THE "MOST CONTENTIOUS ISSUE" — FEDERAL PREEMPTION IN THE AMENDED TOXIC SUBSTANCES CONTROL ACT

Date: 28 July 2016

Public Policy and Law Alert

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This client alert is the third in a series that discusses the significant changes instituted by the passage of a new federal Toxic Substances Control Act. The first alert addressed broadly the law's myriad of changes. The second alert addressed how changes in the law will impact manufacturers, processors, and importers of new chemical and existing chemicals. Future alerts will cover enforcement of the new law, protection of confidential information, and international impacts of the amendments.

Recently signed into law, the Frank R. Lautenberg Chemical Safety for the 21st Century Act (the "Lautenberg Act"), significantly reforms the 1976 Toxic Substances Control Act ("TSCA") and includes important provisions regarding federal preemption of state laws regulating chemicals. Federal preemption issues related to TSCA reform had been discussed for years, and Senator James Inhofe (R-OK) described the preemption provisions in the Lautenberg Act as "the most contentious issue of the negotiations as well as the most important linchpin in the final deal" this year. By examining the compromise reached by Congress, this alert focuses on how TSCA, as amended, preempts state regulation of chemicals and preserves certain state laws and regulatory authority, and notes how businesses can best position themselves to prepare for the new requirements.

BACKGROUND

Largely due to federal inactivity and the lack of robust regulation of chemicals under TSCA since its enactment in 1976, individual states themselves began to regulate commercial activities in the chemical sector. In the years leading up to enactment of the Lautenberg Act, chemical manufacturers, chemical distributors, and product retailers grew increasingly concerned by this growing patchwork of state chemical regulations. As the scope of state regulations expanded, associated compliance costs escalated for the industry. Seeking nationwide regulatory uniformity and more certainty, the chemical industry wanted strong federal preemption provisions to be part of any TSCA reform legislation. Disagreements about the federal preemption issues had doomed TSCA reform efforts in previous years, but in 2016 legislators reached a preemption compromise that ultimately paved the way for passage of the bill that became the Lautenberg Act. Going forward, industry will still need to comply with state-level regulations, but these regulations will be more limited due to the new preemption provisions.

FEDERAL PREEMPTION OF STATE LAW

The Lautenberg Act includes two significant new preemption provisions. First and foremost, TSCA now precludes

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state action on a chemical if the United States Environmental Protection Agency ("EPA") determines through a risk evaluation that such chemical does not present an unreasonable risk or if EPA promulgates a rule to address the identified risks posed by the chemical. The scope of federal preemption matches the scope of the hazards, exposures, risks, and uses or conditions of use of a given chemical included in EPA's final action on such chemical. For example, if EPA were to conduct a risk assessment limited to a particular use of a chemical and did not evaluate or take final action related to other uses of the chemical, then preemption would not apply to such other uses. Importantly, preemption based on final action by EPA (whether by a determination of no unreasonable risk or a final rule addressing chemical risks) is effective when such final action occurs. Additionally, the amended law also precludes states from requiring the development of information regarding a chemical that would be "reasonably likely" to duplicate information that will otherwise be required to be developed under TSCA, such as in the course of an EPA risk evaluation.

Second, the law creates the new concept of "pause preemption." Under this concept, a state is temporarily preempted from imposing any new restrictions on a given chemical from the time that EPA defines the scope of a risk evaluation for a high-priority chemical until EPA publishes its final risk evaluation or when the deadline for completing the evaluation expires, whichever is earlier. The scope of the preemption matches the scope of EPA's risk evaluation, so if certain risks or chemical uses are not included in the scope of EPA's risk evaluation, the "pause preemption" does not apply, and a state could take new action on such chemical related to risks or uses that are outside that scope. Since EPA must provide at least one year between identifying a chemical for prioritization and publishing the scope of the associated risk evaluation, states would have an opportunity to place restrictions on a chemical by statute or administrative action prior to the pause preemption taking effect. If EPA publishes a final risk evaluation concluding the chemical presents an unreasonable risk, a state has another opportunity to impose new restrictions while EPA promulgates a final rule regarding such chemical. In addition, pause preemption does not apply to the first ten risk evaluations of high-priority chemicals that EPA conducts or to any risk evaluations nominated by a manufacturer unless such evaluations are of chemicals listed on the most recently published TSCA Work Plan for Chemical Assessments, a list used to indicate which existing chemicals EPA intended to target for assessment under the original law.

PRESERVATION OF CERTAIN STATE REGULATORY AUTHORITY

Under the amended law, states maintain significant regulatory authority. For example, states can act on any chemical or particular use of a chemical that EPA has not yet addressed and can implement reporting, monitoring, or disclosure requirements not imposed under federal law.

States also can adopt and enforce chemical regulations that are identical to the federal regulations. As a practical matter, this empowers states to adopt parallel regulations and then to interpret and enforce them independently of EPA. One unresolved question is whether activist state regulatory authorities will interpret their parallel regulations differently from, or enforce them more aggressively than, EPA.

Similarly, states can adopt regulations related to water quality, air quality, and waste treatment or disposal notwithstanding EPA action. However, such regulations cannot (i) restrict the manufacture, processing, distribution, or use of a chemical substance and (ii) address the same hazards and exposures, with respect to the same conditions of use included in EPA's risk evaluation. States may be able to exert substantial, indirect

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influence over the use of chemicals through the adoption and enforcement of water quality, air quality, and waste treatment or disposal regulations by addressing different hazards, exposures, uses and conditions of use.

Perhaps most important, however, the Lautenberg Act includes two significant grandfathering provisions:

1. States may continue to enforce any actions taken or requirements imposed regarding specific chemicals ***prior to April 22, 2016***; and
2. States may continue to enforce and take new regulatory actions regarding chemicals pursuant to state laws that were ***in effect on August 31, 2003.***

The grandfathering provisions were a critical part of the compromise reached by legislators on preemption. In particular, the August 31, 2003 date preserves California's Proposition 65 law and regulations and Massachusetts' Toxics Use Reduction Act.

Additionally, the amended TSCA does not preempt state "right to know" or other laws requiring disclosure of the presence of, or exposures to, a chemical. For example, the amended law will not affect the obligations to make disclosures regarding exposures to numerous chemicals pursuant to California's Proposition 65. Common law rights of action, laws granting remedies for civil relief, including damages, or penalties for criminal conduct also are not preempted.

Recent, California regulatory action illustrates the interplay between state and federal regulation, and preemption, following enactment of the Lautenberg Act. On July 15, 2016, California's Department of Toxic Substances Control ("DTSC") released draft regulations that would identify the flame retardant chemicals TDCPP or TCEP, which had commonly been used in children's foam-padded sleeping products, as "priority chemicals" pursuant to California's "Safer Consumer Products" program. If adopted, the new regulation would require consumer product manufacturers to remove products containing those chemicals from the California marketplace or to conduct an "Alternatives Analyses" to determine if safer alternative chemicals or products can be used. DTSC would have a variety of options available to regulate the chemicals in California following completion of Alternatives Analyses, including banning the chemicals from the California marketplace.

However, EPA is already in the process of assessing risks from flame retardants pursuant to its TSCA Work Plan Chemical Assessment process. This assessment includes TDCPP and TCEP. It remains to be seen whether and to what extent the EPA assessments will lead to action that preempts California's proposed regulation, or whether California will request a preemption waiver notwithstanding EPA action.

STATE WAIVERS OF PREEMPTION

Reducing the reach of the federal preemption provisions, the Lautenberg Act includes substantial state waiver provisions. Specifically, states may seek a mandatory waiver from pause preemption or a discretionary waiver from general preemption where certain criteria are established. Under the waiver provisions, EPA must grant a state a waiver from pause preemption if the state enacted a statute or proposed or finalized an administrative action intended to prohibit the use of a chemical no later than 18 months after EPA initiates the prioritization process for a chemical or when EPA publishes the scope of its risk evaluation, whichever is sooner. EPA must also grant a waiver regarding pause preemption if a state applies to EPA and demonstrates that a proposed state

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restriction would not unduly burden interstate commerce and would not cause a violation of federal law, and the state's concern about the chemical in question is based on peer-reviewed science.

States may also apply to EPA for discretionary waivers from the general preemption provisions. However, such waivers require rulemaking by EPA based on a determination that (i) compelling conditions warrant granting the waiver to protect health or the environment, (ii) compliance with the proposed state requirement would place no undue burden on interstate commerce, and (iii) the proposed state requirement is designed to address a risk that was identified using the best available science. Given the requirement for rulemaking and the required substantive determination, it appears unlikely that discretionary preemption would be feasible in any but extraordinary circumstances. However, there are many open questions regarding the role of this discretionary waiver. One important open question is whether EPA could grant a waiver if EPA had previously promulgated a final rule regarding a given chemical that included a safety standard that was weaker than the standard proposed by the state in its waiver application.

CONCLUSION

In addition to other significant provisions of the Lautenberg Act discussed in prior alerts, the TSCA amendments include complicated preemption provisions that determine the relative authority of states and EPA to regulate the chemical industry. Understanding how and when states, as well as EPA, may regulate manufacturing, processing, and distribution in commerce of chemical substances is an important component of realizing the full effect of the new regulatory framework for chemicals in the United States.

Looking forward, industry players would be well advised to engage legal and policy professionals to advocate for their interests as EPA develops rules and guidance during the next few years. The extent to which state laws will be preempted will be substantially affected by the hazards, exposures, risks, and uses or conditions of use studied by EPA in its risk evaluations. In addition to participating in the initial rulemaking process, businesses should also carefully monitor chemical risk evaluations on the federal and state level as an indicator of significant regulatory risk related to a given chemical or category of chemicals.

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