

NACD KEY ISSUE: TSCA MODERNIZATION

NACD ISSUE

Modernizing the Toxic Substances Control Act in a way that will promote innovation, support U.S. jobs, and protect public health and the environment.

BACKGROUND

The U.S. Environmental Protection Agency (EPA) regulates chemicals through authority granted by a number of federal statutes, most notably the 1976 Toxic Substances Control Act (TSCA.) EPA has used TSCA to review more than 47,000 new chemical submissions and lists more than 80,000 chemicals on its current TSCA Inventory. Now 35 years old, there is widespread agreement that TSCA needs modernization because of new chemical innovations, claims that the current law fails to protect the public, and the enactment of international and state chemical management programs.

In response to concerns about the TSCA's perceived failure to protect the public from toxic chemical exposures and pressure from health and environmental groups, individual states and Congress have taken action to ban certain types of chemicals in the name of consumer safety. According to the Safer Chemicals, Healthy Families coalition, as of January, 2011, 18 state legislatures had passed 71 chemical laws in the last eight years. In 2008, California became the first state to enact a comprehensive chemicals management program. As individual states take action, a major concern is that federal and state programs may be duplicative or conflicting. This could make chemical distribution across state lines extremely difficult. On the federal level, in July 2008, Congress overwhelmingly approved a measure to ban certain types of phthalates from children's products.

In 2007, the European Union's Registration, Evaluation, Authorization and restriction of Chemicals (REACH) regulation took effect. This regulation addresses the production and use of chemical substances, and their potential impacts on both human health and the environment. REACH took seven years to pass, has been described as the most complex and strictest legislation in EU history, and is impacting industries throughout the world. When REACH is fully in force, it will require all companies manufacturing or importing chemical substances into the EU in quantities of one ton or more per year to register these substances with the European Chemicals Agency, which will decide whether to allow, restrict, or ban continued use of each substance. Because REACH applies to some substances that are contained within other products, any company importing goods into Europe could be affected.

In 2009, EPA Administrator Lisa Jackson stated that TSCA reform was a top priority for the agency and announced her principles for reform. The EPA has also substantially increased its regulatory activities under its current TSCA authority. Among other actions, the agency has made changes to the rules for claiming confidential business information (CBI), targeted groups of chemicals for additional testing, posted the TSCA Inventory on the agency's Web site, and issued a proposed rule to substantially increase the amount of information required through Chemical Data Reporting (CDR), formerly known as Inventory Update Reporting (IUR).

LEGISLATIVE UPDATE

During the 111th Congress, more than 10 hearings were held on TSCA. Last year, Senator Frank Lautenberg (D-NJ) and then-Chairman of the Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection Bobby Rush (D-IL) each introduced bills that would have made several sweeping changes to TSCA. The bills would have required EPA to establish “minimum data sets” for all chemicals and mixtures in the marketplace, required EPA to create a priority list of no fewer than 300 chemicals where safety determinations must be made, and required public disclosure of much more information about chemicals, including items that are currently covered under confidentiality agreements between suppliers and their customers.

On April 14, 2011, Sen. Lautenberg reintroduced his TSCA reform legislation, S. 847, the Safe Chemicals Act. While S. 847 includes some changes from last year’s bills, the objectives of requiring chemical manufacturers to submit data on chemicals, requiring EPA to make safety determinations on these substances, and placing limits on the use of confidential business information (CBI) claims remain the same. While some references to chemical mixtures have been removed, the bill clearly gives EPA the authority to subject mixtures to all requirements. The bill also requires *each manufacturer and processor* to submit a minimum data set for each chemical, as opposed to a collective submission for each substance.

TSCA legislation has not yet been introduced in the House in the 112th Congress.

NACD POSITION

NACD recognizes the need to update the Toxic Substances Control Act (TSCA). This law was enacted 35 years ago, and a lack of confidence in the current program has resulted in the spread of misinformation about certain chemicals, unnecessary product de-selection by consumers and retailers, and a patchwork of state and local laws to regulate or ban chemicals. This has created confusion and regulatory uncertainty throughout the chemical supply chain. An updated TSCA would alleviate the need for this patchwork of different state laws and regulations and individual chemical bans that are not based on sound science.

When considering TSCA modernization, it is important to recognize chemical distributors’ unique and important role in the chemical supply chain and to refrain from placing a disproportionate burden on this segment of the industry.

The primary function of a chemical distributor is as a **general distributor**. General distributors engage in storage, warehousing, and distribution of materials without any change to chemical components. This includes companies that repackage, as long as there is no addition of other chemical components or changes in material concentrations. Almost every chemical distribution company functions as a general distributor, or “middleman” in the supply chain. In addition to their role as middlemen, many chemical distributors have extensive and growing mixture processing operations. Approximately 70% of the nation’s chemical distributors process chemical mixtures and blends for a wide industrial customer base. These **processor distributors**, in most cases, do not manufacture new molecules, but mix existing chemical components that do not result in a new chemical reaction. Many chemical distribution companies also act as importers. Current TSCA law treats **importer distributors** the same as chemical manufacturers.

While NACD agrees that TSCA is overdue for modernization, this must be done in a way that is efficient, risk-based, and promotes innovation throughout the U.S. chemical industry. In order to keep the cost burden down for chemical distribution companies, as well as other entities in the supply chain, any reform of TSCA must truly prioritize chemicals based on risk and exposure considerations. This would create a more effective and modern chemical management framework.

When collecting information about chemicals, it is reasonable for EPA to expect some minimum data for each substance; however, it is important to avoid unnecessary and duplicative data development and chemical screening processes. Data and information submitted under existing chemical management programs such as EPA's IUR, the EU REACH regulation, and Canada's Chemical Management Plan should be leveraged to the extent possible.

In the spirit of prioritization and designing a workable system, chemical mixtures should not be subject to reporting and testing requirements. The inclusion of mixtures is unnecessary because of data available on the individual chemical components of the products. In addition, including mixtures would exponentially expand the universe of substances subject to requirements and would place unnecessary burdens on both industry and EPA. Formulating chemical mixtures for customers is a key element of many chemical distributors' businesses. Being subject to TSCA reporting and testing requirements for mixtures would be extremely burdensome for chemical distributors, most of whom are small businesses, and would produce no benefit with data already available on the individual components.

In addition, protection of CBI is essential to maintain innovation in the marketplace and fair competition among entities within the supply chain. Chemical distributors that have processing operations regularly create innovative new products for their customers. Maintaining the confidentiality of the formulas and processes that create these products is critical for these distributors in order to be able to compete and innovate. New limits on CBI could interfere with non-disclosure agreements that distributors have with their customers regarding these products. In general, too many limitations on CBI would discourage innovation and would be extremely disruptive to the chemical marketplace, which is a key part of the U.S. economy.

NACD also believes that federal preemption is an important element of any reform of our nation's chemicals management effort. Lack of a strong national standard will result in a continued patchwork of different chemical management laws throughout the nation, which would make compliance confusing for any company that does business across state lines, which is the industry norm, and would not be in the best interest of either the regulated community or those who seek information on and use chemicals.

In conclusion, NACD urges Congress to modernize TSCA in a way that embraces a true risk-based model that effectively manages chemicals in the United States while acknowledging the innovations and safe processes of the chemical distribution industry.