
TSCA IMPLEMENTATION: WHAT'S IN TRUMP'S PLAYBOOK?

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Most people knew candidate Trump was no fan of climate change regulation or the Clean Water Rule (CWR). Mr. Trump's views on chemical management were never clearly articulated, however. Some may have interpreted this notable silence as support for Toxic Substances Control Act (TSCA) reform, given the broad bipartisan support it enjoyed before its enactment last June. Others may have assumed candidate Trump, in the heat of the campaign, was unaware of the significant commercial, legal, and trade implications occasioned by enactment of the Frank R. Lautenberg Chemical Safety of the 21st Century Act (Lautenberg), the most sweeping legislative overhaul to our domestic chemical management law in four decades. Similar to candidate Trump, President Trump has kept his TSCA cards close to his vest. To the extent money talks, the President's fiscal year 2018 budget doubles down on slashing the U.S. Environmental Protection Agency's (EPA) budget by over 30 percent. The chemicals program, however, would largely be spared cuts and in fact would get a boost under the Trump budget submitted to Congress in late May, suggesting solid support for ensuring the new law is implemented timely.

TSCA Reform

TSCA is the federal law that provides EPA with authority to regulate imported, manufactured, and processed industrial chemical substances, including chemicals intended for commercial and consumer uses. Lautenberg extensively amended TSCA, revising and adding definitions, expanding testing authority, regulating new and existing chemicals, expanding information reporting, narrowing confidential business information protection, and tinkering with preemption, among other changes. Further extensive information is available on our TSCA Reform website: <http://www.lawbc.com/knowledge-resources/tsca-reform-news-info>.

The run-up to enactment was protracted and contentious, and many thought it unlikely. The law passed under a Democratic president and a Republican-led House and Senate. How the law was passed is the stuff of growing urban legend. *See* <https://www.youtube.com/watch?v=0riZtGD-Q4Q>. The important take-home point for purposes of this discussion is the law passed with broad bipartisan support, a fact in which many stakeholders have taken perhaps false comfort knowing what we now know.

The Trump Administration and EPA

Mr. Trump is no fan of EPA, and he has wasted no time in expressing the view that environmental regulation needs to be rolled back. Two cherries sit atop Mr. Trump's pie of diminished environmental protection. The first is his selection of Scott Pruitt for EPA administrator, an unlikely pick to lead the agency. An avowed skeptic of mainstream climate change science, the former attorney general of Oklahoma sued EPA 14 times opposing President Obama's climate change policies. While Administrator Pruitt does not believe climate change is a "hoax," he supports debate, not action, to measure the impact of human activity on climate change, a view well outside the scientific mainstream.

The second cherry is President Trump's 2018 budget, which proposes a jaw-dropping 31 percent reduction in EPA funding (from \$8.2 billion in 2017 to \$5.7 billion in 2018). By any standard, this proposal is a thinly veiled weapon of mass-EPA destruction. Under this plan, 3200 EPA employees would lose their jobs, some 50 EPA programs would be sacrificed, and 50 percent of the EPA Office of Research and Development's budget would be eliminated, among other major consequences.

What This May Mean for TSCA Implementation

To date, there has been no public change in the Office of Chemical Safety and Pollution Prevention's (OCSPP) course of conduct regarding

TSCA implementation. With the exception of former Toxics Assistant Administrator Jim Jones, key staff within OCSPP and the Office of Pollution Prevention and Toxics (OPPT) remains the same. Acting Toxics Assistant Administrator Wendy Cleland-Hamnett is an experienced, able leader, well respected by staff and diverse stakeholders alike, a veteran OCSPP leader who knows the law and OCSPP staff well, and whose presence within the agency is undoubtedly reassuring during these uncertain times. Nancy Beck, Ph.D., DABT, was recently brought on as the principal deputy assistant administrator for OCSPP, and began working at EPA on May 1. Dr. Beck holds a doctorate in environmental health, and for the past five years has served as the senior director for Regulatory Science Policy at the American Chemistry Council.

Like any administration, the Pruitt administration can be expected to drive EPA regulatory and science policies. Mr. Trump is an outspoken critic of what he described as the Obama EPA's "manipulated" (fake?) science to support a political outcome and, of course, vowed to "fix" this. Under Lautenberg, EPA is required to promulgate the TSCA Inventory notification rule, TSCA procedures for prioritizing chemicals for risk evaluation, and TSCA procedures for chemical risk evaluation, all by June 2017. It is difficult to predict how exactly the new administration can be expected to influence the many critically important policy issues at play in these proposals, especially since Mr. Pruitt personally has no apparent prior experience with chemical law and policy. Dr. Beck's recent arrival at EPA, however, significantly enhances the front office's bandwidth in science policy issues.

That the administration will seek to influence chemical regulatory policy, however, is clear as the stakes are high and the consequences for the domestic chemical industry too great to be ignored. How, for example, will "weight of evidence" be defined; must all "conditions of use" be included in the scope of every section 6(b) risk evaluation; how should the "reasonably foreseen" provision

in definition of "conditions of use" be applied; will the composition of the Science Advisory Committee on Chemicals change and, if so, when. These are just a few of the many consequential decisions that this administration will decide concerning the Frank R. Lautenberg Chemical Safety for the 21st Century Act, some of which will almost certainly be litigated. In that neither a permanent toxics assistant administrator nor a general counsel has yet been identified, the window is closing for political appointees to make their mark on the framework rules, or on the scope of the risk evaluations for the 10 chemical substances identified on December 19, 2016. EPA reopened the comment period on this action in March, but little can be inferred from this decision or from Mr. Pruitt's decision to decline to commit to prioritizing an asbestos ban (asbestos is one of the 10 priority chemicals) when asked if he would do so during his confirmation hearing.

Interesting questions also arise from application of the EOs President Trump has issued with respect to their impact on TSCA implementation. EO 13,777, Enforcing the Regulatory Reform Agenda, issued on February 24, 2017, follows closely on the heels of his previous EO concerning government regulations (EO 13,771), which directs the head of every agency to designate an officer to "oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms." Of particular note is Executive Order No. 13,771, issued on January 30, 2017, requiring that agencies identify two rules for repeal for every new regulation the agency proposes. The particulars of the EOs are on top of the cold, hard fact that an expectedly unfriendly Trump Office of Management and Budget (OMB) will be in charge of regulatory reviews of each regulation, and significant EPA policies. Application of the EO to the TSCA implementation could burden OPPT's already strained resources to an unsustainable degree, hamper its ability to devote its limited resources to implementing the new law, and seriously disrupt the chemical manufacturing community by holding hostage urgently needed new chemicals.

It is unclear if the new administration appreciates the urgent need to ensure OPPT staff is sufficiently resourced to process new chemical notifications, and the critical role new chemicals play in sustaining industry and paving the way for more environmentally benign chemistries. EPA was expected to gain between 50 and 200 positions to implement Lautenberg. With a proposed reduction of thousands of positions, the prospect of even minimal net gains may be unachievable. Given the backlog of chemical notifications since June, OPPT is in urgent need of reinforcement to clear the jam and get back to a 90-day (instead of 6–9 months) review schedule, as contemplated by TSCA. More recent reports from EPA suggest Mr. Pruitt and his staff have made significant progress in diminishing the back-log, and EPA is to be commended for this success and urged to continue along this path. Similarly, required rulemakings under Lautenberg apparently are on track, as are the risk evaluations for the 10 priority chemicals. EPA is urged to stay focused and on target as failure to implement the new law timely and credibly will invite an erosion of the trust the public was beginning to place in the federal government's ability to manage chemical risks since Lautenberg's bipartisan enactment.

Call to Action

The magic moment in time that enabled Lautenberg's enactment was truly remarkable. Chemical stakeholders vested in ensuring Lautenberg is thoughtfully implemented should work hard now to fulfill the bipartisan and multi-stakeholder support on which Lautenberg's enactment rested. TSCA implementation is unlike other high profile environmental issues, as it resonates at a very personal level with the public. Restoring the public's confidence in EPA's ability to regulate chemical safety is essential to the success of the chemical community and its downstream customers.

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