

June 28, 2016

*By Amanda Porter and Michelle Corrigan*

The Toxic Substances Control Act (TSCA) was enacted on October 11, 1976 to regulate certain chemical substances and mixtures being used in interstate commerce. [15 U.S.C. § 2601, et seq.](#) TSCA delegated enforcement authority to the Environmental Protection Agency (EPA), which may prohibit a chemical from use in commerce, or limit its production or use, if it is found to pose an unreasonable risk of injury to health or the environment. [15 U.S.C. § 2605.](#) In the 40 years since TSCA was enacted, the EPA has used this authority to place restrictions on nine chemicals.

### 1976 TSCA by the numbers

Approximately 82,000 chemicals are known to be used in commerce and are documented within TSCA's inventory.<sup>1</sup> Of these chemicals, 62,000 were already being used in commerce when TSCA was passed in 1976. So far, the EPA has reviewed over 40,000 of these chemicals for any hazardous risks. Five of the nine chemicals the EPA has restricted to date were within the 'existing' inventory at the time of TSCA's passage, and include: (1) polychlorinated biphenyls (PCB), (2) fully halogenated chlorofluoroalkanes, (3) dioxin, (4) asbestos and (5) hexavalent chromium.

The remaining four chemicals restricted by the EPA under TSCA began being used in commerce after 1976. They are primarily substances used in metal working fluids which become hazardous when combined with nitrates. These include: (1) mixed mono and diamides of an organic acid, (2) triethanolamine salts of a substituted organic acid, (3) triethanolamine salt of tricarboxylic acid, and (4) tricarboxylic acid.

### 2016 TSCA reform

On June 7, 2016, the U.S. Congress passed a bill to reform TSCA. See, [Frank R. Lautenberg Chemical Safety for the 21st Century Act](#) (H.R. 2576) (Lautenberg Act). On June 22, 2016 President Obama signed the Lautenberg Act into law. The new law has amended TSCA in a variety of ways. Notably, within two years, the EPA:

- » must develop policies and procedures for:
  - Requesting chemical safety data from manufacturers and processors of chemicals used in commerce;
  - Evaluating and prioritizing existing chemicals and their risks;
  - Reviewing and testing new chemicals and their potential hazards;
  - Conducting safety assessments and determinations of whether a chemical abides by set safety standards;
- » must produce an annual report detailing the status of new and ongoing chemical assessments; and
- » may request the production of information from manufacturers or processors of chemicals for certain purposes, regardless of any prior knowledge that the chemical poses a risk, via a rule, consent agreement, or order.

<sup>1</sup> [Chemical Regulation: Options Exist to Improve EPA's Ability to Assess Health Risks and Manage Its Chemical Review Program](#), GAO-05-458, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE 1-2 (June 13, 2005).

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## Chemical screening and prioritization under the Lautenberg Act

In carrying out the priority screening program for existing chemicals, the EPA must focus on the risks and hazards of those chemicals used in commerce within the past ten years. In order for the EPA to consider inactive chemicals, there must be a potential for high hazards or widespread exposure. A manufacturer or processor of an active chemical may pay the EPA to prioritize a safety assessment and determination for that chemical.

Before introducing a new chemical into commerce, the EPA must make a determination of whether it will meet safety standards following a 90-180 day review period.

The EPA may collect fees from chemical manufacturers, importers or processors. Standards for companies qualifying as small manufacturers and processors must be reviewed within 180 days of enactment and every ten years thereafter.

## Chemical Testing under the Lautenberg Act

Under the Lautenberg Act, testing on animals must be minimized. Any testing of chemicals under EPA guidelines must be attempted by non-animal means prior to the allowance any animal testing.

Any non-confidential testing information of a manufacturer or processor must be made available to the public. The EPA must review all confidential business information (CBI) claims and reclassify which CBI claims are and are not protected from disclosure, including exceptions and exemptions. All CBI protections are limited to a 10-20 year period.

## Effect of the Lautenberg Act on State Laws

The Lautenberg Act makes some allowance for the regulation of chemicals by the states. However, any state action banning or restricting chemicals that are not designated as high-priority by the EPA must be reported to the EPA by the state. The EPA must then conduct a prioritization screening for that chemical if it (1) poses an unreasonable risk, (2) has a likely impact on interstate commerce, or (3) has been subject to restrictions in two or more states. Any state action banning or restricting chemicals that are designated as high-priority, but have not undergone an EPA safety determination, must be reported to the EPA with scientific and legal bases for the state action.

With the passage of the Lautenberg Act, the states have only limited authority to restrict chemicals that (1) are currently being reviewed by the EPA, (2) have been determined by the EPA not to pose unreasonable risk, or (3) are subject to federal risk management. However, state laws requiring reporting and monitoring of chemicals used within the state are preserved. Also, any state laws imposing chemical restrictions that were enacted prior to April 22, 2016 are considered "grandfathered in" and will not be preempted by the Lautenberg Act.

## **Impressions**

The passage of the Lautenberg Act will likely have a significant impact on all manufacturers and processors of chemicals in the United States, including manufacturers and distributors of products containing chemicals. While the Lautenberg Act allows states to retain their current restrictions or impose new restrictions on chemicals used within the state, state laws may be preempted if the EPA performs an assessment of the chemical at issue, especially with regard to the same uses and concerns of the chemical that the state is attempting to regulate.

Federal preemption was one of the hottest issues of debate within the TSCA reform arena, and will likely have a large impact on the children's products industry. Currently, there are several state laws and proposed state regulations specifically placing restrictions on chemicals used in products designed for and marketed for use by children.<sup>2</sup> Whether and to what extent these laws will be preempted by the Lautenberg Act, and how the regulation of chemicals by grandfathered state laws in conjunction with the newly reformed TSCA, will likely be debated for years to come.

For more information about the Lautenberg Act and its reform of TSCA, and the continued regulation of chemicals in various states, please contact Michelle Corrigan or the Stinson Leonard Street attorney with whom you regularly work.

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<sup>2</sup> See [New York, New York: The Status of Regulation of Children's Products in the Empire State](#), Corrigan, STINSON LEONARD STREET (May 24, 2016), and [Flame Retardants: A Guide to Current State Regulations](#), Corrigan, STINSON LEONARD STREET (June 14, 2016)