THE
NATIONAL LAW REVIEW

Democratic Senators Call on EPA to "Stop Undermining Key Chemical Safety Law"

Sunday, June 23, 2019

On June 20, 2019, Senators Tom Udall (D-NM), Cory Booker (D-NJ), Ed Markey (D-MA), Jeff Merkley (D-OR), and Sheldon Whitehouse (D-RI) sent a letter to U.S. Environmental Protection Agency (EPA) Administrator Andrew Wheeler requesting information on EPA's implementation of the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Lautenberg Act). The letter notes that the Lautenberg Act was intended to enact reforms addressing "longstanding structural problems" with the Toxic Substances Control Act (TSCA). According to the letter, EPA's implementation of the Lautenberg Act "has deviated dramatically from Congress' intent and the new law's requirements." The Senators' letter requests EPA's responses to a number of questions regarding the following areas of concern:

Article By Carla N. Hutton
Lynn L. Bergeson
Bergeson & Campbell, P.C.
Toxic Substances Control Act Blog

Environmental, Energy & Resources
Biotech, Food, Drug
All Federal

- **Section 4: EPA's failure to use its enhanced information authorities under TSCA**. Under the Lautenberg Act, EPA can now acquire information where needed to review new chemicals or to prioritize or review the risks of a chemical already on the market. The law also makes clear that EPA can require the development of real-world exposure information. According to the Senators, in the nearly three years since enactment of the Lautenberg Act, "EPA has not once used these new authorities, and seems to be avoiding using them at all costs -- even where there are critical information gaps."

- **Section 5, Part 1: EPA's failure to protect workers when reviewing new chemicals under TSCA**. The Lautenberg Act strengthened EPA's authority to regulate chemicals that may present risks to workers "by explicitly naming workers as a 'potentially exposed or susceptible subpopulation' and requiring that EPA consider and address potential risks to workers when assessing new or existing chemicals." According to the Senators, EPA is failing to use TSCA's health standard, which is more stringent than the Occupational Safety and Health Administration's (OSHA) workplace standards, to determine whether any of the new chemicals "may present an unreasonable risk" to workers. Where EPA finds a new chemical does or may present serious risks to workers, it is allowing that chemical onto the market without imposing any conditions to protect the workers. EPA's "only justification for this is that it simply 'expects' that workers will protect themselves from harmful workplace exposures by wearing personal protective equipment (PPE) that the company is not required to provide or train workers to use properly." This deference to OSHA regulations "allow[s] workers to be exposed to chemical risks that are a thousand or more times higher than are acceptable under TSCA.

- **Section 5, Part 2: EPA's failure to adequately identify and review "reasonably foreseen" conditions of use when reviewing new chemicals under TSCA**. When reviewing a new chemical, the Lautenberg Act directs EPA to examine the chemical under its "conditions of use" -- "the circumstances, as determined by the Administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of."

According to the Senators, "EPA has attempted to skirt this requirement for an integrated assessment of both intended and reasonably foreseen conditions of use in several ways that are contrary" to TSCA's requirements:

- For most new chemicals that EPA has reviewed in recent months, it simply asserts there are no such reasonably foreseen uses;
- For those new chemicals where EPA identifies a reasonably foreseen use, it merely states, without providing any analysis, that it expects that use to present no greater risk than the intended use. By doing this, EPA not only fails to demonstrate that the reasonably foreseen use is not likely to present an unreasonable risk, it also fails to consider that the combination of use could present such a risk; and
- For the remaining new chemicals where EPA does identify a reasonably foreseen use and identifies some potential concern with that use, EPA has separately promulgated a significant new use rule (SNUR) that requires a company to notify EPA prior to engaging in that reasonably foreseen use. In these SNURs, EPA has not made clear that it would assess the potential exposure and risks from that use in combination with the already approved intended uses as part of its review of any such notice, however.

The Senators note that none of these recent policy changes to EPA's examination of new chemicals' conditions of use has been made public or subject to a public comment opportunity.

- **Section 6: EPA's failure to assess even known conditions of use and pathways of exposure in conducting risk evaluations of existing chemicals under TSCA**. The Lautenberg Act requires EPA to evaluate potential risks arising from activities across the entire lifecycle of a chemical, considering all "known" and "reasonably foreseen" circumstances, not just those "intended" by a company making or using a chemical. The letter states that EPA "has sought in numerous ways to limit the scope of its risk evaluations and risk determinations." In its final Risk Evaluation Rule, EPA "asserted sweeping authority to pick and choose what activities and what exposures it includes in its risk evaluation of a chemical." According to EPA, it can ignore any exposure to a chemical that also falls under the authority of another agency, such as OSHA, regardless of whether that agency has actually taken any action to mitigate the risks of the chemical. EPA also stated that it will exclude "legacy" activities associated with a chemical. EPA has begun to conduct risk evaluations that exclude most or all pathways of exposure to a chemical that falls under the jurisdiction of another statute administered by EPA.
- **Section 14: EPA's failure to provide timely public access to non-confidential information and access by eligible parties to confidential business information under TSCA**. The Lautenberg Act amended Section 14, enhancing requirements for companies' assertion and substantiation, and EPA's review of confidential business information (CBI) claims; for providing public access to chemical information; and for providing expanded access to CBI. Although these provisions were immediately effective, nearly three years after enactment, "there is little evidence that EPA is effectively implementing these provisions or requiring compliance with them."

Commentary

The letter is well written if not quite one-sided. Complicated issues require thoughtful analysis, and this letter demands a clear and compelling response from industry advocates that may well respectfully disagree with the Senators' position on many of the points made in the letter. We suspect this letter may well be a point of discussion at Monday's TSCA at Three conference.

Source URL: https://www.natlawreview.com/article/democratic-senators-call-epa-to-stop-undermining-key-chemical-safety-law