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2012 Predictions For TSCA Reform And EPA Initiatives

Law360, New York (January 19, 2012, 1:55 PM ET) -- We offer our thoughts on what may be headed our way in 2012 with regard to reform of the Toxic Substances Control Act (TSCA) and chemical management initiatives from the U.S. Environmental Protection Agency's (EPA) Office of Chemical Safety and Pollution Prevention (OCSPP).

Not surprisingly, the 2012 presidential election cycle will influence activities in Congress by both parties and decisions made by the administration in 2012.

Environmental issues are often used to make clear distinctions between the two parties, and this could lead to initiatives by either party with the intention to illustrate or exacerbate those differences. This will likely lead to at least a few new initiatives, or some actions labeled as "new," and some number of high-profile decisions on the part of the administration.

In the meantime, there will be continued, and sometimes blistering, criticism from congressional Republicans about the costs and alleged adverse impacts of environmental regulations on jobs and the economy.

Congress

The Prospects for TSCA Legislation

The future prospects for any new TSCA legislation are dim. On April 14, 2011, Sen. Frank R. Lautenberg, D-N.J., chairman of the Environment and Public Works Subcommittee on Superfund, Toxics and Environmental Health, introduced the Safe Chemicals Act of 2011, which is intended to modernize TSCA to require chemical companies to demonstrate the safety of industrial chemicals and the EPA to evaluate safety based on the best available science.

Lautenberg previously introduced TSCA reform legislation in the 111th Congress, the Safe Chemicals Act of 2010 (S. 3209).

In response to feedback from chemical industry leaders, public officials, scientists, doctors, academics and nonprofit organizations, Lautenberg stated that he has made changes to the bill to improve its chances of success.

Critics continue to argue that the legislation, while improved, would still have huge and unnecessary implementation costs and adversely impact the ability of domestic chemical companies to innovate new products.

On Nov. 17, 2011, the Senate Environment and Public Works Committee and the Committee's Superfund, Toxics and Environmental Health Subcommittee held a hearing on the legislation.

While all committee members applauded the attempt at continued discussion and negotiation between the nongovernmental organization advocates and industry, some Democratic senators, especially Sen. Ben Cardin, D-Md., were especially critical of the American Chemistry Council (ACC) and the lack of a concrete alternative proposal developed and supported by the chemical industry.

Lautenberg indicated that he intends to bring his legislation up for a committee vote "in the near future" and would hope that consensus can be reached — with the implication that he will attempt to report his bill even if the industry has not agreed with the provisions in any pending legislation.

The prospects of legislation becoming law are increasingly remote, given that any successful bill would essentially need consensus in the full Senate — and must still overcome the lack of any legislative movement in the House of Representatives.

At the same time, the tenor of the Senate hearing exhibited a bit more frustration on the part of Democrats with the lack of specific alternative language from the industry, language that would illustrate their idea of how to capture ACC's much-noted "10 Principles for Effective Chemicals Management" that have been discussed for more than two years.

If there is a lame duck session of Congress at the end of 2012, there could be some remote possibility of limited action on TSCA — and many other issues — as advocates and opponents of any legislation evaluate the results of the election, e.g., is there a change of administration, or a change in party control of the Senate or House.

Students of history will recall that the original TSCA legislation was enacted during a lame duck session of Congress in 1976 after years of impasse due to similar considerations.

The EPA

OCSPP Leadership

On Oct. 25, 2011, OCSPP Assistant Administrator Stephen A. Owens announced his resignation from the EPA. Since it is late in the president's first term, it is unclear if the administration will be seeking to fill the position with a new political appointee.

The bitter partisan atmosphere on Capitol Hill has led to numerous holds on current nominees still awaiting Senate confirmation for many senior positions across many government agencies. Without senior political leadership in place, the fate of pressing issues may become even more unpredictable as election year considerations, and their attendant distortions, become more important as November 2012 draws near.

It is possible the administration may attempt to place a nominee if only to indicate that the OCSPP issues remain a priority and will not be lost in the larger dynamics of the 2012 election.

Jim Jones, the current deputy assistant administrator for the EPA's Office of Air and Radiation, was designated to serve as the new OCSPP acting assistant administrator, beginning Dec. 1, 2011. Since Jones is familiar with OCSPP and its operations, the transition to new leadership is expected to be straightforward.

At the same time, the EPA as a whole under the continued leadership of Administrator Lisa Jackson will now face an election year with intensely bitter rhetoric coming from both parties in Congress.

Across all media programs, the administration will continue to face intense criticism that environmental requirements, stringent or otherwise, both current and pending, are a hindrance to economic growth and employment.

At the same time, some of the pending issues awaiting decisions during 2012 will present an opportunity for the administration to address some of its core constituencies among labor, environmental and minority public health and environmental advocacy groups.

The election itself will decide the fate of the larger debate, but in an election year, the EPA will be driven to account for its accomplishments during the president's first term in each media program, and some issues might be pressed to sharpen the partisan divide or otherwise appeal to certain constituencies.

As a result, there may be a renewed emphasis on environmental justice issues, potential health impacts on children, the potential for chemicals and pesticides to cause endocrine disruption, the potential impacts of genetically modified organisms (GMO) or nano pesticides and chemicals, the need for developing green chemistry alternatives, and the like.

What form these continued initiatives might take, or how strident the EPA tone, will be partly driven by election year needs as November 2012 draws near.

The EPA's Enhanced Chemical Management Program

While the EPA released two new Chemical Action Plans in 2011, for methylene diphenyl diisocyanate (MDI) and related compounds, and toluene diisocyanate (TDI) and related compounds, this is half as many plans as were released in 2010 and 2009.

The EPA's emphasis on action plans was reported to be stretching thin the available resources of the agency's Office of Pollution Prevention and Toxics (OPPT).

In September 2011, the EPA announced a new approach for identifying priority chemicals for review and assessment under TSCA.

In Step 1 of the prioritization process, the EPA plans to identify an initial group of priority chemicals for review by using a specific set of data sources to identify chemicals that meet one or more of the action plan priority factors.

In Step 2, the EPA intends to refine that group by using a broader range of data sources to analyze further and select specific chemicals from the initial group for further assessment.

The combined TSCA Section 4 test rule and Significant New Use Rule (SNUR) on certain polybrominated diphenyl ethers (PBDE) submitted to the U.S. Office of Management and Budget (OMB) on Dec. 17, 2010, remains under review.

The EPA has submitted more recent rulemakings, including a proposed SNUR that would add nine chemicals (dyes) to the benzidine-based chemical substances (dyes) SNUR at 40 C.F.R. Section 721.1660; create a SNUR for di-n-pentyl phthalate (DnPP); and create a SNUR for alkanes, C12-13, chloro. The EPA also submitted a proposed SNUR concerning hexabromocyclododecane (HBCD) used in textiles.

The PBDEs action is particularly interesting in the way it will attempt to combine SNUR requirements with a test rule, thus forcing industry to choose to abide by the SNUR or confront potentially significant testing costs if a chemical such as decabrominated diphenyl ether (decaBDE) is to remain on the market.

The SNUR is also likely to break new ground with the inclusion within its scope of imported articles containing pentaBDE, octaBDE and/or decaBDE. This represents the second time that the EPA will attempt to handle importation of articles containing a chemical as a significant new use. The issue was first raised in the proposed SNUR on pentaBDE and octaBDE, but in issuing the rule, the EPA did not include imported articles within its scope.

This is a potentially difficult and complex undertaking considering that it remains to be established that such importation is not ongoing and that the EPA has stated it intends to allow continued recycling (processing) of PBDE-containing foam and plastics that would then be involved in domestic manufacture of new PBDE articles.

The EPA's ability to get these actions through OMB in relatively intact form will be telling.

The EPA promulgated the much-anticipated final revisions to its Inventory Update Reporting (IUR) Modifications Rule, now known as the Chemical Data Reporting (CDR) Rule. The CDR Rule is intended to enable the EPA to collect and publish information on the manufacturing, processing and use of commercial chemical substances and mixtures on the TSCA Chemical Substance Inventory.

The CDR Rule establishes the upcoming submission period, which will be from Feb. 1, 2012, to June 30, 2012, and that will include submission of production information from 2010 and production, processing and use information from 2011.

While considerable uncertainty remains regarding how exactly regulated entities must report all required data elements under the CDR Rule, compliance with the reporting requirements should be a priority.

Historically, the EPA has placed considerable importance on the information reported through the IUR, the CDR's predecessor, for rulemaking prioritization, and related standard setting initiatives, and the EPA had directed its limited enforcement resources on reporting requirements accordingly.

Regulation of Nanoscale Materials

In the waning days of 2011, the EPA's inspector general took the EPA to task in a report concluding that the EPA has insufficient information and procedures implemented to manage effectively risks from nanomaterials.

The EPA rejects this criticism, and points to its nano initiatives in 2011 and previously. The EPA continues to work on a TSCA Section 4 test rule to require chemical manufacturers of certain multiwall carbon nanotubes, certain clays, alumina and spray-applied nanomaterials to conduct testing for various effects, as well as provide material characterization data.

The EPA is developing a SNUR for existing chemical nanoscale materials under TSCA Section 5(a)(2) and developing a proposal to require reporting and recordkeeping under TSCA Section 8(a), that would require persons who manufacture nanoscale materials to notify the EPA of certain information.

While the SNUR and TSCA Section 8(a) rulemakings were previously separate, the EPA has combined them into a single rulemaking.

In June 2011, the EPA proposed several possible approaches for obtaining certain additional information on the composition of pesticide products. The EPA focused particularly on information about what nanoscale materials are present in registered pesticide products, and defined "nanoscale material" as "an active or inert ingredient and any component parts thereof intentionally produced to have at least one dimension that measures between approximately 1 and 100 nanometers (nm)."

According to the EPA's June 17, 2011, Federal Register notice, the EPA believes Federal Insecticide, Fungicide and Rodenticide Act Section 6(a)(2) "is the most efficient and expedient administrative approach to obtaining information about nanoscale materials in pesticides and EPA would prefer to use this approach."

The EPA announced on Dec. 1, 2011, that it is conditionally registering a pesticide product containing nanosilver as a new active ingredient. HeiQ AGS-20 is a silver-based antimicrobial pesticide product approved for use as a preservative for textiles.

The year 2012 will be a very interesting year. Given the tall shadow that presidential elections cast on all things touched by the EPA, 2012 may be as remarkable for what is not accomplished this year as what may emerge.

TSCA legislation is unlikely and with diminished EPA budget and resources generally, the EPA's ambitious enhanced chemical management program may remain more aspirational than real.

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