

THE IMPACT OF THE TSCA AMENDMENT ON PRODUCT LIABILITY LAWSUITS

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I. INTRODUCTION

On June 22, 2016, the Frank R. Lautenberg Chemical Safety for the 21st Century Act (“Lautenberg Chemical Safety Act” or “LCSA”), which amends the Toxic Substances Control Act of 1976 (“TSCA”), the Nation’s primary chemicals management law, was signed into law.

There are over 80,000 chemicals on the market in the United States today, and the Environmental Protection Agency (“EPA”) has had the power to regulate harmful chemicals under TSCA since 1976. But the agency has actually used this power only a handful of times, banning a total of nine chemicals during the forty years since TSCA was first enacted.

The new law, named after the late chemical safety crusader Senator Frank Lautenberg (D-NJ) who had long championed an overhaul of the loophole-ridden toxic substances law, drastically changes the way that the United States Environmental Protection Agency (“EPA”) approves and regulates chemicals and microbials. The new TSCA received bipartisan support in both the United States House of Representatives and the Senate and includes much needed improvements such as:

- Mandatory requirement for the EPA to evaluate existing chemicals with clear and enforceable deadlines;
- New risk-based safety standard;
- Increased public transparency for chemical information; and
- Consistent source of funding for the EPA to carry out the responsibilities under the new law.

But Congress left many crucial decisions about its implementation to the agency, and following the January 2017 change in administrations, a number of former EPA officials and other critics have charged that the Trump White House is subverting the new chemical safety law under Trump EPA Administrator Scott Pruitt, who himself had sued the EPA 14 times while serving as Oklahoma’s attorney general.¹

¹ See, e.g., <https://whowhatwhy.org/2017/07/31/toxic-politics-clash-toxic-chemicals/>; https://www.huffingtonpost.com/entry/scott-pruitt-environmental-protection-agency_us_5878ad15e4b0b3c7a7b0c29c.

Despite these criticisms, one year after the new law was passed, on June 22, 2017, EPA announced a number of implementation activities which purportedly have enabled EPA to meet its first-year statutory responsibilities. And, in February 2018, the EPA announced that the agency “is making great progress in implementing the [Lautenberg Act].”²

Legal commentators have suggested the LCSA’s new testing mandates and relaxed protections for confidential business information will provide the plaintiffs’ bar with government-generated ammunition to support “toxic soup” cases. Health and environmental groups around the country, including Safer Chemicals Healthy Families, Earthjustice, the Learning Disabilities Association of America, Asbestos Disease Awareness Organization, and the Alaska Community Action on Toxics, have already begun challenging the EPA’s new rules in court in order “to make sure [the EPA] assesses chemicals as required by the revised [TSCA]” and “protect[s] the public from toxic chemicals in the years, and possibly decades, to come.”³ At this stage, however, it remains too early to tell what impact the Lautenberg Act ultimately will have upon consumer products liability litigation in the United States.

A. Congressional Reform of TSCA

A number of commentators have speculated that the recent historic TSCA reform will incentivize the plaintiffs’ bar to bring more toxic tort suits against chemical manufacturers.⁴ By way of background, TSCA had been the Nation’s primary chemicals management law for the past forty years, granting EPA the authority to regulate chemicals in commerce. When it was enacted in 1976, TSCA “grandfathered in” thousands of unevaluated chemicals that were in commerce at the time. The law did not give EPA a structure with which to evaluate chemicals or require companies to generate and provide data on chemicals they produced. Thus, some 62,000 chemicals were never tested by the EPA because they were grandfathered in and statutorily not considered an “unreasonable risk.” Over time, public confidence in EPA’s assessment of chemicals waned, some states passed their own chemical laws, and pressure grew in the marketplace to deselect certain products without sound scientific justification.⁵ This patchwork of different approaches to chemicals created confusion for consumers and businesses alike.

In June 2016, after years of negotiation and with input from industry, environment, public health, animal rights, and labor groups, Congress overwhelmingly passed the bipartisan Lautenberg Chemical Safety Act to reform TSCA.⁶ The Senate passed the measure on a voice vote; the

² See <https://chemicalwatch.com/63848/looking-ahead-to-significant-tsca-progress-in-2018>.

³ See <https://www.nrdc.org/experts/daniel-rosenberg/pruitt-epa-see-you-and-your-illegal-tsca-rules-court>.

⁴ See, e.g., <https://www.law360.com/articles/817057/defending-against-a-new-generation-of-toxic-torts>.

⁵ See <https://www.americanchemistry.com/LCSA-Learn-More.pdf>.

⁶ The American Chemistry Council was joined by over 150 diverse business groups in support of the LCSA, along with environmental groups including the Environmental Defense Fund, public health groups like the March of Dimes, animal rights groups such as the Humane Society, and

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House approved it 403 to 12. The intention was to give the EPA the authority necessary to require new testing and regulation of thousands of chemicals used in everyday products, from laundry detergents to hardware supplies. On June 22, 2016, the LCSA was signed into law by President Barack Obama.

The new act significantly overhauls the way EPA regulates the tens of thousands of chemicals made and used in American industry. Among other highlights, the Lautenberg Chemical Safety Act:

- ❖ Subjects *all* chemicals to an EPA review for the first time
 - EPA will conduct a risk-based review of all chemicals in commerce.
 - Risk evaluations must be based only on human health and environmental considerations.
 - EPA must consider vulnerable groups like infants, pregnant women, and the elderly.
- ❖ Requires EPA to focus on chemicals that are the highest priorities
 - EPA will establish a transparent, risk-based process to identify high and low priority chemicals that considers a chemical's inherent hazards; uses; typical exposures to people, including vulnerable groups, and the environment; proximity to drinking water sources; and other relevant information.
 - A thorough risk evaluation will be conducted on all chemicals designated as "high priority."⁷
- ❖ Makes it easier for EPA to require more safety testing of chemicals
 - Empowers EPA to require manufacturers to perform additional safety testing on chemicals if the Agency believes more data is needed to make a safety determination. In the past EPA had to demonstrate that a chemical did not meet the safety standard before it could require more tests.

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labor organizations like North America's Building Trades Unions. See <https://www.americanchemistry.com/LCSA-Learn-More.pdf>.

⁷ The amended law defines "high-priority" substances as those that "may present an unreasonable risk of injury to health or the environment because of a potential hazard and a potential route of exposure ... including an unreasonable risk to a potentially exposed or susceptible subpopulation" (e.g., infants, children, pregnant women, workers or the elderly). Section 6(b)(1)(B)(i).

- ❖ Gives EPA a full range of options to manage risks posed by chemicals
 - EPA will apply risk management measures to any chemical found to present an unreasonable risk that could include labeling requirements, use restrictions, phase-outs, or bans.
 - Compliance with all rules must be as soon as practicable, but generally within five years.

- ❖ Sets aggressive deadlines for EPA to complete its work
 - EPA has **180 days** from enactment to have risk evaluations underway on the first **10** high priority chemicals, to be pulled from EPA's existing Work Plan Chemicals list.
 - Within **1 year**, EPA must establish the process to identify additional high and low priority chemicals.
 - Within **1 year**, chemical manufacturers must report to EPA all chemicals they are currently producing or processing so the Agency has an accurate accounting of chemicals currently in commerce.
 - Within **3.5 years**, EPA must have evaluations underway for at least 20 high priority chemicals.
 - Risk evaluations must be complete in **3 years**, with a possible 6 month extension.

A week after President Obama signed the new law, on June 29, 2016, EPA released its “First Year Implementation Plan” which listed the various actions EPA is required to take and a number of other changes EPA intended to implement within the first year. In addition, the EPA announced that, for existing chemicals with risk assessments completed before the date of enactment of the LCSA, EPA would continue to publish proposed and final rules consistent with the scope of those assessments.⁸ Specifically, EPA announced that it planned to finalize rules for trichloroethylene (“TCE”), methylene chloride, and N-methylpyrrolidone (“NMP”) by late 2017.

- B. EPA's proposed section 6 rules for TCE, NMP and methylene chloride have apparently been shelved indefinitely.

Section 6 of TSCA, which predates the 2016 amendments, gives the EPA power to ban or restrict a chemical if it concludes that it presents an unreasonable risk to human health or the environment. The EPA issued three proposed section 6 rules in the Obama administration's final days in January 2017.

⁸ TSCA § 26(l)(4); 15 U.S.C. § 2625(l)(4). All references to TSCA provisions are to TSCA as amended, rather than to the LCSA.

Specifically, EPA published proposed section 6 rules seeking to restrict and prohibit certain uses of TCE, methylene chloride, and NMP based on the Agency's prior risk assessments for these chemicals. A proposed rule to prohibit the manufacture, processing, distribution, and use of TCE for aerosol degreasing and in spot cleaning in dry cleaning facilities was published on December 16, 2016,⁹ and a companion proposed rule to prohibit the manufacture, import, processing, distribution, and use of TCE in vapor degreasing was published on January 19, 2017.¹⁰ Both of these proposed rules would require manufacturers, processors, and distributors, except for retailers, of TCE to provide downstream notification of these prohibitions throughout the supply chain, and keep records. EPA accepted comments on the TCE aerosol degreasing and spot cleaning proposed rule until March 16, 2017, and the TCE vapor degreasing proposed rule until April 19, 2017.¹¹

Similarly, on January 17, 2017, EPA issued a proposed section 6 rule seeking to regulate certain uses of methylene chloride and NMP in paint and coatings removers based on a proposed determination that such uses pose an unreasonable risk.¹² The proposal would prohibit the manufacture, import, processing, and distribution of methylene chloride and NMP for all consumer uses and most types of commercial paint and coating removal (*e.g.*, paint stripping). It would also require manufacturers, importers, processors, and distributors, except for retailers, of methylene chloride and NMP to provide downstream notification of these prohibitions throughout the supply chain, and keep records. EPA accepted comments on the proposed methylene chloride and NMP restrictions until April 19, 2017.

In December 2017, however, the EPA signaled it is now shelving the Section 6 proposals to restrict the use of the solvents TCE, methylene chloride, and NMP, in an effort to curb "unnecessary regulatory burdens."¹³ The EPA's action came approximately eleven months after President Trump signed an order in January 2017 that was aimed at cutting regulations on businesses, saying that agencies should eliminate at least two regulations for each new one adopted.¹⁴ Critics blasted the move immediately, asserting that the reversal demonstrates the EPA's increasing reluctance to use enforcement powers granted to it by Congress under the revised TSCA.

⁹ See <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/federal-register-notice-trichloroethylene-tce-regulation>.

¹⁰ See <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/federal-register-notice-trichloroethylene-tce-0>.

¹¹ See <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/federal-register-notice-trichloroethylene-tce-1>.

¹² See <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/methylene-chloride>.

¹³ See <https://www.nytimes.com/2017/12/19/health/epa-toxic-chemicals.html>.

¹⁴ See https://www.washingtonpost.com/news/energy-environment/wp/2017/01/30/trump-wants-to-cut-two-regulations-on-businesses-for-every-new-one-imposed/?utm_term=.1a6da59f839d.

For example, Senator Tom Carper, Democrat of Delaware and the ranking minority member on the Senate Environment and Public Works committee, opined that EPA Administrator Scott Pruitt is “blatantly ignoring Congress’s clear directive to the agency to better protect the health and safety of millions of Americans by more effectively regulating some of the most dangerous chemicals known to man.”¹⁵

C. EPA has named the first high priority chemicals to be reviewed under the LCSA.

Separately, on December 19, 2016, EPA published in the Federal Register its initial list of ten “high priority” chemicals that EPA will evaluate for potential risks to human health and the environment under the LCSA. The high priority chemicals list includes:

- 1,4-Dioxane;
- 1-Bromopropane;
- Asbestos;
- Carbon tetrachloride;
- Cyclic aliphatic bromide cluster (HBCD);
- Methylene chloride (also known as Dichloromethane);
- N-Methylpyrrolidone (NMP);
- Pigment Violet 29 (Anthra[2,1,9-def:6,5,10-d’e’f’] diisoquinoline-1,3,8,10(2H,9H)-tetrone);
- TCE; and
- Tetrachloroethylene (also known as perchloroethylene).¹⁶

Many of the substances on EPA’s initial list of “high-priority” substances came as no surprise and are unlikely to generate any fresh new waves of products liability litigation. At the time of the TSCA amendments, EPA had already initiated risk assessments for approximately a dozen Work Plan substances and EPA selected five of its first 10 “high-priority” substances from the shorter list of those substances for which EPA has completed risk assessments: 1-Bromopropane; 1,4-Dioxane; Methylene Chloride; N-Methylpyrrolidone (NMP); and TCE.

¹⁵ See <https://www.nytimes.com/2017/12/19/health/epa-toxic-chemicals.html>.

¹⁶ See <https://www.epa.gov/newsreleases/epa-names-first-chemicals-review-under-new-tsca-legislation>.

Both 1-Bromopropane and 1,4-Dioxane were likely candidates, because they have a hazard score of 3, are possible carcinogens, are widely used in consumer products, have high reported releases to the environment, and have been detected in drinking water or groundwater. In contrast, Methylene Chloride and NMP, which have both low environmental persistence and potential for bioaccumulation, were less likely choices.

EPA's choice of TCE is somewhat surprising, given that EPA had undertaken a rulemaking with respect to TCE under TSCA Section 6(a). To some observers, this strongly suggested there are uses for TCE that remained of concern to EPA and that fall outside of the scope of the proposed rules that EPA already had submitted to the OMB for review. Given recent events, however, it also might be the case that agency officials, in view of the impending change of administrations, wanted to provide some "insurance" through these particular listings and provide the additional momentum that can be leveraged by nongovernmental organizations who can point to the new statutory deadlines should the pending proposals get stalled (or derailed) along the way.

Carbon tetrachloride is another listing that is somewhat curious. Carbon tetrachloride has a hazard score of 3, is carcinogenic, was widely used in consumer products, has high reported releases to the environment, is highly persistent, and has been detected in drinking water supplies.¹⁷ Nevertheless, the major consumer uses in the U.S. have largely ceased, maximum concentration limits have been established for drinking water, and there are workplace regulations governing its use and limiting worker exposures.

In contrast, Pigment Violet 29 and tetrachloroethylene ("PERC") are not unexpected choices given they both have properties that meet many — if not all — of the factors Congress set forth for selection to the "high priority" list. Pigment Violet 29 is widely used in consumer products, has high environmental persistence, toxicity to aquatic species, and hazard and exposure scores of 3. PERC has similar properties, is listed as a probable human carcinogen, and has also been detected in biomonitoring programs and in drinking water supplies.¹⁸

Finally, EPA's selection of asbestos is not at all surprising, given that Senator Barbara Boxer, D-California, seemed willing to torpedo the TSCA amendments because asbestos was not singled out by name in the legislation at the time when the amendments were coming up for a vote in the Senate. The asbestos listing also provides the agency an opportunity to test whether the recent amendments to the statute will finally enable EPA to more readily address a substance that was the target of restrictions in a TSCA Section 6 rulemaking that was successfully challenged in federal court a quarter century ago.¹⁹

¹⁷ See <https://monographs.iarc.fr/ENG/Monographs/vol71/mono71-17.pdf>.

¹⁸ See <https://monographs.iarc.fr/ENG/Monographs/vol106/mono106-002.pdf>.

¹⁹ Over twenty-five years ago, EPA sought to phase out the use of asbestos in commercial products but was defeated by the Fifth Circuit's decision in *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991), which held that EPA had failed to adequately justify the ban. Since then, even though asbestos is no longer commonly used in most products, no regulatory or legislative ban has been enacted.

Nevertheless, asbestos is different from the other substances on EPA's list, and poses different challenges from the others, which all are more traditional industrial chemicals. Put simply and in contrast to the other chemicals set for evaluation, asbestos is not manufactured, even when it is used in products. Asbestos is different than other involved substances because in raw form it exists in nature, it has been the focus of massive product liability litigation for a generation, and it presents a different set of compliance challenges for industry.

1. Prior attempts to regulate asbestos

Some asbestos history is in order. Certain types of “asbestos” — usually defined as a group of silicate minerals with fibrous properties — have historically been component parts of many industrial products, because asbestos functions as an insulator. Asbestos was intentionally used as a part of products as varied as insulation, gaskets, flooring and brakes, and litigation over asbestos-containing products has driven more than 100 companies bankrupt. Plaintiffs in these cases argue that asbestos in commercial products can cause chronic health conditions like asbestosis and mesothelioma.

Yet EPA has never banned asbestos. EPA had found in a 1989 rule-making — which was subsequently overturned by the Fifth Circuit — that asbestos is a human carcinogen and “is one of the most hazardous substances to which humans are exposed in both occupational and nonoccupational settings.” OSHA has also said that there is no safe level of asbestos exposure for any type of asbestos fiber, and that asbestos exposures as short in duration as a few days have caused mesothelioma in humans.²⁰ According to the U.S. Geological Survey, domestic mining of asbestos had ceased in 2002 because of a decline in the U.S. asbestos market attributed to health and liability concerns; thus the country depends on imports to meet manufacturing needs.²¹ The chloralkali industry accounted for an estimated 90 percent of U.S. consumption, with the remainder used in coatings and compounds, plastics, roofing products, and other “unknown applications.”²²

As of today, the TSCA limits the definition of “asbestos-containing materials” to those containing more than one percent asbestos.²³ The TSCA further defines “asbestos” to include only six particular varieties of asbestos, namely chrysotile, crocidolite, amosite, anthophyllite, tremolite and actinolite.²⁴

In the most significant criminal litigation about asbestos — *United States v. W.R. Grace et al.* — a primary defense was that the “asbestos” fibers at issue were not among the substances that had

²⁰ See <https://www.osha.gov/SLTC/asbestos/>.

²¹ See <https://minerals.usgs.gov/minerals/pubs/commodity/asbestos/mcs-2016-asbes.pdf>.

²² *Id.*

²³ See 15 U.S.C. § 2642.

²⁴ See *id.* § 2642(3).

been defined as “asbestos,” but instead were winchite and richterite (also known as “Libby vermiculite”).”²⁵

While the Ninth Circuit rejected this argument in favor of an undefined yet broader definition of “asbestos,”²⁶ the TSCA definition has never been changed. Various legislation has been introduced to address these concerns over the years, but none of it has ever been passed by Congress.

This uncertainty results in some confusion surrounding EPA’s December 19, 2016 announcement, which refers to just “asbestos.”²⁷ EPA’s 2014 Work Plan, referenced in the announcement, in turn refers to “asbestos & asbestos-like fibers.” Throughout the *W.R. Grace* litigation, the agency sought to use a broad definition of asbestos; thus, we do not now know what precisely will constitute “asbestos” for EPA’s LCSA evaluation. Presumably, the question of what is or is not asbestos is one that regulators will wrestle with in the coming years.

2. Next steps for asbestos and other high priority chemicals under the LCSA

EPA’s publication of the “high priority” list on December 19, 2016 triggered a statutory deadline under the LCSA for a scoping document for each chemical to be published by June 19, 2017,²⁸ and for EPA to complete risk evaluations for the chemicals by December 19, 2019.²⁹ These risk evaluations eventually will determine whether each substance presents an “unreasonable risk” in the context of the intended conditions of use and any reasonably foreseeable uses.³⁰

²⁵ See *United States v. W.R. Grace*, 455 F. Supp. 2d 1122 (D. Mt. 2006).

²⁶ See *United States v. W.R. Grace*, 504 F.3d 745 (9th Cir. 2007) (rejecting the “six-fiber” definition in favor of one from the Chemical Abstract Service Registry, under which “asbestos” is “a grayish non-combustible material”).

²⁷ See <https://www.federalregister.gov/documents/2016/12/19/2016-30468/designation-of-ten-chemical-substances-for-initial-risk-evaluations-under-the-toxic-substances>.

²⁸ The “scoping document” for each substance or cluster will be subject to a public comment period and must include the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations the agency plans to consider in the risk evaluation.

²⁹ EPA is required to designate additional high-priority chemicals over the next several years. For each risk evaluation that EPA completes, the agency must begin another. By the end of 2019, EPA is required to maintain a minimum of 20 high-priority chemicals under review.

³⁰ On March 6, 2017, EPA published a notice in the Federal Register reopening the comment period on the risk evaluation scoping efforts under the LCSA for the ten chemical substances that were designated on December 19, 2016. The initial notice, issued in the Federal Register on January 19, 2017, announced a public meeting which took place on February 14, 2017, and solicited “comments to receive input and information to assist the Agency in its efforts to establish the scope of risk evaluations under development for the ten chemicals substances.” This notice extended the comment period for 14 days, from March 1, 2017, to March 15, 2017, in response to a request from the interested public.

As noted above, once EPA designates a chemical as a high priority, that chemical must undergo a complete risk evaluation that is intended to determine whether the chemical poses an “unreasonable risk of injury to health or the environment.”³¹ To inform that evaluation, EPA has the authority to mandate industry — *including users as well as manufacturers* — to fund, develop and submit new technical and scientific data. EPA also will assess fees on both manufacturers and users (processors) to fund the agency’s evaluation of existing chemicals.³² The amended law requires the agency to complete these risk evaluations within three years.

To that end, on February 8, 2018, the EPA proposed to update a fee program that would raise \$20 million per year from chemical manufacturers and distributors and help the agency fund its obligations under the recently amended TSCA. “EPA has moved swiftly to implement the amended TSCA requirements,” EPA Administrator Scott Pruitt said in a statement.³³ “Our proposed TSCA fees rule ensures we have sufficient resources to review chemicals for safety with the highest scientific standards.” Annualized fees collected from the chemical industry are estimated to be about \$20 million, the agency said. The EPA said the fees would go toward evaluating the health and environmental risks of existing chemicals; collecting and reviewing toxicity and exposure data and other information; reviewing claims by businesses that some information related to a chemical should be kept confidential; and determining the safety of new chemicals before they enter the marketplace. However, critics have been quick to charge that the EPA’s proposed fees rule is an attempt to lowball the real costs to the agency of doing this work, meaning the EPA gets less money in fees than it would otherwise get and industry has to pay less, with the end result being “we’re going to get assessments done with far less robust information on the risks chemicals present than we should be getting.”³⁴

³¹ EPA has established dockets and announced agency contacts for each of the initial ten “high priority” chemicals. Each docket contains a document with EPA’s preliminary evaluation about the domestic manufacturing, processing, distribution, use, and disposal of the chemical.

³² The LCSA allows EPA to collect up to \$25 million annually in user fees from chemical manufacturers and processors when they submit test data for EPA review; submit a premanufacture notice for a new chemicals or a notice of new use; manufacture or process a chemical substance that is the subject of a risk evaluation; or request that EPA conduct a chemical risk evaluation. According to EPA, the new fees will defray costs for new chemical reviews and a range of LCSA implementation activities for existing chemicals. *See* <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/highlights-key-provisions-frank-r-lautenberg-chemical>.

³³ *See* https://www.law360.com/productliability/articles/1011037/tsca-rule-would-help-fund-broader-epa-chemical-program?nl_pk=ef08880c-d6d8-499f-bf6e-ccb62c5f7c1d&utm_source=newsletter&utm_medium=email&utm_campaign=productliability

³⁴ On the environmentalists’ side, Richard Denison, lead senior scientist at Environmental Defense Fund, said the EPA could and should be collecting even more money from fees. Although the TSCA amendments do not require the EPA to collect fees, Congress said if the agency chose to do so it could get more than what it is asking for in the proposed rule. In particular, Denison pointed to the fees the EPA has proposed implementing to cover Section 4

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At the end of its high priority chemicals evaluation, if EPA determines that a chemical poses an unreasonable risk, EPA is required by the LCSA to adopt restrictions on usage to address the identified hazards.³⁵ EPA has the authority to impose a wide range of restrictions on the use of new and existing chemicals, not just on their manufacture. In the worst case, EPA could order the complete ban of a chemical from the market, eliminating the availability of that chemical to manufacturers and processors. But, even if EPA does not take such a dramatic step, other restrictions could have an impact on chemical manufacturers, processors, and users. For example:

- EPA could impose nationwide volume restrictions on the amount of the chemical which can be manufactured or imported.
- EPA could impose emissions limits, or work with OSHA to set workplace exposure limits. This could mean that processing facilities will be required to install new pollution-control devices and/or require employees to don additional personal protective equipment such as respirators.

Product manufacturers will also need to pay attention to the LCSA's unique method of dealing with preemption of state laws-based chemical regulation. Over the past several decades, a number of states — most notably California — have created their own chemical regulation regimes, with varying degrees of success. The new law has the potential to replace those regimes. But there will not be the immediate and wholesale replacement that some originally sought: State laws are only impacted on a chemical-by-chemical basis, if and when EPA takes a chemical-specific action.

Notably, certain existing state laws and regulations will remain untouched even if EPA takes action. By design, California's Proposition 65 will continue in force, and the state may even be able to add additional chemicals to that program. However, other existing laws, such as California's Green Chemistry law, will be subject to some preemption.

In short, unless EPA has taken action on a chemical the states remain free to do so instead. This has been described by state action advocates as allowing states to “step in” and fill a gap if EPA

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costs. While TSCA says the EPA can collect fees to cover up to 25 percent of its costs, the agency has proposed collecting only 3.5 percent. “The fee rule is just the latest manifestation, on paper, of the political leadership's disturbing unwillingness to impose costs on the industry that Congress gave it the authority to do,” Denison said. See https://www.law360.com/environmental/articles/1011037/tsc-rule-would-help-fund-broader-epa-chemical-program?nl_pk=30bd29a5-19e3-4c37-9c63-4ff1066209e0&utm_source=newsletter&utm_medium=email&utm_campaign=environmental.

³⁵ If the evaluation prompts EPA to determine that a chemical substance presents an unreasonable risk under certain use conditions, EPA must undertake and complete a Section 6 rulemaking within two years (unless an extension of as much as two additional years is needed).

is too slow or unwilling to act on a specific chemical. However, it also means that states could put chemical and product manufacturers through a state-based process imposing new restrictions — all at great expense to industry — only to have that effort duplicated at a federal level and the restrictions replaced by something different.

Finally, chemical users (processors) also must be paying attention to EPA’s implementation of the panoply of new requirements, with respect to both the implementing regulations and the individual chemicals named for evaluation. Processors should not assume that their suppliers are taking care of everything: suppliers may have different economic interests; have other chemicals which are of greater concern to them; or may simply be unaware of the importance of a particular chemical. Chemical users should already be communicating with their suppliers to share their concerns and keep up to date, and should begin evaluating their chemical supply chains for potential concerns.

D. What Lies Ahead for TSCA Reform Under the Trump Administration?

President Trump’s nominee to serve as EPA Administrator, Scott Pruitt, was confirmed by the Senate on February 17, 2017. With the change of administrations, Jim Jones, who had served as Assistant Administrator of EPA’s Office of Chemical Safety and Pollution Prevention (“OCSPP”), stepped down.

The new Administration’s policies could have an impact on TSCA reform implementation and the LCSA in general. For example, on February 8, 2018, the Trump Administration signaled that it wanted to cut the EPA’s budget, which could hinder the agency’s ability to implement TSCA reform and efficiently and effectively operate under the LCSA. Specifically, President Trump proposed cutting the EPA’s budget by nearly a quarter in fiscal year 2019. The EPA also proposed cutting full-time equivalent staffers from the current level of 15,408 to 12,250 in 2019, a level not seen since 1984.³⁶

Moreover, the EPA’s new regulatory agenda, updated December 14, 2017, also says the agency does not expect to propose rules for reviewing confidential business information (“CBI”) claims related to TSCA inventory chemicals until 2019. The CBI regulation was moved to the long-term agenda in the December update, although it is required by TSCA. The notice says the EPA expects to propose a rule in January 2019 and finalize it by the end of that year.

Finally, at a Senate Committee Oversight Hearing held on January 30, 2018, Senator Jeff Merkley (D-OR) expressed concern that EPA’s chemical reviews under TSCA were only focusing on new “items” (chemicals) being made, but overlooking “legacy” chemicals already in

³⁶ See https://www.law360.com/environmental/articles/1011583/trump-proposes-25-percent-cut-to-epa-in-2019-budget?nl_pk=30bd29a5-19e3-4c37-9c63-4ff1066209e0&utm_source=newsletter&utm_medium=email&utm_campaign=environmental.

the environment (e.g., asbestos). Merkley cited a report that claimed that review of the ten chemicals on the priority list were being “slow-walked” by Pruitt’s EPA.³⁷

On the other hand, new Administrator Scott Pruitt could ensure continuation of EPA’s implementation of the LCSA. During his confirmation process, he declared that “I am committed to implementing the Lautenberg Act as required by law including meeting the statutory deadlines enumerated in the law including the required rulemakings, risk evaluations, and future chemical prioritizations.”³⁸ And, in response to Senator Merkley’s criticisms, Pruitt stated “it is an absolute priority during [EPA’s] first year,” the three TSCA final rules were issued consistent with the implementation schedule in the first year, and the backlog of chemical reviews has been addressed through the addition of resources.

To that end, the TSCA inventory reset process is now taking place. The EPA maintains a list, known as the Toxic Substances Control Act Inventory, of all the chemicals that were either in existence when the Toxic Substances Control Act was enacted or approved since that time. If a chemical is not on that list, it cannot legally be used in the United States. The EPA is in the midst of determining which chemicals on the inventory are still in active commerce, referred to as the “inventory reset”.

Chemical manufacturers or importers must report to the EPA any chemical manufactured or imported during the 10-year period before June 21 2016. This reporting had to be completed by February 7 2018. The EPA will then compile a preliminary list and give “chemical processors” – defined as any other entity that uses chemicals – an opportunity to report chemicals not previously identified. That reporting period closes on October 5 2018.

This seemingly small reporting obligation has a significant effect: if a chemical is not identified and reported or subject to a reporting exemption, it will not be placed on the “active” inventory, and that chemical will not be legal for use in the United States. This includes all chemicals used in manufacturing consumer electronics, juvenile products, pharmaceuticals, clothing, paints, coatings, adhesives, lubricants and cleaners. Even if the end product is regulated under a different statute, the constituent chemicals are still regulated under TSCA and must be included in the inventory.

The reporting deadline for chemical manufacturers and importers was February 7, 2018. EPA will issue an interim list of active substances following the Feb. 7, 2018, deadline. Processors can use that list as a basis for their active notification submissions that are due October 5, 2018. Meeting these deadlines is important because a chemical will not be legal for use in the United States if it is not identified, reported (or subject to an exemption) and included in the active TSCA inventory.

³⁷ See <http://www.tscablog.com/entry/pruitt-addresses-legacy-issues-tsca-implementation-in-oversight-hearing>.

³⁸ See https://www.epw.senate.gov/public/_cache/files/6d95005c-bd1a-4779-af7e-be831db6866a/scott-pruitt-qfr-responses-01.18.2017.pdf.

In the meantime, the chemical industry is stepping up to assist the EPA in lawsuits already filed by the Environmental Defense Fund (“EDF”) and other campaign groups. Under dispute are the EPA’s final rules to implement the updated TSCA.³⁹ The plaintiffs argue that the EPA’s rules governing how the agency will assess the risks posed by chemical substances, published on July 20, 2017, cave to the chemical industry. They assert that the final rules are significantly relaxed compared to the original proposals – made in January 2017, right before President Trump took office.

The American Chemistry Council (“ACC”) has joined other industry groups in legally applying to intervene in the litigation on behalf of the EPA. The trade group argues that the suits are “without merit” and could jeopardize the EPA’s ability to prioritize chemicals for risk evaluation, and to conduct those risk evaluations of high-priority substances in the required timeframes.⁴⁰

II. CONCLUSION

TSCA reforms were intended to create a framework to meaningfully evaluate and regulate materials which could create risk. Asbestos will pose a crucial early test of these reforms.

Commentators have suggested the LCSA’s new testing mandates and relaxed protections for confidential business information will provide the plaintiffs’ bar with government-generated ammunition to support “toxic soup” cases.⁴¹ However, nearly two years after the LCSA was enacted, the only real uptick in litigation noted has been in reference to the EPA’s implementation and enforcement of the new law. What lies ahead remains to be seen.

³⁹ The fees rule is the final of four framework rules under the LCSA. As previously noted herein, the other three rules are a prioritization rule that helps the EPA identify high-priority chemicals for risk evaluations; a risk evaluation rule that creates a framework for assessing the risk potential of high-priority chemicals; and an inventory rule that requires industry to report which of its chemicals manufactured, imported or processed in the U.S. over the past 10 years are active in U.S. commerce. All three of those rules have been challenged in court. *See* <https://www.law360.com/articles/983681>.

⁴⁰ *See* <https://www.chemistryworld.com/news/industry-intervenues-in-chemical-regulation-lawsuits/3008017.article>.

⁴¹ The new LCSA regime weakens protections for confidential business information (“CBI”). Previously, companies could protect most proprietary information, subject to EPA review. Now, CBI claims will expire after 10 years unless a company re-submits its claim and seeks EPA’s affirmative approval to keep information confidential. EPA also will be required to enhance access to CBI for states, medical professionals, and first responders. This risks exposing manufacturers to additional lawsuits, as more proprietary information could be publicly revealed and potentially used against the company by the plaintiffs’ bar.