

## How The Trump Administration Is Putting Its Stamp On TSCA

By **Juan Carlos Rodriguez**

*Law360, New York (November 9, 2017, 11:03 PM EST)* -- The Trump administration has pleased industry players and frustrated environmental groups with its approach to implementing amendments to the Toxic Substances Control Act, weighing in on key issues ranging from how the government handles applications for new chemicals to enter the marketplace, to how it evaluates the risk posed by substances already in use.

Here are five ways the President Donald Trump administration is shaping the way TSCA is interpreted by the U.S. Environmental Protection Agency.

### **New Chemical Reviews**

Under the EPA's new chemicals program, companies must submit applications for new chemicals they want to bring to the market. Before the 2016 amendments to TSCA, the EPA had authority to review new chemicals but was under no obligation to do so. Now, the EPA must review them, and the Trump administration's methods differ markedly from its predecessors'.

After passage of the law, applications started to back up as the EPA struggled to review them. The EPA said about 600 applications had accumulated by the beginning of the summer, but in August Administrator Scott Pruitt said the backlog had been mostly cleared. Richard Denison, lead senior scientist at Environmental Defense Fund, said that's because the Trump administration is taking shortcuts.

"[Under Obama], many more chemicals were being flagged and subjected to either testing or other conditions because EPA now had to make a determinative finding about the chemical's risk," Denison said. "What the industry did was to go directly to the agency, which has forced changes to the program that are just now playing out and essentially revert back to where the program was before the law was amended."

Denison said because the EPA's approach hasn't come in the form of a rule, it hasn't been challenged in court yet, but he said that could happen down the road as more information about the process comes to light. The EPA is hosting a public meeting on Dec. 6 to discuss changes to the program.

Others feel the EPA has made a practical change that recognizes its resource limitations and still provides the public protection for which the law was intended.

Mark Duvall, a principal at Beveridge & Diamond PC, credited the Pruitt EPA for looking for ways to speed up the processing of new chemical applications, and said while it's still slower than industry would like, it's getting better.

"It's important because the process is the route to bringing new chemicals to market, many of which are greener and more efficient, can contribute to economic growth, which can aid pollution prevention by reducing the amounts of more toxic chemicals," Duvall said.

### **Inventory Reset Rule**

Under the TSCA amendments, also called the Frank R. Lautenberg Chemical Safety for the 21st Century Act, the EPA was required to come up with a rule to update its inventory list of chemicals — a daunting prospect, since the list contains about 85,000 chemicals. The rule was finalized in August, and differed from the version proposed by the Barack Obama administration in January, particularly in respect to how companies may assert claims that chemicals constitute confidential business information — a relief to many businesses.

"I was pleasantly surprised about how many of the comments were favorably addressed by EPA in the final rule. In almost every respect, the final rule was more workable than the proposal," said Thomas Berger, a partner at Keller and Heckman LLP.

But EDF has challenged the rule at the D.C. Circuit. While no briefs have been filed in the case, Denison said the controversy stems from the fact that the final rule establishes that any company can assert a CBI claim for a particular chemical.

"EPA's final rule establishing the inventory reset does something we think is not legal: to allow not only the company that originally made a CBI claim for its chemical to reassert it, but to allow any company that makes that chemical to assert the claim," he said. "In our view the law is quite clear that it is only someone who wishes to maintain an existing claim who is allowed to reassert it."

### **Prioritization Rule**

The first step under the TSCA revisions for evaluating the safety of existing chemicals is prioritization. In an August final rule that set up the prioritization process, the agency said it must decide the level or risk that a chemical poses and designate it as either high priority, which requires further evaluation, or low priority, meaning further study isn't needed.

This rule — and another that addresses how the agency assesses risk — has also been challenged by EDF, as well as two other groups that each filed separate petitions for review in different circuit courts. One of those groups, the Natural Resources Defense Council, said the Trump administration's approach will result in incomplete analyses that play down a chemical's risk to human health.

"We oppose the rules because they give EPA nearly unlimited discretion to decide which uses of a chemical it considers to determine whether the chemical poses an unreasonable health risk," NRDC attorney Daniel Rosenberg and scientist Jennifer Sass said in an August blog post when the lawsuit was filed. "TSCA requires EPA to consider a chemical's 'conditions of use,' including all 'intended, known, and reasonably foreseeable uses.' But these rules allow EPA to pick and choose which uses to consider. So EPA can exclude sources of exposure to a chemical that affect the overall risk the chemical poses."

Warren Lehrenbaum, a partner at Crowell & Moring LLP, said he thinks the criticism of the Trump administration rule is premature.

“It’s too early to tell whether these changes in the final regulations will have the dramatic consequences that some critics are predicting,” he said. “It also remains to be seen whether those rules will survive the pending court challenges.

### **Risk Evaluation Rule**

Another rule issued in August addressed the second step in the chemical assessment regime: risk evaluation. The EPA set up a process for determining if a chemical presents “an unreasonable risk of injury to health or the environment.” In making that finding, the EPA said it may not consider costs or other “nonrisk” factors.

The same groups that challenged the prioritization rule have challenged the risk evaluation rule for largely the same reasons. Denison said the Trump administration’s final rule reversed course “180 degrees” from what the Obama administration had proposed in regard to how the agency will look at chemical uses that may no longer be common, or “legacy” uses. Again, the rule’s challengers say the Trump administration can ignore certain uses, which could result in skewed risk analyses.

He said instead of studying every “condition of use,” as the previous regime had proposed, the EPA now will exclude certain types of uses in some cases.

“The legal challenges said EPA asserts authority and discretion that the law doesn’t give it,” Denison said.

But the EPA said in August it believes its rule passes muster.

“This process incorporates the science requirements of the amended statute, including best available science and weight of the scientific evidence,” the rule said.

--Additional reporting by Adam Lidgett. Editing by Pamela Wilkinson and Breda Lund.