

Amendments to TSCA Likely in 2004

White House and Congressional interest in ratifying three international environmental treaties on the manufacture and use of chemical substances is likely to lead to legislation next year to amend the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). This TSCA Advisory summarizes recent efforts to amend TSCA, and the status of the related international treaties.

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Proposals to Amend TSCA to Keep Pace with REACH

An emerging European Union (EU) toxics policy has prompted at least one Senate Democrat, Senator Frank Lautenberg (D-NJ), to consider drafting separate legislation to amend TSCA. A Lautenberg bill modeled on a proposed EU policy on the registration, evaluation, and authorization of chemicals (REACH) could be introduced as early as January. REACH requires chemical manufacturers to conduct environmental health and safety tests for over ten thousand chemicals, and would require the industry to demonstrate the safety of a chemical before allowing sales in Europe. REACH is not expected to be implemented in the EU until 2005, and Democratic-sponsored bills patterned on REACH likely would face a cool reception from the White House and Republican-controlled Congress.

Proposals to Amend TSCA in Connection With International Treaties

Legislators from both parties, as well as the Administration, are expected to work to pass amendments to U.S. toxics laws in 2004 that will allow the Senate to ratify three international treaties on the manufacture and sale of chemical substances: the Stockholm Convention on Persistent Organic Pollutants (the Stockholm Convention),

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the Persistent Organic Pollutants Protocol to the Convention on Long-Range Transboundary Air Pollution (the POPs Protocol), and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the Rotterdam Convention).

All three international environmental agreements have been signed by the U.S. and enjoy broad support in Washington. Before the Senate can ratify the treaties, however, Congress must pass implementing legislation in the form of amendments to TSCA and FIFRA. Prior bills aimed at conforming the U.S. environmental statutes to the treaties have failed to make it out of committee because the parties have split over provisions dealing with regulation of new POPs that may be added to the Stockholm Convention and the POPs Protocol.

Congress is under pressure from the regulated community to pass implementing legislation early in 2004 so the U.S. can participate in the initial party meetings where crucial policy details will be ironed out. One treaty, the POPs Protocol, already entered into force on October 23, 2003, and the first meeting of the parties has been scheduled for December 15 - 18, 2003. The Rotterdam Convention becomes effective on February 24, 2004, with the first conference of the parties set for September of 2004. The Stockholm Convention has not yet been ratified by the 50 countries required for the treaty to enter into force, but that threshold is expected to be met in 2004, and a Conference of the Parties could take place early in 2005.

Earlier this year, Sen. Lincoln Chafee (R-RI) introduced a bill to amend TSCA (S. 1486) that would pave the way for ratification of all three treaties. The legislation would give EPA authority to regulate new persistent organic pollutants that may be added to the Stockholm and Rotterdam Conventions, but would not require EPA to regulate such additional POPs. Environmentalists have lobbied for provisions requiring the EPA to regulate substances added to the Convention, but Republicans have been reluctant to so constrain U.S. discretion. The Chafee bill was marked up in the Senate Environment and Public Works Committee in July, and work on the draft is expected to continue in 2004.

Draft legislation introduced by the Bush Administration last year (S.2507) would have amended FIFRA to facilitate ratification of the treaties, and the House and Senate Agriculture committees are using the administration proposal and the Chafee bill as templates to draft FIFRA amendments. Because FIFRA already gives EPA considerable authority to cancel the registration of pesticides found to be hazardous, the amendments are not expected to be as contentious as those to TSCA. Environmentalists, however, have questioned the 2002 Administration proposal because it would not require the U.S. to ban any pesticide banned under international law. The groups suggest that an international ban should be given substantial if not dispositive weight in any U.S. decision regarding continued registrations. It is unclear to date which direction Congressional legislation will take.

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Stockholm Convention on Persistent Organic Pollutants

Over 40 nations have ratified the treaty, which requires 50 ratifications to take effect. A recent vote by the European Parliament approving EU ratification of the treaty ensures that it is on course to become international law by the end of 2004.

The objective of the Stockholm Convention is "to protect human health and the environment from persistent organic pollutants." The treaty regulates the

production, import, export, use, and release of twelve POPs: eight pesticides, two industrial chemicals, and two unintentional byproducts. It also provides for the regulation of additional substances in the future, and regulates POP waste management.

The Stockholm Convention has a health and environment focus, while the POPs Protocol, which also regulates POPs, has a risk-management objective. Both the Convention and the Protocol, however, divide regulated chemicals into three groups: (1) those slated for elimination (Annex A), (2) those slated for restriction (Annex B), and (3) those slated for emissions reductions (Annex C).

Annex A under the Stockholm Convention contains the pesticides aldrin, chlordane, dieldrin, endrin, heptachlor, mirex, and toxaphene; polychlorinated biphenyls (PCBs); and the industrial byproduct hexachlorobenzene (HCB). Parties promise to "[p]rohibit and/or take the legal and administrative measures necessary to eliminate" Annex A chemicals, subject to the exemptions in Annex A itself. Annex B POPs are restricted in production and use. The only chemical in Annex B is DDT, which may be produced under certain circumstances. Annex C contains unintentional industrial byproducts: dioxins, furans, PCBs, and HCB. Parties do not promise any specific reductions of these chemicals, but rather agree to develop action plans, promote best environmental practices, and encourage substitute materials.

The Convention also includes a process to add new substances to any of the annexes, a provision that has complicated the passage of implementing legislation and ratification by the U.S. The Convention provides that a member state may submit a proposal to list a chemical, and after a technical evaluation, the parties to the Convention may vote to amend the annex to include the new chemical. A member state that opposed the listing can opt out of that particular listing. Another option, which the U.S. strongly advocated and may take advantage of in its ratification instrument, is for a state to join the Convention on an "opt-in" basis. This allows a state to join the Convention on the express basis that no annex amendment applies against that state unless it explicitly opts in.

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POPs Protocol to the Convention on Long-Range Transboundary Air Pollution (LRTAP)

The POPs Protocol, which amends the LRTAP Convention, took effect October 23, 2003 after being ratified by 16 nations. While the Stockholm Convention will have more parties once it is ratified, the Protocol is the first legally enforceable ban on POPs, and on any individual chemical substances, at the international level. The Protocol is an instrument of the 55-member United Nations Economic Commission for Europe (UNECE), one of five U.N. regional commissions.

The POPs Protocol seeks to "control, reduce or eliminate discharges, emissions and losses of persistent organic pollutants." It covers the 12 chemicals regulated by the Stockholm Convention and four additional substances. Like the Stockholm Convention, the Protocol divides the substances into three categories: those slated for elimination, use restrictions, or emissions restrictions.

The POPs Protocol commits parties to restrictions on specific named chemicals and identifies persistent, bioaccumulative and toxic chemicals (PBTs) that should eventually be eliminated completely. Key treaty modifications are expected to be

discussed at the first meeting of the ratifying parties, which takes place in mid-December of this year, including the addition of several substances for which the UNECE has either begun or already completed evaluations.

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Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

The Rotterdam Convention requires countries exporting certain listed chemicals or pesticides that are banned or severely restricted at home, or exporting severely hazardous pesticide formulations, to notify the importing country beforehand and to receive the importing country's prior consent before the shipment is sent. The Convention provisions also require that a review be initiated if a chemical is banned or severely restricted in two countries from two different regions. The treaty officially will enter into force on February 24, 2004, but already is being implemented on a voluntary basis.

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