

Panelists at hearing express optimism that a compromise on TSCA modernization can be reached but substantial policy differences remain

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On May 22, 2013, David Vitter (R-LA), Ranking Member of the U.S. Senate's Environment and Public Works Committee, and the late U.S. Senator Frank Lautenberg (D-NJ) introduced S.1009, the Chemical Safety Improvement Act ("CSIA"). At present, the CSIA is cosponsored by 12 Democrats and 13 Republicans and, as such, is the first and only Toxic Substance Control Act ("TSCA") modernization bill to enjoy bipartisan support. If enacted into law, the CSIA would update TSCA, give the U.S. Environmental Protection Agency ("EPA") enhanced authority to collect data and regulate potentially problematic chemical substances, clarify EPA's obligation to protect confidential business information, and address the difficult issue of conflicting and duplicative laws by U.S. states to restrict and ban commercial chemical substances.

Since the enactment of TSCA in 1976, the Dentons/TSG TSCA Practice Group has been advising clients on TSCA implementation, enforcement, and compliance. We wrote the book on the subject, "*The TSCA Handbook*," currently in its fourth edition, and we have presented the "*Toxic Substances Control Act: Fundamentals and More*" seminar for over 25 years.

In this series of advisories dedicated to the CSIA, we offer clients and friends of the firm our thoughts and analyses. In this advisory, we discuss the latest developments and possible compromise regarding TSCA modernization.

Last Wednesday, the House Energy and Commerce Subcommittee on Environment and the Economy held a hearing on the Chemical Safety Improvement Act ("CSIA"), bipartisan legislation introduced last May by the late Senator Frank Lautenberg (D-NJ) and Senate Environment and Public Works Committee Ranking Member David Vitter (R-LA) to modernize the Toxic Substances Control Act ("TSCA"). CSIA garnered support from a diverse group of Senators and stakeholders, but the legislation also evoked opposition from Senate Environment and Public Works Committee Chair Barbara Boxer (D-CA) and some environmental organizations. The hearing highlighted the differences which have inhibited the CSIA's momentum, though both supporters and opponents of the legislation expressed optimism that a compromise could be reached.

The Subcommittee held three previous hearings on TSCA modernization, but Wednesday's House hearing marked the first time the Subcommittee has directly focused on the CSIA. The hearing consisted of two panels, along with testimony from Senator Vitter and Senate Superfund, Toxics and Environmental Health Subcommittee Chair Tom Udall (D-NM). The first panel featured testimony from Jim Jones, EPA Assistant Administrator, Office of the Chemical Safety and Pollution Prevention, and the second panel heard testimony from the following witnesses: Cal Dooley, President and CEO, American Chemistry Council; Richard Denison, Senior Scientist, Environmental Defense Fund ("EDF"); Ernie Rosenberg, President and CEO, American Cleaning Institute; Andy Igrejas, National Campaign Director, Safer Chemicals, Healthy Families; and Dr. Wendy Wagner, University of Texas School of Law.

At Wednesday's hearing, Senator Vitter and Senator Udall testified that the CSIA was not perfect, but that they are working with their colleagues and other stakeholders in an attempt to address concerns about the bipartisan legislation. In particular, Senator Udall identified three issues that must be resolved for the CSIA to be successful: (1)

ensuring that EPA has authority to protect vulnerable populations, such as pregnant women and children, from dangerous chemicals; (2) ensuring that the CSIA does not preclude private rights of action on toxic tort claims; and (3) addressing concerns relating to preemption of state chemical laws. Senator Vitter and Senator Udall stated that they wanted to reach a compromise, but they declined either to provide a timeline for when an updated bill might be released or to offer any specifics as to how these discussions might address controversial issues such as state preemption.

Based on Wednesday's hearing, it is clear that the CSIA's preemption of U.S. state laws remains a major problem for some stakeholders. At the hearing, Committee Democrats, including House Energy and Commerce Committee Ranking Member Henry Waxman (D-CA), registered their opposition to CSIA's preemption provisions, echoing Senator Boxer's position on the issue. One possible solution was proposed by Richard Denison (EDF), who testified that any preemption should occur only after EPA has taken a final agency action on a chemical. It remains to be seen whether this idea might gain any traction.

The House hearing also highlighted other issues that may need to be addressed in order for the CSIA or another bill to move forward, including the following: the identification of a sustained source of funding for EPA to meet any new responsibilities under the CSIA; and the establishment of deadlines for EPA to conduct safety assessments and safety determinations under the CSIA. EPA Assistant Administrator Jim Jones testified to some of the benefits of the CSIA, including mandating that the Agency test all chemicals in commerce and affirmatively approve all new chemicals before they enter the market. Jones also called for changes to CSIA. In particular, Jones urged Congress to provide EPA with "clear, enforceable, and practicable deadlines" to review and take actions on chemicals and to identify a sustained source of funding for EPA's implementation of any changes to TSCA.

The NGO witnesses also raised several other issues that they think should be addressed as part of any TSCA modernization bill. For example, Andy Igrejas with the Safer Chemicals, Healthy Families and Denison contended that CSIA's confidential business information provisions fail to provide EPA with the authority to require documentation of past confidentiality claims. Both Denison and Igrejas also called for enhanced EPA authority to require testing for new chemicals.

EDF initially endorsed the CSIA but is now calling for substantial changes to it. In particular, Denison stated that while CSIA "contains many of the elements of effective reform," the bill "needs significant changes if it is to actually deliver the promised reforms." Other environmental organizations have been more critical of the CSIA and, thus, are expected to continue their opposition to the bill, absent major changes to it.

Nonetheless, we view the fact that the House Subcommittee held a hearing last week as a sign that there is still a desire and an ongoing effort to reach a legislative compromise during the current Congress, which will adjourn sometime late next year (2014). House Environment and the Economy Subcommittee Chair John Shimkus (R-IL) signaled his support for CSIA, but he also seemed inclined to see where the ongoing Senate negotiations lead, instead of moving his own bill in the House. For the time being, the focus will remain on negotiations involving Senator Boxer, Senator Vitter, and Senator Udall. Last Wednesday, Senator Vitter and Senator Udall reiterated their desire to engage with interested stakeholders on how to resolve some of the concerns that have been raised with respect to the CSIA. The Senators' offer provides an opportunity for industry to provide their expertise and perspective on the best approaches to TSCA modernization.

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