

States Will Lead The Way On Chemical Regulations In 2015

--By *Lawrence Culleen, Peggy Otum and Shailesh Sahay, Arnold & Porter LLP*

Law360, New York (December 23, 2014, 1:53 PM ET) -- As 2014 comes to a close, it has become clear that the failure of the 113th Congress to enact compromise legislation reforming the aging federal Toxic Substances Control Act emboldened numerous state legislatures, which enacted or are currently entertaining laws that regulate — and in some cases completely prohibit — certain chemical substances. Such legislation ranges from laws that completely prohibit a specified chemical substance and products that contain that chemical, to statutes enabling a state agency to identify and list “priority” chemicals for which makers of products containing the listed substances must file certain reports and make disclosures to customers. Such legislation generally seems innocuous. Who could say no when asked to support a bill enabling state officials to identify and post a list “chemicals of concern?” However, the potential consequences of such laws have yet to be determined.

The difficulty faced by product manufacturers, importers and retailers in keeping up with emerging requirements while monitoring 50 state legislatures and state bureaucracies cannot be underestimated. Nevertheless, if the uptick in state legislative activity in chemical control laws continues to be the trend in 2015, the entities most affected by the bills — the makers and marketers of commercial and consumer-use retail products that might contain a listed chemical — will find themselves repeatedly facing risks of violating state laws of which they may be unaware if they inadvertently distribute a prohibited product.

Impetus for State Action

During the past decade, consumers have become increasingly aware of the presence of certain substances in commercial products. In the U.S., consumer concerns about the chemical content of household-use products has been significantly enhanced through the efforts of multiple nongovernmental organizations.[1] Plaintiffs' law firms share an interest in fomenting such concerns.[2] The federal government and certain national governmental authorities abroad are also committed to raising consumer awareness through efforts to enhance “transparency,” reflecting the right-to-know movement.[3]

The rise in awareness and concerns about chemicals in consumer products is fueled by access to, and increased reliance upon, the Internet for information concerning chemical substances. Individual consumers and affinity groups communicate with one another directly, wirelessly and occasionally in real-time to obtain and retransmit information on chemical safety and product content from a variety of sources, assuming the information to be reliable and sound. The extent to which public awareness about chemicals of concern can influence consumer behavior and buying choices has been observed and noted in the literature for nearly a decade[4] and is no doubt being actively observed and more readily monitored today.[5]

Certainly consumer movements and NGO actions have prompted some state legislative and administrative actions to regulate chemicals. The federal government seemingly has done nothing to discourage state chemical regulatory actions.[6] However, some attribute the rise in state regulatory actions affecting chemicals to a lack of action to restrict such chemicals on the part of the federal government, specifically toward the U.S. Environmental Protection Agency's inability to effectively build the robust chemical-regulatory scheme envisioned when Congress enacted TSCA more than 35 years ago.[7]

Potential Influence of the 2014 Elections

Ironically, congressional efforts at reforming and reinvigorating the TSCA in the 113th Congress might have invigorated NGO campaigns to enhance consumer concerns about chemicals in products^[8] and to specifically incentivize chemical regulatory actions among the states. Arguably, activist legislators may be responding to fears being circulated about the possibility that compromise TSCA reform legislation will be enacted containing expanded federal preemption language.^[9] The thought that such legislation could be enacted quickly by the next Congress — after the Republicans take control of the Senate and followed by further inaction from the EPA — is likely to be the mantra whispered in the ears of friendly state legislators by the advocates of state chemical control bills.

Stakeholders Affected by State-Initiated Chemicals Regulation

The emergence of multiple and potentially inconsistent state laws regulating chemical substances has drawn legitimate concerns from many quarters. Although there is some indication that certain states are coordinating their approach on some issues,^[10] there is by no means uniformity among the chemical-regulatory statutes in effect and those under consideration at the state level. For entities in the chemicals industry, and the makers and marketers of consumer-use products that incorporate chemicals, the lack of uniformity has created a number of challenges, including the need to develop state-by-state strategies for product manufacturing, compliance assurance, regulatory tracking and supply chain management. These strategies also must simultaneously take into account numerous existing and emerging new requirements under the TSCA and EPA's other chemical tracking and reporting authorities.

Eventually, the patchwork of state laws may become problematic for NGOs and other policy groups that are advocates for chemical control requirements and product content disclosure efforts. Requiring the makers of consumer products distributed and sold nationally to collect and report different types of data for multiple chemical substances through a variety of channels may potentially detract from good faith efforts to amass high-quality data to be made available in a uniform format and central location.

“Typical” State Chemical Regulatory Legislation

Although state legislation regulating chemicals in products has taken a variety of forms, much of this legislation falls into two general categories. In the first category, the state legislation is very specific, banning the use of specific chemical substances in only certain products. For example, in 2014, Minnesota enacted a ban on the use of the anti-microbial triclosan in certain consumer hygiene and personal care products.^[11]

In the second category, the legislation that has been enacted is much broader in scope. These laws often authorize a state regulatory agency to create a list of “priority chemicals” or “chemicals of high concern” based on the state agency's assessment of chemicals' potential adverse impacts on human health and the environment. The laws often then require manufacturers of products containing some or all of the listed chemicals to notify the state of the chemical's use and perhaps conduct an “alternatives assessment” to determine if there is a superior substitute for the chemical — one that is both “feasible” and presumably has comparatively fewer environmental impacts. The commercial goods that fall within the scope of such legislation range from all products, to consumer products, to children's products, or to only those products specifically listed by a state agency. Based on the results of the alternatives assessment, the state agency might ban or restrict the use of the chemical in question in certain products.

The California Safer Consumer Products Regulation, also known as the Green Chemistry Initiative, is an example of such legislation — and it has understandably garnered significant attention. While at the outset the California program is limited to a handful of chemicals and products, many anticipate that it will significantly grow in scope in the future. Indeed, California's Department of Toxic Control Substances recently issued a draft

work plan that targets seven categories of products for Green Chemistry Initiative review, some of which were widely anticipated — personal care and household cleaning products — and others that were not — fishing equipment.[12]

Both types of chemical regulatory legislation — specific and broad — create compliance challenges for manufacturers and distributors of chemicals used as raw materials and the makers of products incorporating them. The stakes can be high, as many states' chemical regulatory laws include provisions for penalties when violations occur, such as HB 3997 proposed in Massachusetts earlier this year. The emergence of such legislation means that all manufacturers and distributors must closely monitor chemicals laws and regulations in all states for compliance purposes. This can be a difficult undertaking when coupled with the emergence of an increasing number of chemical-related requirements being imposed by retailers upon their product suppliers.[13]

Keeping Up With the States

2015 could become a significant year if states continue to expand legislative and administrative efforts to control certain chemicals and consumer products. Whether state legislators are acting out of frustration over the absence of a federal chemical regulatory program that states perceive to be effective, or out of fears that they may see TSCA reform legislation enacted in 2015 that specifically preempts state chemicals legislation, activist states are expected to continue legislating vigorously in this area.

To enable readers to stay on top of developments, Arnold & Porter has created a [table](#) providing information on state-level chemical-regulatory legislation. Please check this site for periodic updates and feel free to contact the authors for the latest information on the regulation of chemicals by individual states.

[Lawrence Culleen](#) is a partner in Arnold & Porter's Washington, D.C., office. Prior to joining the firm, Culleen served as chief of staff to the assistant administrator of the EPA, where he assisted in policy development and execution for the Office of Prevention, Pesticides, and Toxic Substances. He was also chief of the New Chemicals Branch, where he managed the EPA's pre-manufacture notification program under the Toxic Substances Control Act.

[Peggy Otum](#) is a partner in Arnold & Porter's San Francisco office.

[Shailesh Sahay](#) is an associate in Arnold & Porter's Washington, D.C., office. Sahay is currently co-vice chairperson of special projects for the Pesticides, Chemical Regulation, and Right-To-Know Committee of the American Bar Association's Section of Environment, Energy, and Resources.

Margaret Barry contributed to this article.

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- [6] EPA Region 9, U.S. Environmental Protection Agency and DTSC Broaden California's Push for Safer Consumer Products through Key Alliance, <http://www.epa.gov/region09/mediacenter/greenchem/index.html> (last visited Nov. 24, 2014).
- [7] Environmental Defense Fund, Chemicals Policy Reform, <http://www.edf.org/health/policy/chemicals-policy-reform> (last visited Sept. 24, 2014).
- [8] Amy Westerveldt, A Threat and a Promise: Changing US Policies on Toxic Chemicals, The Guardian, <http://www.theguardian.com/sustainable-business/government-safety-regulations-consumer-retailer> (March 28, 2014) (last visited Sept. 24, 2014).
- [9] Letter from attorneys general to Reps. John Shimkus, R-Ill., and Paul Tonko, D-N.Y., Regarding Chemicals in Commerce Act Draft Bill (Apr. 17, 2014), available at http://www.oag.state.md.us/Press/house_subcomm_letter.pdf. Letter from National Conference of State Legislatures to Sens. Barbara Boxer, D-Calif., and David Vitter, R-La., Regarding S. 1009, "The Chemical Safety Improvement Act" (July 24, 2013), available at <http://www.ncsl.org/research/environment-and-natural-resources/tsca-reform-letter-to-senate-epw.aspx>.
- [10] For example, reporting procedures in Maine's statute are designed to be consistent with reporting procedures in the Washington statute.
- [11] <https://www.revisor.mn.gov/bills/bill.php?f=SF2192&y=2014&ssn=0&b=senate>.
- [12] Read more about DTSC's Priority Product Work Plan at <http://www.consumeradvertisinglawblog.com/2014/09/california-publishes-draft-work-plan-targeting-seven-categories-of-products-for-green-chemistry-revi.html>.
- [13] Walmart, Policy on Sustainable Chemistry in Consumables (last visited Sep. 24, 2014), available at http://az204679.vo.msecnd.net/media/documents/wmt-chemical-policy_130234693942816792.pdf.