemicals as candidate chemicals. If California has not implemented any of the SCP regulatory requirements for the candidate chemical, once EPA completes its prioritization process for that chemical, absent a preemption waiver, California could be preempted from further developing SCP requirements for that chemical. However, if California completes the SCP regulatory process for a chemical before EPA completes the prioritization, the SCP requirements will remain at least until EPA completes its safety determination.

The Act contains a relatively complex preemption waiver process. To obtain a waiver, California would have to argue that it could not wait for EPA to complete the safety assessment and determination for that chemical. EPA would then have to determine that (i) there were compelling state conditions warranting the waiver to protect human health or the environment; (ii) compliance with the proposed regulation would not unduly burden interstate or foreign commerce nor violate applicable federal law; and (iii) the proposed regulation would be developed based on the best available science and supported by the weight of the evidence. Alternatively, EPA could determine that a safety assessment or determination has been unreasonably delayed and conditions (i) through (iii) above have been met, except that the regulation need only be based on reasonable scientific concern. Waivers are available only for chemicals that have been designated as high priority or for which a safety determination has been completed.

Confidential Business Information

Also of particular interest to industry are the CBI provisions. While the Act still provides for the protection of CBI, it contains a wider range of exceptions than currently exist under TSCA. The most significant exception applies where EPA determines that disclosure "is necessary to protect human health or the environment." This extremely broad, vague provision is likely to be the subject of continued dialogue in the legislative process.

* * * * *

While the Act is presently enjoying bipartisan support, once it receives wider scrutiny, there is a significant chance of amendments, any of which could affect the likelihood of the bill's final passage. For more information about the Chemical Safety Improvement Act and its potential impacts on the chemical industry and California law, contact one of the attorneys listed below.

Contacts

Daniel E. Uyesato
duyesato@hunton.com

Malcolm C. Weiss
mweiss@hunton.com

Belynda Reck
breck@hunton.com

Diana Pfeffer Martin
martindp@hunton.com

Timothy J. Carlstedt
tcarlstedt@hunton.com

Matthew F. Hanchey
mhanchey@hunton.com

Suedy Torabi
storabi@hunton.com

© 2013 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.