

Do It Now, Or It May Never Be Done

LYNN L. BERGESON

Whatever window of opportunity exists to reform the Toxic Substances Control Act is closing. This is not only because the mid-term elections are fast approaching, or that there are too few legislative days left this session, or even that Congress is polarized and achieving passage of complicated chemical legislation seems intuitively beyond reach.

It is also because the emergence of chemical management frameworks like the EU's Registration, Evaluation, Authorization and Restriction of Chemicals, Korea REACH, and Canada's Chemicals Management Plan; state programs like California's Safer Consumer Products Regulations; private regulatory, stewardship, and retailer initiatives; and the inevitable chemical deselection that is underway as an outgrowth of these developments have diffused the urgency and perhaps even the need for TSCA reform.

As these other trends continue to grow, TSCA, reformed or otherwise, becomes increasingly irrelevant. Absent TSCA reform now — in this Congress — emerging global chemical frameworks will continue to evolve, at considerable cost to U.S. credibility as a global leader and, of course, to the chemical community's commitment to protect environmental and human health.

Neither S. 1009 nor the House discussion draft as written would pass, and rightly so given their failure to address fully TSCA's fundamental flaws. To salvage the momentum that has developed, focusing narrowly and fixing only on the most important of TSCA's many

flawed provisions, may be the best hope for success.

First, reform legislation must provide EPA with clear requirements and authority to prioritize, assess, and impose restrictions on existing chemicals posing risks and do so according to a deadline-driven scheme. Neither measure does this. S. 1009 is bloated with multiple, confusing "assessment frameworks." Neither S. 1009 nor the House draft provides clear and direct authority to require testing needed to support prioritization.

While both address to some extent the problems in using TSCA Section 6 to control existing chemicals, it is difficult to see how either as presently drafted would succeed. The absence of deadlines in these measures is counter-productive if not irrational. Both Canada and the EU have managed to prioritize, assess, and control existing chemicals, and so should we since without deadlines, even a more refined assessment framework will languish.

Second, a determination of chemical safety should be based solely on hazard data, Structural Activity Relationship modeling or other predictive methodology, or both, and exposure information. Any regulatory response to such a determination under the House measure must be "proportional" to the avoided risk, be "cost-effective," and impose restrictions only when "technically and economically feasible alternatives" are available.

This is an impossibly high standard and appears equivalent to re-imposing the stifling "least burdensome" requirement now applied under TSCA and could well make the situation worse. A more balanced approach would have EPA consider such factors in taking a control action and otherwise authorize the agency to grant time-limited exemptions or other waivers based on a determination of critical need or the absence of viable alternatives, as the EU has done under REACH and as

suggested by provisions in S. 1009.

Third, as important as any other area is the urgent need to ensure that EPA has adequate funds to implement the program. Even the most perfect prioritization process will fail if EPA lacks resources to do its job. It is time to consider adopting a fee program similar to the approach taken under the Pesticide Registration Improvement Act. EPA assesses fees under PRIA on pesticide registration applications to pay for some fraction of the cost of EPA's services. While a fee for service program would appear impossible, our collective indifference to the fiscal realities presented by the chronic underfunding of the TSCA program — and the silence on this critical topic in the Senate and House TSCA reform drafts considered since the late Senator Frank Lautenberg (D-NJ) first introduced TSCA reform legislation years ago — is reckless.

Reform measures are far from aligned. Whatever momentum that exists will dissipate in a potentially dramatically new Congress after the mid-term elections. Given the uncertainties that change invites, we may well be on a path to just say no permanently to TSCA reform. We would, in so doing, endure the national indignity of having our commitment to chemical safety be dictated not by our unwavering pledge to protect human health and the environment, but by the chemical governance frameworks, policies, and practices of others.

Lynn L. Bergeson is managing partner of Bergeson & Campbell, PC., a Washington, D.C., law firm. She is also president of The Acta Group, with offices in Washington, D.C., Manchester, UK, and Beijing, China, and president of B&C Consortia Management, L.L.C., with offices in Washington, D.C.