
CHEMICAL CONTROL REFORM EFFORTS UNDER TSCA SHOULD INCLUDE FEDERAL "VOLUNTARY" PROGRAMS

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As lawmakers and stakeholders debate whether and how to reform the 40-year old Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et seq., it is important to recognize that traditional regulatory development and enforcement are not the only tools federal regulators use to shape and influence chemical research, development, commercialization, and selection. Increasingly, the U.S. Environmental Protection Agency (EPA) and other federal agencies are using the Internet, social media, and health and environmental marketing techniques to promote market adoption and deselection of substances and products that would be difficult, if not impossible, to accomplish using regulatory authority alone. If the goal of TSCA reform is to reestablish the federal government's credibility in setting risk-based, data-driven health and environmental safety standards for chemicals used in commerce, any new bill should recalibrate EPA's voluntary program authority as well.

The line between regulatory authority and market influence has blurred over the past two decades. Following the 1991 *Corrosion Proof Fittings* decision that overturned EPA's comprehensive ban on asbestos, EPA largely abandoned its TSCA section 6 risk management authority, opting instead for public-private partnerships and market-based incentive programs like the Design for the Environment (DfE) program, the "Environmentally Preferable Products" website, and related efforts. See www.epa.gov/saferchoice and www.gov/epp. These programs steer consumers, retailers, and their supply chains toward products and product inputs that EPA has deemed to be "safer" or preferable based on simple hazard screens that equate a product's safety and environmental impact to the theoretical toxicity of its individual ingredients.

While popular with many stakeholders and expedient from a resource management perspective, hazard-based ingredient standards say little about the ultimate safety, let alone the broader sustainability, of the end-use product. See, e.g., Charles L. Franklin, *Chasing Hazards: Toxicity, Sustainability, and the Hazard Paradox*, American Bar Association, Natural Resources & Environment, volume 29, number 4 (Spring 2015). Indeed, in October 2014, the National Research Council (NRC) issued a report evaluating EPA's DfE program, along with several other state and third-party alternative analysis regimes, recommending "increased focus on comparative exposure assessment" and greater consideration of "other metrics, including environmental impact, cost, performance and social impact" in assessing potential trade-offs. National Academies of Science (NAS), NRC, *A FRAMEWORK TO GUIDE SELECTION OF CHEMICAL ALTERNATIVES*, ISBN 978-0-309-31013-0 (2014), 1-7, available at <http://www.nap.edu/catalog/18872/a-framework-to-guide-selection-of-chemical-alternatives>. Notwithstanding the recommendations of the 2014 NAS report, the Obama administration essentially doubled down on its hazard-only paradigm five months later when, in March 2015, it rebranded its DfE labeling program as the "Safer Choice" labeling program while making negligible changes to the evaluation criteria used to assess the relative safety of selected products.

To date, there has been little, if any, public debate about the merits of aligning EPA's voluntary program activities with EPA's regulatory activities under a reformed TSCA statute. With three very different legislative proposals still in play, however, it is not too late. Section 24 of the bipartisan Frank R. Lautenberg Chemical Safety for the 21st Century Act (introduced March 10, 2015) would amend section 27 of TSCA, governing "Development and Evaluation of Test Methods," and direct EPA to establish an interagency

“Sustainable Chemistry Program” to promote and coordinate federal sustainable chemistry research, development, demonstration, technology transfer, commercialization, education, and training activities. See <https://www.govtrack.us/congress/bills/114/s697>. As introduced, the bill would grant the administrator complete discretion in defining the scope, meaning, and criteria underpinning such sustainable chemistry efforts, raising concerns that EPA might disregard calls for consideration of exposure and life-cycle considerations as it did with its Safer Choice program. One way to prevent this without imposing undue constraints on EPA reasonable discretion would be to insert a clarifying sentence in the bill requiring EPA to consider and follow the recommendations of the non-partisan 2014 NAS report when developing a framework for its Sustainable Chemistry Program:

“The activities of [EPA’s Sustainable Chemistry Program] shall be designed to—

(1) Incorporate the recommendations of the National Academies of Science (NAS) in their 2014 Report, *A Framework to Guide Selection of Chemical Alternatives*, ISBN 978-0-309-31013-0 (2014), including, but not limited to placing a greater emphasis on comparative exposure assessment and lifecycle thinking;”

Neither the TSCA Modernization Act of 2015 discussion draft released by Congressman Shimkus in April 2015 nor the Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act, S. 725, as introduced by Senator Boxer and Senator Markey in March 2015, includes any reference to EPA’s voluntary program authorities. Still, nothing would prevent including such a provision in future drafts or consensus documents in the course of future negotiations.

Redirecting EPA’s voluntary programs to consider exposure, risk, and other life-cycle impacts will not resolve the difficult issues remaining for lawmakers in the regulatory reform debate. It could, however, ensure that EPA’s own voluntary programmatic

activities do not undermine or contradict the carefully crafted federal risk framework of a reformed chemical control statute.

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