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TSCA: Three Years Later

Panel 3: Regulatory and Policy Issues

**George Washington University
Milken Institute School of Public Health**

Environmental Law Institute

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James V. Aidala
Bergeson & Campbell, P.C.
Washington, D.C.
www.lawbc.com

TSCA at 3: Growing Pains?

■ Some History

- Toxic Substances Control Act (TSCA) 1976 -- It works on paper
- TSCA 2016 -- A long gestation, then legislative success
 - Still long road ahead

■ Food Quality Protection Act (FQPA) -- Relevant?

- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) amendments: >four tries (1972, 1978, 1988, 1996) to get it finished...
- Analogous lessons?

■ Concluding Thoughts

- “New TSCA” will have a year 4 (and 5, and 6 ...)

A Little History: TSCA 1976

- TSCA 1976
 - Part of Nixon's second environmental message
 - Most contentious issue: mandatory pre-market data
 - Enacted lame duck session in October 1976
- Design
 - First: List of all chemicals, production data (Inventory)
 - Second: All new chemicals subject to review (premanufacture notifications (PMN))
 - Third: Test existing chemicals (Section 4 test rules)
 - Fourth: Regulate unreasonable risks (Section 6)
 - Also, no hiding adverse information, get rid of polychlorinated biphenyls (PCB)
 - One more thing:
 - Do not hurt innovation, and use least burdensome restrictions
- “Worked on Paper”

A Little History: TSCA 2016 Gestation

- Frustration with progress from 1976
 - Periodic Government Accountability Office (GAO) reports, Congressional hearings on the “Toxic Chemicals Conversation Act”
 - Lack of chemical test rules, failed attempts to regulate asbestos, mire of PCB elimination, and litigation outcomes frustrate program implementation
- 1994: Clinton Administration starts consideration of amendments
 - Senate Environment and Public Works (EPW) Committee hearings in May and July
 - Change in party control of House in 1994 elections -- little prospect for change
- 2009: Obama Administration renews legislative push
- Senator Frank R. Lautenberg makes it a priority
- Early efforts regarded as partisan with little hope of success
- Lautenberg led efforts; announced “compromise” in 2013
 - Concerns among some members delayed agreement

Success: Lautenberg Amendments

- “Compromise” sausage-making: new terms, tight deadlines, new powers with limits
 - Different stakeholders emphasize different priorities; some conflicts carry over to implementation debates
- Administration change leads to different approaches (same as 1980 -- Carter to Reagan)
- Current debates over definitions (“reasonably foreseen,” confidential business information (CBI), risk prioritization and evaluation procedures, PMN reviews)
- Resources, staffing, workload, litigation, and deadlines remain challenging
 - Among other things ...

FQPA Pesticide Amendments -- Similar or Unicorn?: Success on Fourth Try

- Good news: FQPA enacted unanimously in 1996
 - Added new requirements about risks to children
- Bad news: Modern FIFRA legislation to review all “old” pesticides (“40,000 products”) started in 1972, completed in 2006
 - First deadline for reviews -- 1975
 - Early implementation marred by lack of modern data, little exposure information, controversies over individual pesticides
- After 1972, Congress enacts refining amendments in 1978, 1988, and finally in 1996 -- 24 years after first try
 - U.S. Environmental Protection Agency (EPA) mostly successful in meeting 2006 deadline

Early Years of Any New Legislation

- Stakeholder expectations high and impatient
- “Sudden” change in requirements upends program
 - Must develop new policies, guidance, rules
 - Limited or no phase in effective date for new requirements
 - Old work must be completed, new work coming in the next day
- Resources not immediately available
 - Budgets need to be reallocated or wait for appropriations
 - Staffing slowed by recruitment and training
- Deadlines need immediate attention, but can take away from other important needs (policy development, hiring and integrating new staff, tool and model development)
- Constant strains on management attention
 - Litigation, Congress, novel issues, “crises”

Operating Environment for Both Office of Pesticide Programs (OPP) and Office of Pollution Prevention and Toxics (OPPT)

- EPA budget, staff resources
 - Shutdowns, hiring freezes, pay policies, and retirements/aging workforce impact program success
- Aggressive litigation over appropriate scientific and policy basis of decisions and statutory interpretations
- Legislation on specific chemicals (per- and polyfluoroalkyl substances (PFAS), asbestos, chlorpyrifos)
 - Science/risk issues difficult for Members to evaluate
 - State and local officials have less review resources
 - Not clear how TSCA preemption provisions might affect any state actions
- House oversight will consume leadership time and energy
 - EPA accountable to 30 Committees and Subcommittees

Some Things that Made FQPA Easier

- Pesticide program is data rich, “easy” order authority, extensive exposure data, relatively limited universe (1,100 active ingredients) with defined scope (labeled uses)
- After first 30 years, wider agreement/understanding of what data are expected and how they will be analyzed
 - Guide was “simple”: make all old pesticides have same data and review as a new pesticide submission -- may not be comparable to TSCA situation
- After FQPA first two years, complaints about lack of articulation about how program decisions are made and what policies support program decisions
 - EPA established large Federal Advisory Committee Act (FACA) group, with wide stakeholder participation
 - Discussions led to 27 requested/useful policy papers outlining key policies and decision guidance about important program elements
- Policy papers drafted, subject to public comment, prepared in final

Concluding Thoughts

- Three years after enactment is a relatively short time frame for implementing the changes made in the legislation
 - Progress also hindered by slow pace of appointments in Trump Administration
- Fees, appropriations, authorization on hiring and training staff will allow program to respond more fully to stakeholder concerns
 - Fundamental policy differences among stakeholders will remain
- Now, three years after, a stakeholder process (similar to the FQPA FACA process) might help develop program policies and guidance in less controversial areas
- Some important parts of Lautenberg amendments are unexplored to date, over time could be important contributors to program success
 - Section 4 authority to gather data (new order authority for toxicology data and exposure potential)
 - Preemption authority may come into play soon
 - New Chemical Data Reporting (CDR) information may be useful to evaluate chemical long-term trends in chemical use and innovation since 1976
 - Comparing trends might help develop testing strategy

One Last Thing to Remember

- There will be a year 4, 5, 6, . . .
 - Program will confront the future with issues of resources, staffing, litigation, deadlines, and workload challenges
 - Program will survive issues of resources, staffing, litigation, deadlines and workload challenges
- **Time waits for no bureaucracy**



Thank You

James V. Aidala

BERGESON & CAMPBELL, P.C.
2200 Pennsylvania Avenue, N.W., Suite 100W
Washington, D.C. 20037
jaidala@lawbc.com