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**Michael Petro**

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The Toxic Substances Control Act has been in effect since 1976 but is one of the few environmental laws enacted around that time that have yet to be revised or amended.

That may change in the near future, according to **John Weinholtz** of **Nixon Peabody** in Buffalo. He said there is recognition in both the environmental and chemical industries that the law should be updated and made more efficient.

The TSCA regulates chemicals in industrial, consumer and commercial applications, and one of the proposed bills to revise it has bipartisan support in both the **New York State Assembly** and the Senate. That's a rarity in the political scene, he said.

"When that happens, it tells me that it's a bill that involves compromise on both sides of the competing vantage points," said Weinholtz, a partner in the products class action, trade and industry representation group of Nixon Peabody.

The act regulates the production, use, distribution and disposal of certain chemical substances and requires the **Environmental Protection Agency** to require testing, reporting and record keeping for designated substances before they enter the U.S. marketplace. The established inventory contains more than 83,000 chemicals but only a small percentage are formally regulated.

He said there are nearly 62,000 "existing" chemicals grandfathered into the TSCA and not subject to EPA review, and that doesn't sit well with many of the people seeking reform. The EPA only has authority over "new" chemical substances, he said, including PCBs, asbestos, radon and lead-based paint

“People are thinking, ‘Wait a minute, how do we know these 62,000 chemicals are safe for everyone and meet the safety standards?’ ” Weinholtz said.

While other environmental laws such as the Clean Air Act and Clean Water Act have been modified multiple times, the TSCA is basically untouched, according to **David Flynn**, a partner at Phillips Lytle who focuses on environmental law and energy.

Said Flynn: “I think there is a realization and strong push that this act doesn’t properly protect the American public and should put a more significant burden on industry to prove and establish the safety of chemicals before they’re introduced into the marketplace, as well as give EPA more teeth to oversee and enforce in a more aggressive way how chemicals are used in products in our economy.”

The question now is to what degree is reform needed, he said. Does the act need to be completely overhauled or should it retain elements of what has been called a more passive regulatory program?

“The chemical industry seems to be embracing an update of the act but is warning not to go too far. Because if you do, you’re going to stifle innovation and create roadblocks to getting great new products and materials out in the marketplace,” Flynn said. “It will become such an impediment that will become an overreaction.”

The sides have come together in an effort to lift the law’s safety measures and better align it with a changing environment. Weinholtz said reform would help the industry side by better serving the introduction of safe chemicals into the marketplace and help the environmental side by ensuring that what is being introduced is safe.

Two bills have been proposed but the one with the most support is the Frank Lautenberg Chemical Safety for the 21st Century Act. It’s named for the late Frank Lautenberg, a leader in environmental legislation. The other is the Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act (the Boxer-Markey Bill), which came out later and is slightly more slanted on the side of environmentalists.

Both bills provide for review of the 62,000 grandfathered chemicals and set forth a schedule by which it would be done, but they differ in how that would be completed, according to Weinholtz. Both also provide for the EPA designation of high- and low-profile priorities for all of the chemicals.

“That’s an enormous amount of chemicals to deal with, so they figured let’s prioritize them,” he said. “From there, they can go into further review, testing and analysis to determine if limitations should be put on manufacturers’ sales of the chemicals.”

There is a much-debated confidentiality part to the TSCA in which a company can submit information for review by the EPA without having to release it to the public. However, the Lautenberg bill would put an up-front burden on corporations to provide a reason for why something should be kept confidential.

“That pleases the environmentalists because then there is less concern that things are being done behind the curtain,” Weinholtz said.

**Stephen Schwarz**, managing partner of Faraci Lange, sees procedural changes that should be made to the act. He said the current process takes too long and allows for possible chemical exposures. The EPA can do more to protect the public, which is the design of many of the changes in the proposed bills, he said.

But while the bills may lead to well-meaning revisions that are long overdue, Schwarz said what is being overlooked is an exception built in that could create a potential federal pre-emption issue. If the federal government issues regulations under TSCA, then an argument can be made that all state law claims involving damage from a specific chemical are pre-empted and that only the federal regulatory system is entitled to control the acts of a chemical company.

“It would have drastic effects in the opposite direction; it would be pretty troubling,” said Schwarz, who has spent three decades focusing on toxic tort and environmental contamination cases.

There are exceptions to the TSCA where there has been regulation by other federal agencies on more hot-button issues such as consumer-used chemicals, pesticides and tobacco. However, with the lack of reform, states have taken up regulating some chemicals on their own.

Weinholtz said he has worked with attorneys in the law firm's California office because that state takes a proactive approach to regulating chemicals. The firm often counsels clients regarding chemicals manufactured or distributed in the state and clients forced to deal with different sets of rules in place to place.

"That's one of the reasons industry got behind the Lautenberg bill — because most companies deal nationally, if not internationally, so they would prefer one set of rules that they have to deal with and not have to do different testing or have different restrictions when they jump from state to state. It can be a cost issue, as well," he said.

The bill has been referred out of committee and to the House and Senate. Weinholtz sees it as more realistic reform.

The Reinstein bill has yet to gain the same traction, he added.

Due to the bipartisan support, Flynn said he sees change occurring sometime in 2015. It's one of those rare circumstances where he's seen a level of commitment from each side to a bill and an effort to avoid the gridlock oftwn seen in Washington, D.C.

"As with a lot of these initiatives, it comes down to how willing the sides are to meet in the middle," Flynn said. "Are they going to hold out for the perfect legislation or are they willing to settle for something short of that to get most of what they're looking for."

Schwarz said he hopes a lingering issue is resolved before the bill is finalized. And he doesn't think the pre-emption scenario is something that has been touted as a reason why the act could be revised, but it should be if protecting the public is the bill's intention, he said.

"One of the things that protects the public the most is the threat of a civil lawsuit under state law and the financial consequences to the chemical industry when they get it wrong," he said. "If you remove that preventive aspect for them, I think you lose a lot of protections for the public."