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UPPING THE ANTE: SENATOR BOXER CIRCULATES TSCA REFORM PROVISIONS

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Months of quiet negotiations on potential amendments to the Toxic Substances Control Act (TSCA) organized by Senators and staff working across party lines were surprisingly upended in late September when Senate Environment and Public Works Chairwoman Barbara Boxer (D-Calif.) issued a statement and her own markup of what had been a closely held confidential draft of amendments to the May 2013 Lautenberg-Vitter compromise TSCA reform bill (the Chemical Safety Improvement Act, S. 1009), http://www.epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord_id=69343ad5-ff65-15c3-6d34-53c14f435018&Region_id=&Issue_id=. Notwithstanding the progress that had been made collaboratively by Senators Tom Udall (D-NM) and David Vitter (R-LA), prognosticators have concluded this development signals that all hopes have faded that the 113th session of Congress could produce a compromise TSCA reform bill capable of being enacted.

Because the changes Senator Boxer made to the previously confidential Udall-Vitter drafts are being described as being less radical than has been suggested by the tone and sentiments expressed in her statements in the press, certain features of the Boxer markup are worth noting, especially if they could serve as a starting point for discussions in the next session of Congress. Following are eight changes made by Senator Boxer that are among the more interesting, and potentially complicating, developments:

- Senator Boxer's markup tosses out the "unreasonable risk of injury" standard in the current law, as enhanced in the previously confidential version in the Udall-Vitter draft, and would establish a "safety standard" requiring the U.S. Environmental Protection Agency (EPA), in undertaking assessments and making determinations regarding the safety of chemical substances, to "ensure with reasonable certainty, without taking into consideration cost or other non-risk factors, that no harm to human health or the environment will result" from chemical exposures or releases under "foreseeable conditions of use," including "reasonably foreseeable" unintended exposures such as spills ("unplanned releases"). Moreover, EPA's safety determinations will be required to address aggregate exposures from multiple pathways of exposures to the same substance.
- Senator Boxer ups the ante on Senator's Udall and Vitter repeatedly in her markup of their draft, by raising from 10 to 15 the number of substances EPA must include on its initial list of high-priority substances for safety assessments and determinations to be released six months following enactment. Senator Boxer would also require that the high-priority list be further expanded by 15 high-priority substances 12 months after its initial publication and each year thereafter for four years, and for each substance EPA removes from the high-priority list following a safety determination, Senator Boxer's markup would require the agency to add three other substances to the list.
- The Boxer bill would modify the discussion draft such that "low-priority" determinations would become final actions subject to judicial review.

- Costs and benefits analysis in support of section 6 (risk management) rulemakings would be triggered under the Boxer markup (unlike the versions we have seen of the working draft) only when the proposed rule is determined to have an annual effect on the national economy of greater than \$100 million. Exemptions to risk management regulations would be considered only when available information demonstrates that “the risks to health or the environment from continued use of the substance are substantially lower than the risk to health or the environment of replacing that use of the substance with reasonabl[y] available alternatives.”
- The Boxer markup would add as section 6(f) a requirement that EPA issue, within 180 days of enactment, a list of “persistent, bioaccumulative and toxic [substances that] have the potential for high or widespread exposure”. Within 60 days thereafter, EPA must issue orders requiring manufacturers and processors to submit “any additional information” EPA determines to be “necessary to conduct an expedited assessment” of the “intended, known or reasonably foreseeable uses of, and exposures to” the persistent, bioaccumulative, and toxic substances (PBTs). EPA’s use and exposure assessment of the listed PBTs must be completed within a year of receiving the requested information. Not later than two years after completing the use and exposure assessment, EPA must issue rules imposing “restrictions ... necessary to achieve the maximum practicable reduction in human or environmental exposure to” the listed PBTs. Exemptions to such rules may be granted for not greater than five years.
- Asbestos is addressed specifically in Senator Boxer’s markup of section 6 of the previously confidential discussion draft, as she would require all forms of asbestos be listed among the high-priority substances and specify that a safety assessment and determination for the listed forms of asbestos be completed within two years from enactment with a final rule addressing asbestos promulgated no more than three years after enactment.
- The Boxer bill adds a fee structure to fund actions taken under the bill. Fees are to be assessed on a basis of a manufacturer’s production or import volumes.
- Not surprisingly, the Boxer bill strikes the preemption provisions in the Udall-Vitter discussion, inserting terms providing that “nothing in this Act, nor any regulation... shall affect the right of a State or a political subdivision...to adopt or enforce” a health or environmental restriction.

Since the House Republicans who had been active on TSCA Reform seem to have lost interest in their own discussion drafts, all eyes will remain on the new Republican-controlled Senate to see what effect it will have on the future of TSCA reform.

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