On June 22, 2016, President Barack Obama signed into law the Frank R. Lautenberg Chemical Safety for the 21st Century Act, or H.R. 2576, which provides for a major overhaul of the 1976 Toxic Substances Control Act, or TSCA. While TSCA was enacted to regulate chemicals, the U.S. Environmental Protection Agency had only mandated testing on approximately 200 of the tens of thousands of chemicals used in commerce since TSCA’s inception. In addition, the EPA had restricted the uses of only five chemicals in existence before the passage of the TSCA in 1976.

Critics have long argued that TSCA limited the EPA’s ability to collect information on chemicals and to restrict certain uses of potentially harmful chemicals. In the absence of a more stringent regulatory program, states began to set their own standards for various chemicals and in some cases banned the use of certain chemicals altogether.

Thus, the chief concern for states in the bipartisan negotiations that led to the passage of H.R. 2576 was that the bill would pre-empt states’ ability to regulate chemicals within their borders. While the Frank R. Lautenberg Chemical Safety for the 21st Century Act gives the EPA greater authority over chemical regulation, it still allows state regulation of the chemical industry.

H.R. 2576 requires the EPA to do several things. First, the agency is required to ensure that new chemicals introduced into commerce are safe. In addition, EPA must evaluate the risks of chemicals already available to consumers, which will involve gathering information about what chemicals are in commerce and assessing those chemicals based on a prioritization process. EPA will then conduct risk evaluations on chemicals it deems to be the highest priority.

But under H.R. 2576 states can still regulate a chemical within their borders as long as EPA has not addressed that same chemical for the uses the state proposes to regulate. Thus, if EPA finds a certain chemical safe for industrial purposes, a state can still regulate the consumer use of that same chemical. Similarly, states are free to regulate chemicals that EPA has not already addressed.

In addition, states can continue to enforce laws in effect on or before Aug. 31, 2003, and any past actions taken under laws in effect on or before that date would continue to be valid. Likewise, state laws or regulations addressing a specific chemical and in effect before April 22, 2016, would be grandfathered and remain in force.

However, if EPA is in the process of analyzing whether a chemical presents an unreasonable risk for a certain use or uses, a state is pre-empted from addressing that chemical for the uses EPA has identified in its evaluation until EPA has completed its analysis. But, according to Alexandra Dunn,
executive director and general counsel of the Environmental Council of the States, in an interview with Bloomberg, “the pause applies to the specific use that EPA is studying and as such, states are not pre-empted from taking action regarding other uses of the same chemical. In addition, states can seek a waiver if the pause creates a public exigency in their state.”

While some states do not anticipate TSCA reform to change how they regulate chemicals, other states have been more critical. New York Attorney General Eric T. Schneiderman said in a June 8 statement, “I am disappointed that the amended Toxics Substances Control Act passed by Congress expands federal pre-emption, creating new obstacles to the ability of New York and other states to protect their citizens from the hazards of toxic chemicals.” In contrast, Indiana and Delaware have stated that they do not foresee TSCA reforms having any impact on how they currently regulate chemicals in their states.

As states continue to assess how TSCA reform will impact the regulation of chemicals in their states, the EPA recently published an implementation plan for complying with the new law. As part of this implementation plan, the EPA has indicated its intent to provide stakeholders and partners the opportunity to engage on the implementation of the rule early in the process and to be transparent about its activities in implementing this comprehensive reform of chemical regulation in the United States. As such, states and the federal government will continue to have roles to play in the regulation of chemicals and in the protection of human health and the environment and states should engage with the EPA early on this issue to address any concerns that exist within their borders.

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