

Memo

To: Stakeholders & Interested Parties

From: Squire Patton Boggs LLP

Re: Prospects for Modernization of the Toxic Substances Control Act (TSCA) During the 114th Congress

Date: 10 April 2015

The “Do Nothing” 114th Congress has started doing things. Just prior to the Easter Recess, for example, the House and the Senate approved budget resolutions for the first time in six years. More significantly, House Speaker John Boehner and Minority Leader Nancy Pelosi found common ground to move major bipartisan entitlement reform legislation through the U.S. House of Representatives. After more than a decade of trying, the House was able to agree to a permanent “doc fix” bill. Modernization of the Toxic Substances Control Act (TSCA), the 1976 law governing the commercial use of toxic chemicals, could be the next “under-the-radar” bill to move through Congress.

Few in Washington question the need to update the nearly 40-year-old TSCA law. Members of Congress from both parties have invested significant time and resources in recent years examining the law and exploring potential reforms in a mostly bipartisan manner, laying a solid groundwork for possible action in the current session of Congress. This deliberative process has proceeded in both the House and Senate, mostly at the committee level, even as Republicans and Democrats have clashed openly on other, more high-profile matters.

The Obama Administration has said little to date in its comments about the possibility of TSCA reform moving through the Republican-led Congress, suggesting the Administration is giving as much space as possible to congressional negotiators as they try to forge a bipartisan and bicameral consensus. The President indicated early in his Presidency that TSCA reform was a very important part of his environmental agenda. Given efforts underway in Congress, he may be able to accomplish another legacy agenda item by working with Republicans (and Democrats) to find common ground.

The years-long bipartisan process appears to be coming to a head at an ideal time for proponents of TSCA modernization. Congressional leaders are eager to schedule votes on and pass meaningful economic legislation that will further demonstrate the ability of the new Congress to govern and to focus on economic matters, which continue to be a top priority for American voters. The recent vote in the House of

Representatives to address the “doc fix” illustrates that significant legislation can pass in the current Congress, particularly when it is legislation that is truly bipartisan in nature and has not become a lightning rod for partisan warfare. We think TSCA reform could be next.

CURRENT STATUS OF LEGISLATION

Senate Outlook. In the U.S. Senate, Senators Tom Udall (D-NM) and David Vitter (R-LA) have introduced the Frank R. Lautenberg Memorial Chemical Safety for the 21st Century Act (S.697). The measure, which picks up on the bipartisan work begun by the late Sen. Frank Lautenberg (D-NJ), was **formally introduced** March 10 and already boasts an impressive 11 Democratic and 11 Republican co-sponsors. Republican backers include Sen. Jim Inhofe (R-OK), the chairman of the Senate Committee on Environment and Public Works, which has primary jurisdiction over TSCA; and Sen. John Thune (R-SD), the chairman of the Senate Commerce Committee on Commerce, Science & Transportation. The Udall-Vitter legislation is opposed by former Environment and Public Works Chairman Sen. Barbara Boxer (D-CA), who now serves as the committee’s ranking Democratic Member. She and a number of outside organizations that oppose the bill have expressed concerns that the legislation would favor industry at the expense of public health and safety and would preempt the ability of California and other States to impose more stringent measures in the interest of public health and safety.

For supporters of S.697, continuing to grow the bipartisan list of co-sponsorships is critical. Republicans presently have a numerical majority in the Senate, but are several votes shy of the 60-vote threshold needed to pass most bills through the chamber. This effectively means no Republican-backed bill can pass the Senate without the cooperation of at least six Democrats. The Udall-Vitter bill, with its 11 current Democratic co-sponsors, would appear to have enough Democratic support when coupled with a more receptive Republican majority. However, while having a significant number of Democratic co-sponsors may ultimately pave the way to overcome an anti-Udall-Vitter filibuster – most likely led by Sen. Boxer – it assumes that a majority of the majority (*i.e.*, 40 or more Republicans) will support the bill when it comes to the Senate floor. Assuming there is overwhelming support within the Senate Republican Conference for S.697 and that the current 11 Democratic cosponsors maintain their support, the odds become increasingly likely that the Senate will approve the Udall-Vitter bill. But as in baseball and other sports, you actually have to play the game to go beyond theory to get a definitive result. Until S.697 reaches the floor, anything can happen.

House Outlook. TSCA modernization supporters in the U.S. House of Representatives are watching developments in the Senate closely, and have largely taken a “wait and see” approach to date. By all accounts, Sens. Udall and Vitter have coordinated closely with Rep. John Shimkus (R-IL), chairman of the House Energy and Commerce Subcommittee on Environment and the Economy, which has jurisdiction over TSCA in the House. Rep. Shimkus, a strong advocate for TSCA modernization, has initiated

hearings on the topic and has recently circulated a new discussion draft that is narrower than S.697, but may hold off in actually moving legislation until the Senate either passes the Udall-Vitter bill, or demonstrates it has the votes needed to pass on the Senate floor.

Rep. Shimkus discussed the outlook for TSCA modernization in a March 20 interview with [Bloomberg BNA](#):

“To the credit of the senators involved. . .they have done the work needed in their process to have a bipartisan bill. Not just a bipartisan bill that's defined as one Democrat, but a bipartisan bill that's defined as a lot of Democrats. And that's really important to their process. So I'm optimistic that Leader McConnell can move a bill like that.”

“I think [the Udall-Vitter bill] is similar to what they were working on in the last Congress. I think they made a few tweaks. Sen. Udall is a good friend of mine. He is an unabashed supporter of ensuring that the health and protections are in there for the communities. No one questions that. So, we'll have to move our bill and we'll have to see where we can go. But they've done a ton of work and I want to give them credit for that.”

Once Shimkus begins moving a House version, TSCA modernization legislation could move quickly in the House. Shimkus is strongly supported in his efforts by House Energy and Commerce Committee Chairman Fred Upton (R-MI) and by House Republican leaders, who will make action on the issue a priority. Speaker Boehner and other members of the majority leadership in the House are eager to bring bipartisan legislation to the floor related to the economy and job creation. TSCA modernization legislation is also a priority for major corporations in Ohio, including a significant employer in Boehner's Southwest Ohio congressional district that sees enactment of reform legislation as vital to its workers.

While a significant number of House Democrats may follow Sen. Boxer's lead in opposing any TSCA reform measure that has the support of industry and congressional Republicans, a number of moderate House Democrats may see a bipartisan TSCA bill as something they can support. The support of these Democratic Members may prove critical to efforts to move a TSCA reform measure through the House, as there could be some hesitancy among conservative House Republicans about passing a bill that gives the U.S. Environmental Protection Agency (EPA) more authority. While opposition to the current bipartisan blueprint for TSCA modernization from the right has been relatively muted to date, this dynamic could change quickly in the months ahead once it becomes clear that a bill is moving through the House. If a significant number of House Republicans break with their leadership and oppose the measure that ultimately reaches the House floor, House leaders will need to offset those losses with a coalition of moderate and progressive Democrats that are willing to support legislation that enhances EPA authority in some ways despite controversial provisions related to preemption.

If such a scenario were to unfold, it is possible Speaker Boehner and House Majority Leader Kevin McCarthy (R-CA) would engage the leadership of the Democratic minority in the House – House Democratic Leader Nancy Pelosi (D-CA) and/or Democratic Whip Steny Hoyer (D-MD) – to ensure TSCA modernization passes when brought to the House floor. Thus, supporters of bipartisan TSCA modernization will need to focus House efforts in the weeks and months ahead on maximizing support for reform among “gettable” Democrats and minimizing defections among conservative Republicans.

ADMINISTRATION VIEWS

With bipartisan support for TSCA modernization growing steadily in the Senate, the fate of TSCA reform legislation in the 114th Congress may ultimately lie with the Obama Administration. Notwithstanding the President’s support of TSCA reform early in his Presidency, the Administration has yet to take a position on the Udall-Vitter bill. The President may be reluctant to alienate voices on the left who are likely to view him and his administration as the last line of defense between the public and a TSCA bill they view as harmful. In addition, the Administration is increasingly cognizant of the state politics, especially in California, with Sen. Boxer having announced her retirement at the end of this term. At a recent Senate hearing on TSCA modernization, an EPA official suggested that the Obama Administration likely would pay close attention to how the preemption issue (explored in greater detail below) is addressed in deciding whether to support a bill.

In the end, the Administration and his advisors may see the current TSCA reform process as a legacy item that offers the president his last, best chance to leave a legislative and regulatory imprint in the area of chemical safety.

KEY ISSUES IN TSCA MODERNIZATION

Preemption of State Laws. Leaders on both sides of the U.S. Capitol will need to bridge the divide on the matter of federal preemption before legislation can be successfully enacted. Industry stakeholders have traditionally sought a uniform federal regulatory framework that will apply in all 50 states to reduce the compliance challenges associated with varying state-by-state approaches. Environmental advocates and allied stakeholders, such as Democratic state attorneys general, take the contrary view that state regulatory frameworks deserve deference and remain critical tools for protecting citizens and communities, particularly those with unique situations or vulnerabilities.¹

Two competing Senate TSCA reform drafts from the 113th Congress largely reflected this divide. Legislation introduced by Sen. Boxer completely eliminated preemption of “common law rights or federal or state statutory remedies for civil relief, tort liability, private remedies, or actions based on state laws.” The Udall-Vitter discussion draft, on

¹ See e.g. State Attorneys General, A Communication from the Chief Legal Officers of the Following States: California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Oregon, Vermont, Washington, July 31, 2013, http://www.atg.wa.gov/uploadedFiles/TSCA%20Multistate%20Letter%20_FINAL_.pdf.

the other hand, sought to preempt state enforcement of federal law, and to preempt states from initiating new regulations if the federal government had already taken action to regulate in some way. The Udall-Vitter legislation introduced this year (S.697) takes the same approach.

Draft legislation put forth for discussion by Rep. Shimkus in 2014 sought to modify the existing preemption restrictions in three key respects. First, the draft sought to preempt state regulation of a chemical in commerce once EPA took required action regarding that chemical. Second, the draft sought to preempt state regulation of a new chemical regardless of federal action. Third, the draft would have prevented states from requesting health or safety information from a chemical manufacturer if EPA had already made a risk determination.

Resolving the preemption issue could be important to ensuring that any TSCA modernization bill is signed into law by President Obama, and Members will need to reconcile these varying approaches before TSCA reform can move forward. Rep. Shimkus was unable to attract Democratic support in the House for the 2014 blueprint, however, and has signaled the legislation he moves through his subcommittee this year will be more limited. New House Energy & Commerce Committee Ranking Member Frank Pallone (D-NJ) has reacted positively to Rep. Shimkus' new approach and indicated a desire to work with Republicans this year on TSCA modernization, according to reports.

EPA Regulatory Authority, Safety Determinations, and Funding. Beyond preemption, congressional reformers will also need to reconcile varied approaches towards EPA's authority to test and regulate chemicals, and how to fund any expansion in EPA authority – if members wish to increase said authority.

For instance, the Udall-Vitter discussion draft in the last Congress would have required EPA to adhere to an “unreasonable risk” standard for making new safety determinations, while the Boxer version called for a stronger “reasonable certainty” standard to ensure that a chemical would do no harm. Furthermore, Sen. Boxer also sought to increase the number of chemicals that would initially be listed as “high priority” from 10 to 15 chemicals; to increase the rate of repopulation as the review process was completed; and to reduce the timeline for completion of the review process.

Neither the Udall-Vitter draft nor the Shimkus draft in the last Congress included funds to implement the EPA's new, enhanced authority, while the Boxer draft sought to authorize EPA to collect reasonable fees to defray the costs of implementation.

S.697, introduced by Sens. Udall and Vitter in the current Congress, retains the “unreasonable risk” standard for new safety determinations, but also includes a provision for funding, by giving the EPA the authority to set fees.

CONCLUSION & RECOMMENDATIONS

Barring presidential opposition or another major unforeseen development in the months ahead, prospects are surprisingly good for enactment of a bipartisan TSCA modernization bill prior to the 2016 election. For stakeholders concerned about the shape of the regulatory environment in which they may be operating for another few decades, active engagement in the legislative process will be imperative to ensure that their business objectives are advanced. Now is the time to focus on what lies ahead, not least to shape the regulatory world that will develop as the U.S. Environmental Protection Agency interprets the legislation once signed into law.