

In another sign of the momentum building for reforming the Toxic Substances Control Act (TSCA), on June 3, 2015 the US House Committee on Energy & Commerce (E&C Committee) approved HR 2576, the "TSCA Modernization Act of 2015," by a 47 to 0 vote, with one abstention. A bipartisan bill introduced by Reps. John Shimkus (R-IL), Paul Tonko (D-NY), Fred Upton (R-MI) and Frank Pallone (D-NJ), HR 2576 differs slightly from a "discussion draft" version of the bill that was approved by an E&C Subcommittee on May 14.

As approved by the full E&C Committee, HR 2576 makes a number of substantive changes to the existing TSCA law.

Regulatory Action on Chemicals

HR 2576 gives EPA greater ability to take regulatory action on chemicals under Section 6 of TSCA by eliminating the current TSCA requirement that EPA must select the "least burdensome" option for action after the agency has determined that a chemical presents or will present an unreasonable risk of injury to health or the environment under its intended conditions of use.

HR 2576 provides that, before restricting (or banning) a chemical substance, EPA must conduct a "risk evaluation" to determine whether the substance presents an unreasonable risk of injury. If EPA determines that a chemical substance presents an unreasonable risk based on the risk evaluation, EPA would be required to issue a proposed rule setting forth regulatory action on the substance within 90 days after the risk evaluation is published, with the final rule to be issued within 180 days.

In promulgating a rule to restrict or ban a chemical substance or mixture under Section 6, EPA would have to "consider and publish" a statement that addresses "the effects of the chemical substance or mixture on health and the magnitude of the exposure of human beings" to it, as well as its effects on the environment and the magnitude of environmental exposure; the benefits of the substance or mixture; and the "reasonably ascertainable economic consequences" of the rule. Any restrictions imposed on a substance or mixture must be "cost-effective," except where EPA determines that additional requirements "are necessary to protect against the identified risk." EPA also must determine whether "technically and economically feasible alternatives" to the substance or mixture "will be reasonably available as a substitute."

HR 2576 provides that EPA must exempt any replacement parts designed before the Section 6 rule is promulgated unless EPA determines that the parts "contribute significantly to the identified risk, including identified risk to identified potentially exposed subpopulations." HR 2576 also limits EPA's ability to restrict articles by providing that it may do so "only to the extent necessary to protect against the identified risk" presented by a chemical substance or mixture in the article.

Risk Evaluations for Chemicals

HR 2576 provides that EPA will conduct a risk evaluation on a chemical substance if it determines that the substance may present an unreasonable risk because of potential hazard and a potential route of exposure under the substance's intended conditions of use. EPA is authorized to conduct risk evaluations of its TSCA Work Plan chemicals without having to first make such a determination, however. Additionally, HR 2576 requires EPA to conduct a risk evaluation of a chemical substance if the manufacturer of the substance requests that EPA do so, although the manufacturer must pay the cost of the risk evaluation.

In conducting a risk evaluation on a chemical substance, EPA would have to follow certain requirements for considering hazard and exposure data that are set out in the bill. EPA would be required to take into account "the likely duration, intensity, frequency, and number of exposures under the intended conditions of use" of the substance; describe "the weight of the scientific evidence for identified hazard and exposure;" and "consider whether the weight of the scientific evidence supports the identification of doses of the chemical substance below which no adverse effects can be expected to occur." EPA also would be required to "integrate and assess information on hazards and exposures for all of the intended conditions of use" of the substance, including "information on potentially exposed subpopulations." EPA is expressly prohibited from considering information on "cost and other factors not directly related to health or the environment" when conducting a risk evaluation.

EPA would be required to complete a risk evaluation on any chemical "as soon as reasonably possible, subject to the availability of resources," but not later than three years of its selection for evaluation. However, if more information is needed, EPA may extend the deadline by up to 90 days after receiving the information, or two years after initiating the risk evaluation, whichever is sooner.

HR 2576 provides that EPA cannot determine that a chemical substance will not present an unreasonable risk of injury to health or the environment if the agency determines that the substance under the intended conditions of use presents or will present an unreasonable risk of injury to one or more potentially exposed subpopulations.

HR 2576 requires EPA to "initiate" at least 10 risk evaluations in each fiscal year, "subject to the availability of appropriations."

Preemption of State Chemical Regulations

HR 2576 would prohibit any state or political subdivision from regulating a chemical substance if EPA has determined that the chemical does not present an unreasonable risk of injury under its intended conditions of use. If EPA issues a rule under TSCA Section 6 restricting a substance or mixture, a state or political subdivision cannot impose any additional restrictions on the substance or mixture, including any restrictions on articles containing the substance or mixture.

The prohibition would apply to both new and existing state chemical regulations. However, the bill does not preempt restrictions imposed by states pursuant to a federal law or a state law pertaining to air or water quality or waste treatment or disposal. The bill also expressly does not preempt state tort and contract law and remedies.

PBT Chemicals

HR 2576 requires EPA to publish a list of chemicals that are considered to be persistent, bioaccumulative and toxic (PBTs) within nine months after enactment of the bill and, within two years after enactment, designate any such PBT as a “chemical of concern” for which EPA can take regulatory action, if the PBT chemical has a likely exposure to the general population or a vulnerable subpopulation and scores “high” for either persistence or bioaccumulation and “high” or “moderate” for the other characteristic (persistence or bioaccumulation), pursuant to EPA’s TSCA Work Plan Methods Document.

Confidential Business Information

HR 2576 would allow EPA to share confidential business information (CBI) with state, local and tribal government officials and healthcare professionals under certain conditions. The bill also would require CBI claims to be substantiated in writing. A CBI claim would expire after 10 years unless it is reasserted and requested to renewed in writing before this time.

Other Changes to TSCA

HR 2576 would make several other changes to the existing TSCA law, including giving EPA the authority to require testing under TSCA Section 4 by administrative order for the purpose of conducting a risk evaluation. HR 2576 also would require EPA to develop any procedures and guidance to carry out the bill within two years of its enactment and review them at least every five years thereafter.

Additionally, the bill gives EPA the authority to establish fees under TSCA that are “sufficient and not more than reasonably necessary” that will be deposited into a TSCA Service Fee Fund. HR 2576 further requires EPA to submit a report to the US House and the E&C Committee within six months after the date of the bill’s enactment (and at least every five years thereafter) estimating EPA’s ability to conduct and publish risk evaluations and its plans to increase its capacity to do so; the resources necessary to conduct the minimum number of risk evaluations required by the bill; and the agency’s capacity to promulgate any Section 6 rules that may be necessary.

Consideration by the Full US House

HR 2576 is presently scheduled to be considered by the full US House during the week of June 22, according to a schedule recently released by the House Majority Leader’s office.

Contact

Stephen A. Owens

T +1 602 528 4170

E steve.owens@squirepb.com

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

© Squire Patton Boggs.

All Rights Reserved 2015