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TSCA Rule Would Help Fund Broader EPA Chemical Program

By **Juan Carlos Rodriguez**

Law360 (February 9, 2018, 9:08 PM EST) -- The U.S. Environmental Protection Agency's proposed new fee structure for its Toxic Substances Control Act program would bring much-needed revenue to an agency facing dramatically increased responsibilities under recent amendments to the law, although environmentalists say companies would get off easy.

The $20 million expected to roll into the agency's coffers each year from fees paid by chemical manufacturers and distributors would go toward helping the EPA carry out new regulatory duties it was given in 2016 amendments to TSCA. Before the amendments passed, the EPA's chemical program was criticized as unacceptably weak and slow, and the agency has been under pressure to quickly implement improvements desired by both industry, which wants to see a more efficient chemical approval process, and environmentalists, who want to see stronger health protections.

The proposed fee program would defray some of the costs of administering certain provisions of TSCA. Those would be Section 4, which covers chemical testing requirements, Section 5, which covers new chemical reviews and regulation, and Section 6, which covers existing chemical reviews and regulatory actions. The fees would also offset the costs of collecting, processing, reviewing, protecting and providing access to information about chemical substances.

Crowell & Moring LLP partner Warren Lehrenbaum said the fees are a necessary part of ensuring the EPA can handle the increased workload it faces.

"We've seen EPA struggling to meet its new obligations under the new chemical review program, and once the rest of the statute gets going, in particular the prioritizations and risk evaluations, that's going to be a huge burden on staff," Lehrenbaum said. "They need to collect these fees."

Even with the new fees, he said there's still a concern among industry that companies will pay money but still not see the turnaround times — on premanufacture notices for new chemicals, for example — that they're hoping for.

"It would be nice if we had more certainty about the timing of the EPA's actions," he said.

On the environmentalists' side, Richard Denison, lead senior scientist at Environmental Defense Fund, said the EPA could and should be collecting even more money from fees. Although the TSCA amendments don't require the EPA to collect fees, Congress said if the agency chose to do so it could get more than what it's asking for in the proposed rule.

In particular, Denison pointed to the the fees the EPA has proposed implementing to cover Section 4 costs. While TSCA says the EPA can collect fees to cover up to 25 percent of its costs, the agency has proposed collecting only 3.5 percent.

"The fee rule is just the latest manifestation, on paper, of the political leadership's disturbing unwillingness to impose costs on the industry that Congress gave it the authority to do," Denison said.

EDF has challenged three other TSCA rules the EPA has rolled out to implement the changes Congress said it wants to see in the chemical program. The rules address identifying high-priority chemicals for risk evaluations, creating a framework for assessing the risk potential of high-priority chemicals, and documenting which chemicals manufactured, imported or processed in the U.S. over the past 10 years are active in U.S. commerce.

Denison said the group has argued those rules skimp on public health protections by not being as stringent as they should be. And he said the proposed fee rule follows that pattern, although he said it's too early to tell if it will spark a similar legal challenge.

"There's an effort here, in our view, to lowball the real costs to the agency of doing this work, meaning the EPA gets less money in fees than it would otherwise get and industry has to pay less," he said. "The result is going to be that we're going to get assessments done with far less robust information on the risks chemicals present than we should be getting."

Judah Prero, counsel at Sidley Austin LLP, noted that chemical companies are facing big increases in fees from what they currently pay, and said the EPA had to walk a tightrope in setting appropriate amounts.

"No one realistically expected the numbers to stay close to what they have been for a number of years," Prero said. "I think overall EPA tried to strike the balance where, on one hand everything is going to cost money, but on the other if it's too much no one is going to want to play ball within the system."

Chemical businesses told the EPA they were worried that fees could become so onerous that they would make research and development prohibitively expensive in the U.S., Prero said. But they also want their chemicals approved by the EPA.

"If EPA just doesn't have the manpower or the ability to do it, then what good is the new regulatory structure?" he said. "There needs to be a balance, and I think that's what EPA tried to do. It doesn't serve industry to have an underfunded EPA that can't do its job."

--Editing by Mark Lebetkin and Aaron Pelc.