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The Lautenberg Act: Chemical Safety Overhaul of the Toxic Substances Control Act

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By Alyssa S. Rosen, Environmental Law Librarian & Adjunct Professor of Law, Elisabeth Haub School of Law at Pace University

On June 22, 2016, President Obama signed the [Frank Lautenberg Chemical Safety for the 21st Century Act \(Lautenberg Act\)](#); a landmark bipartisan compromise legislation designed to overhaul the Toxic Substances Control Act (TSCA).^[i] The Lautenberg Act makes it easier for the U.S. Environmental Protection Agency (EPA) to regulate toxic substances while providing the chemical industry with regulatory clarity and certainty. Law Librarians, practicing lawyers, and academics have taken note of this groundbreaking law that most likely will set the template for the next generation of environmental reform by tackling issues such as preemption of state law, protection of vulnerable populations, and the balance between industry's need to protect confidential business information and the EPA's need to access this information to evaluate chemicals.

TSCA had not been significantly amended since its original enactment in October 1976, and was considered largely ineffective and weak by health and environmental groups, as well as by the chemical industry.^[ii] In fact, the Lautenberg Act is the first major environmental legislation passed in over two decades. While TSCA required companies to register new chemicals with the EPA before using them in products and industrial processes, the new chemicals were automatically approved for use. The EPA had the burden of showing that a new chemical posed an unreasonable risk to human health of the environment.^[iii] Companies were required to supply the EPA with only limited information about their products, and were able to withhold information from the public by arguing that the data was confidential business information. By contrast, the EPA could not require industry to conduct research without first having evidence that the chemical posed a health risk.^[iv]

While industry adds 700 to 1,000 new chemicals to the marketplace every year, only about 2% of the chemicals in use today have undergone a safety review by government scientists, according to the U.S. Government Accountability Office.^[v] In the absence of a strong federal system, a patchwork of state chemical safety law arose in response to concerns about the safety of consumer products.^[vi] One of the few times the EPA sought to ban an existing chemical, the U.S. Court of Appeals for the Fifth Circuit overturned the agency's ban on asbestos ([Corrosion Proof Fittings v. EPA, 947 F.2d 1201 \(5th Cir. 1991\)](#)), stating that the agency failed to comply with the TSCA requirement to identify the "least burdensome" option before regulating a chemical ([Corrosion Proof Fittings, 947 F.2d at 1228](#)). In recent years, however, in response to expanding regulation, both on the state and international level (with the passage of chemical regulation laws in the EU and China), groups ranging from the chemical industry to environmental non-governmental organizations (NGOs) called for TSCA reform, ultimately resulting in this successful overhaul being passed by Congress.

The Lautenberg Act addresses deficiencies in TSCA by allowing the EPA to make an affirmative finding that a chemical is "safe" before a chemical goes to market, and to assess the risk of a chemical without first considering

the economic implications. As a starting point, the EPA is now tasked with reviewing its inventory of 85,000 substances (only a fraction of which are still in commerce today), identifying substances that are high priorities for risk evaluation, evaluating their health and environmental risks, deciding whether the substances pose an unreasonable risk, and ultimately regulating those substances found to present an unreasonable risk under conditions of use—with all these steps to be taken under a strict timetable. For example, safety evaluations of the first ten substances the EPA designates as high priority must begin within six months of the law's passage (See Lautenberg Act, Section 4).

Other significant changes made to TSCA by the Lautenberg Act include:

- Requiring companies to substantiate claims of confidential business information before withholding data.
- Eliminating the “least burdensome” requirement for chemical regulations that led to the Fifth Circuit invalidating the EPA’s asbestos ban.
- Allowing preemption of state chemical regulations under certain conditions. The issue of federal preemption was the most contentious issue of TSCA reform, due to concerns of limiting the rights of individual states to set their own chemical safety standards.
- Requiring development of a new risk-based standard that takes into account vulnerable populations, such as children and pregnant women.
- Implementing industry fees, which would fund 25 percent of EPA’s overall costs to carry out the testing and chemical safety reviews for new and existing chemicals, up to a \$25 million cap, which can be adjusted for inflation.

*This is an expansion of an article that first appeared on the Pace Law Library Blog: Alyssa S. Rosen, [Chemical Safety Overhaul: President Obama Signs TSCA Reform Legislation](#), Pace L. Libr. Blog (June 22, 2016).

Suggestions for Further Reading:

[Press Release: Remarks by the President at Bill Signing of the Frank R. Lautenberg Chemical Safety for the 21st Century Act](#) (June 22, 2016).

Gina McCarthy, [TSCA Reform: A Bipartisan Milestone to Protect Our Health from Dangerous Chemicals](#), EPA Connect (June 22, 2016).

Juan Carlos Rodriguez, [Senate Approval Sends TSCA Reform To Obama](#), Law360 (June 7, 2016).

Richard A. Denison, [Ten Essential Elements in TSCA Reform](#), 39 ELR 10020 (2009).

Richard A. Denison, [Why Passage of Toxic Chemical Reform Is a Really Big Deal](#), Bloomberg BNA Daily Env't. Rep. (June 9, 2016).

Sarah E. Light, [New Toxic Chemical Legislation Fails on Federalism](#), REGBLOG (June 9, 2016).

Adam D.K. Abelkop & John D. Graham, [Regulation of Chemical Risks: Lessons for Reform of the Toxic Substances Control Act from Canada and the European Union](#), 32 Pace Env'tl. L. Rev. 108 (2015).

Taylor L. Kraus, [Caring about Personal Care Products: Regulation in the United States, the European Union, and China in the Age of Global Consumption](#), 33 Wis. Int'l L.J. 167 (2015). [Linked to HeinOnline]

[\[i\]](#) 15 U.S.C. § 2601 et seq.

[\[ii\]](#) Juan Carlos Rodriguez, [Senate Approval Sends TSCA Reform To Obama](#), Law360 (June 7, 2016).

[\[iii\]](#) 15 U.S.C. § 2605 (2016).

[\[iv\]](#) 15 U.S.C. §§ 2603, 2613 (2016).

[\[v\]](#) GAO, [Chemical Regulation: Actions Are Needed to Improve the Effectiveness of EPA's Chemical Review Program](#), GAO-06-1032T (Aug. 2, 2006).

[\[vi\]](#) Inside EPA (June 10, 2016).

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