

TSCA Legislation Passes Senate, Nears Final Passage

Article By:

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On December 17, 2015, the **Senate** unanimously approved legislation to amend the ***Toxic Substances Control Act (TSCA)***. The legislation amended the bill already approved by the House of Representatives by substituting the text of the Senate TSCA bill. All that remains for final passage is reconciliation of the version passed by the Senate with the version passed by the House in June. The work of reconciliation is expected to begin shortly.

This article describes the events that led to Senate approval, clarifies what the Senate actually voted on, and then discusses the key differences between the bill as reported by the Senate Committee in April and the bill as passed by the Senate in December. Next it reports on EPA's concern about the preemption provision of the bill. The alert concludes with a review of what we can expect from here on.

Delays in Senate Consideration

The Senate vote had been delayed for six months. On April 28, 2015, the Environment and Public Works (EPW) Committee favorably reported (15-5) S. 697, the "Frank R. Lautenberg Chemical Safety for the 21st Century Act," but no floor vote was scheduled. Senator Barbara Boxer (D-CA), who had led opposition to the bill in the EPW Committee, asked for two weeks of floor time to debate dozens of amendments to the bill. Until she relented, Senate leadership declined to schedule a vote.

In the meantime, the House of Representatives passed its own version of TSCA reform legislation on June 23, 2015. H.R. 2576, the "TSCA Modernization Act of 2015," was approved by a vote of 398-1.^[1]

Backers of the bill pressed hard for floor action before the August recess, but were unsuccessful. In September, Senator John Hoeven (R-ND) threatened to complicate matters by attaching to S. 697 an unrelated provision that would lift the 40-year-old ban on export of domestically-produced crude oil. Ultimately, this did not happen.

An apparent breakthrough came on October 2, 2015, when Senator Markey (D-MA) announced that he would support S. 697 (having worked with Senator Boxer to oppose the bill in the EPW Committee), and Senator Boxer said she would accept a brief period of debate, because the bill was

being amended in certain ways. Senator Dick Durbin (D-IL), Democratic Party Whip, also announced his support for S. 697. That brought the number of declared supporters for S. 697 to 60, enough to defeat a filibuster (in case Senator Boxer chose to bring one). No version of the amended bill was publicly released, however.

Shortly thereafter, Senators Richard Burr (R-NC) and Kelly Ayotte (R-NH) announced that they had placed a hold on the bill until they received a vote on reauthorization of the then-expired Land and Water Conservation Fund (LWCF), another issue unrelated to TSCA reform. Funding for the LWCF was included in the Consolidated Appropriations Act, 2016, passed in mid-December.^[2] On December 16 they announced that they would no longer block consideration of S. 697.

One final obstacle then arose. Later on December 16, Senator Boxer announced that she had placed a hold on the bill, notwithstanding her previous commitment not to oppose a vote. She lifted that hold the next day after the bill was further amended. The vote occurred later on December 17.

What the Senate Passed

In a surprise move, when the Senate voted on December 17, it did not vote on S. 697. Senator Inhofe (R-OK), Chairman of the EPW Committee, received unanimous consent for consideration by the Senate of the House bill, H.R. 2576, as amended by the Senate. The amended bill passed unanimously (without an actual vote being recorded).^[3]

Senator Inhofe, on behalf of himself and the chief sponsors of the S. 697, Senators Tom Udall (D-NM) and David Vitter (R-LA), had that day proposed an amendment of H.R. 2576 “to strike all after the enacting clause and insert” the text of S. 697. Thus, S. 697 was not passed. Instead, as amended and passed by the Senate, H.R. 2576 is entitled the “Frank R. Lautenberg Chemical Safety for the 21st Century Act.” The text of the amendment appeared in the Congressional Record.^[4] After the vote, the EPW Committee released the text of an amended S. 697 as representative of what the Senate had voted on.^[5]

What’s New in the Bill as Passed by the Senate

The Senate amendment included both the compromises worked out in October and an apparent concession to Senator Boxer to resolve her hold on December 16. The changes are mostly minor adjustments of some provisions rather than significant additions or deletions. The bill made no changes to the overall structure of S. 697 or its major provisions.^[6]

The principal changes to the text as reported by the EPW Committee are summarized below (section references are to TSCA as it would be amended by the bill passed by the Senate).^[7]

Prioritization Screening – Section 4A

- The amendment broadened the preference for prioritizing persistent and bioaccumulative chemicals. S. 697 as passed by the EPW Committee would give priority in prioritization to chemicals scoring high for persistence and bioaccumulation using EPA’s TSCA Work Plan criteria. The amendment changed this language to a preference for chemicals scoring high for persistence and moderate or high for bioaccumulation, and vice versa.
- The amendment added a preference for chemicals listed in the October 2014 version of EPA’s TSCA Work Plan and subsequent updates that are known human carcinogens and

have high acute and chronic toxicity.^[8] This is an apparent concession to Senators Boxer and Markey, both of whom had pushed for language addressing asbestos.^[9]

- The amendment added a preference for chemicals stored near significant sources of drinking water. This is an apparent reference to the January 9, 2014 spill of 4-methylcyclohexanemethanol into the Elk River near the public water intake for Charleston, West Virginia, which affected some 300,000 residents of the area.
- The amendment added a provision that would require prioritization decisions regarding metals and metal compounds to be made using EPA's 2007 Framework for Metals Risk Assessment.^[10] This is an apparent response to industry concerns that metals and metal compounds differ significantly in toxicity and environmental fate from organic compounds and should be addressed accordingly.
- The section on preemption included S. 697's "high-priority pause," where new state restrictions on a high-priority chemical would be generally preempted until the deadline for completing the safety determination for that chemical. The amendment added a requirement for a state adopting a restriction for a high-priority chemical after expiration of EPA's deadline to issue a safety determination for the chemical (and thus after the high-priority pause has expired) to notify EPA of its action and the basis for it.
- The bill would still require EPA to ensure that 25-30% of the chemicals designated as high priority are those requested by manufacturers or processors. The amendment added a provision that if there are insufficient requests to make at least 25% of the high-priority chemicals be those requested by industry, EPA would have to grant all the qualifying requests.

New Chemicals – Section 5

- The amendment broadened the directive for EPA to address new chemicals that are persistent and bioaccumulative. S. 697 as passed by the EPW Committee would direct EPA to reduce exposure to the maximum extent practicable for any new chemicals scoring high for persistence and bioaccumulation using EPA's TSCA Work Plan criteria. The amendment changed this language to a directive to reduce exposure to the maximum extent practical for any new chemicals scoring high for persistence and moderate or high for bioaccumulation, and vice versa.

Safety Assessments and Safety Determinations – Section 6

- S. 697 as passed by the EPW Committee would allow a two-year extension of the three-year period for completing a safety determination. The amendment limited extensions to one year and provided that no extensions would be available for TSCA Work Plan chemicals designated as high priority unless certain conditions applied.
- The amendment broadened the directive for EPA to address chemicals that are persistent and bioaccumulative and that are not found to meet the safety standard under their conditions of use. S. 697 as passed by the EPW Committee would direct EPA to reduce exposure to the maximum extent practicable for any such chemicals scoring high for persistence and

bioaccumulation using EPA's TSCA Work Plan criteria. The amendment changed this language to a directive to reduce exposure to the maximum extent practical for any new chemicals scoring high for persistence and moderate or high for bioaccumulation, and vice versa.

- The amendment would make compliance dates for rules no later than four years after promulgation, except for exempted uses. The four-year limit could be extended for up to 18 months in limited circumstances.
- The amendment would require restrictions for a chemical found not to meet the safety standard for a particular potentially exposed or susceptible population to be sufficient to make the chemical meet the safety standard for that population.

Information Collection and Reporting – Section 8(a)

- The amendment would direct EPA to consult with the Small Business Administration within six months of promulgation to review the criteria for qualification as a small business, and at least every ten years thereafter. The current provision has not been adjusted since 1997, over 18 years ago.^[11]

Relationship to Other Federal Laws – Section 9(a)

- The amendment added a provision that would require EPA to complete a safety assessment and safety determination and, as appropriate, promulgate restrictions for a chemical referred to another federal agency for action under its statute where that agency has not taken such action within the time period provided in the referral.

Exports – Section 12(a)

- The amendment made minor clarifications to the “export only” exemption.

Confidential Information – Section 14

- S. 697 as passed by the EPW Committee would allow access to confidential business information (CBI) for certain public health and medical personnel. The amendment added a provision that would direct EPA and the Centers for Disease Control and Prevention to establish a request and notification system to expedite access to CBI in those circumstances.

State-Federal Relationship (preemption) – Section 18

- The amendment clarified that the scope of preemption includes the hazards and exposures of a chemical, as well as the uses and conditions of use considered by EPA in its safety assessment and safety determination.
- The amendment clarified the high-priority pause. New language indicates that it would begin

when EPA defines and publishes the scope of a safety assessment and safety determination.^[12] It would end on the date that EPA publishes the safety determination, or on the expiration of the statutory deadline for completion of the safety determination, whichever is earlier.

- The amendment made several changes to the waiver provision. Among others, it extended by 20 days (from 90 to 110) the deadline for EPA review of state requests for waiver of the high-priority pause. It also added provisions limiting EPA's ability to grant state requests for waiver of preemption following final EPA action to regulate a chemical under section 6. Under the new language, EPA would have to find that a waiver request is based on compelling conditions, is consistent with the best available science, is supported by appropriate studies, and reflects the weight of the evidence. (See also the waiver discussion in the next section of this alert.)
- S. 697 as passed by the EPW Committee would not allow EPA to assess a penalty where a state enforcing an identical requirement has assessed a penalty. The amendment would allow EPA to assess a penalty in that case so long as the combined amount of the state and federal penalties did not exceed the maximum amount allowed by section 16 (\$37,500, but subject to increase for inflation by the Debt Collection Improvement Act of 1996). (This is similar to the provision in the House-passed version of H.R. 2576.)

Judicial Review – Section 19

- The amendment moved from the preemption section to the judicial review section the provision in S. 697 stating that any person may seek judicial review of EPA's designation of a low-priority chemical in the D.C. Circuit.
- The amendment would make an EPA determination that a high-priority chemical meets the safety standard be subject to the "substantial evidence" standard rather than the usual "arbitrary or capricious" standard.
- S. 697 would have made EPA orders restricting new chemicals or SNUR chemicals be subject to judicial review under the "substantial evidence" standard also. The amendment deleted this provision.

Administration (fees) – Section 26

- S. 697 as passed by the EPW Committee would have authorized EPA to set fees to cover 25% of the costs of its implementation of TSCA, subject to a ceiling of \$18 million. The amendment raised that ceiling to \$25 million. This change is unlikely to result in an increase in fees in the next several years.^[13]

Sustainable Chemistry – Section 27

- S. 697 as passed by the EPW Committee would direct EPA to establish a new Sustainable Chemistry Program. The amendment made a number of changes to that program.

Mercury Export Ban – Section 29

- In 2008, Congress amended TSCA to ban the export of elemental mercury.^[14] It also mandated that the Department of Energy designate a facility or facilities for long-term storage of elemental mercury. The facility was to be selected by January 1, 2010 and begin accepting mercury for storage by January 1, 2013.^[15] DOE has not yet designated a storage facility. A new section 29 would extend the 2013 deadline to January 1, 2019 and make other adjustments.

Trevor's Law – Section 30

- This is apparently the concession made to Senator Boxer in December to cause her to lift her hold on consideration of S. 697. Unlike the changes discussed above, it was not part of the October compromise. "Trevor" apparently refers to Trevor Schaefer, one of the namesakes of Senator Boxer's TSCA reform bill, S. 725, the "Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act." Title II of that bill is entitled "Strengthening Protections for Children and Communities from Disease Clusters."^[16]
- Section 30 of the amendment is based on Title II of S. 725, but with some changes. Whereas Title II would extend to all "disease clusters," section 30 is limited to "cancer clusters." Section 30 is also shorter than Title II.
- Section 30 would amend the Public Health Service Act and direct the Department of Health and Human Services to develop criteria for the designation of potential cancer clusters; establish guidelines for investigating potential cancer clusters; and consider whether to investigate a potential cancer cluster.
- Two potential cancer clusters in the news during the past few decades were those at Toms River, New Jersey and at Woburn, Massachusetts. The difficulty of proving a cancer cluster in each case has been described in books.^[17] This provision is presumably intended to reduce that difficulty.

EPA Concerns About Preemption

As recently as September, EPA expressed concern about the preemption provision of S. 697, which was not substantially changed in the amendment.^[18] The day after that vote, three Democratic Senators sought to counter those concerns. Senators Sheldon Whitehouse (D-RI), Cory Booker (D-NJ), and Jeff Merkley (D-OR) held a colloquy on December 18^[19] that included the following statement of EPA's interpretation of the waiver provision in S. 697 as reported by the EPW Committee:

Required waivers under section 18(f)(2). These would be State requests for an exemption from preemption under section 18(b). EPA must grant this kind of waiver request if the State law for which waiver is sought would not unduly burden interstate commerce; the State law for which waiver is sought would not cause a violation of Federal law; and the State has a concern about the chemical substance or use of the chemical substance based in peer-reviewed science.

In the colloquy Senator Booker summarized the waiver provision:

The provision requires EPA to allow States to regulate hazardous chemicals while EPA assesses a chemical for safety if the proposed state regulation meets three basic criteria: A, consistent with the dormant commerce clause of the U.S. Constitution, compliance with the proposed regulation will not unduly burden interstate commerce in the manufacture, processing, distribution in commerce, or use of a chemical substance; B, compliance with the proposed regulation would not cause a violation of any applicable Federal law, rule, or order; and C, the State or political subdivision of a State has a concern about the chemical substance or use of the chemical substance based in peer-reviewed science.

Senator Merkley then commented:

Each of these standards has a constitutional foundation. The first reflects the restraints of the dormant commerce clause. The second reflects the Constitution's supremacy clause. The third corresponds to the scientific factual predicate required to meet scrutiny under the due process clause, as not "arbitrary and capricious."

Restoring the ability for States to protect their citizens while EPA assesses the safety of chemicals was one of the primary goals of our work to improve this bill and that has been accomplished under section 18(f)(2) of S. 697, as reported by the Environment and Public Works Committee. We believe this does, within the limits imposed by the Constitution.

What Happens Next

The next step in the legislative process is reconciliation of the House-passed and Senate-passed versions of H.R. 2576.^[20] The House-passed version is 46 pages, while the Senate-passed version is 211 pages. This difference is larger than it seems, since the Senate version restates much of current TSCA without substantive amendment. Nevertheless, the Senate version has more detail as well as some provisions absent in the House version, and the House version has some provisions absent in the Senate version. It is conceivable that the House would accept the Senate version as-is. If not, a detailed consideration of particular provisions may be necessary.

Reconciliation may occur through establishment of a conference committee (a temporary joint committee to resolve differences between House-passed and Senate-passed versions of a measure). The Senate and House would each designate its representatives. Senate procedures would require Senator Boxer, as Ranking Member of the EPW Committee, to be a member of the Senate conferees. The Senate and House conferees would have latitude to accept either the House version or the Senate version, or they could craft their own bill with germane amendments. After the conference committee issues its report, both Houses would have an up-or-down vote to accept or reject the committee's recommended text of the legislation; no amendments would be allowed.

The alternative to a conference committee would be “amendment exchange,” known informally as “ping-pong.” Under this alternative, the measure is sent back and forth between the House and Senate, typically with amendments, for up to two rounds, to see if both can agree to identical language. This process tends to limit the role of the minority party (here, the Democrats).

So far, the Congressional leadership has not indicated which mechanism will be used. By amending H.R. 2576 rather than passing S. 697, however, the Senate has arguably already initiated ping-pong. Following the Senate’s passage of H.R. 2576 with an amendment, on December 18 the Senate sent a message to the House to that effect, saying that “the concurrence of the House is requested.”^[21] Thus, technically the House is in a position to respond with its own amendment, which it could then to the Senate for approval.

A spokesperson for Senator Udall said that a conference committee “may or may not be convened at a later time, and that’s an issue for the House and Senate leadership to decide.” Representative John Shimkus (R-IL), Chairman of the Environment and Economy Subcommittee of the House Energy and Commerce Committee, said that “There are things that we can do” to cut a deal on the two versions of the bill.^[22]

The House has begun consideration of how to proceed. Representative Shimkus said that Republicans on the Committee had already met to discuss the path forward and that “this is something we want to do relatively soon.” The Udall spokesperson said that “We don’t want to rush the process,” but she was hopeful that the process would begin soon.^[23]

Senator Boxer has declared that she plans to be “in the room” when decisions are made on reconciling the two versions of the bill:

I have been assured that, as the House and Senate bills are merged into one, the voices of those who have been most deeply affected—including nurses, breast cancer survivors, asbestos victims, and children—will be heard. I will have the opportunity to be in the room at every step and express their views.^[24]

Once both Houses pass the same legislation, it will go to President Obama for approval. He is expected to sign it, despite the EPA concerns about preemption.

EPA has not commented publicly on how it plans to implement final TSCA legislation. Some indication of how EPA may do so may be gleaned from its experience with the TSCA Work Plan.

[1] See TSCA Reform Nears Enactment with Easy Passage in House (June 26, 2015).

[2] Pub. L. No. 114-113 (Dec. 18, 2015).

[3] [TSCA Modernization Act of 2015](#), 161 Cong. Rec. S8771 (daily ed. Dec. 17, 2015).

[4] [161 Cong. Rec., S8796-S8816](#) (daily ed. Dec. 17, 2015).

[5] [See S. 697](#).

[6] See Udall-Vitter TSCA Reform Bill Builds Momentum for Passage; Senators Boxer, Markey Respond with Competing Legislation

[7] The text of S. 697 as reported by the EPW Committee is available [here](#). The Senate report on S. 697 is available [here](#).

[8] The October 2014 list of TSCA Work Plan chemicals is available [here](#).

[9] “Asbestos & Asbestos-like Fibers” are item 7 in the October 2014 list, where they are characterized as “Known human carcinogens / Acute and chronic toxicity from inhalation exposures.”

[10] The Metals Framework is available [here](#).

[11] Per 40 C.F.R. § 700.43, “*Small business concern* means any person whose total annual sales in the person’s fiscal year preceding the date of the submission of the applicable section 5 notice, when combined with those of the parent company (if any), are less than \$40 million.”

[12] In the TSCA Work Plan, EPA has begun publishing “problem formulations” for its risk assessments. See EPA, [Assessments of TSCA Work Plan Chemicals](#). These probably correspond to the scope documents discussed in the provision.

[13] EPA’s FY2015 enacted budget for Chemical Risk Review and Reduction was \$58.1 million. [EPA, Fiscal Year 2016, Justification of Appropriation – Estimates for the Committee on Appropriations](#) (Feb. 2015), at 202. A 25% ceiling would be \$14.5 million, or \$3.5 million below the alternate \$18 million ceiling in S. 697 as reported by the EPW Committee, and \$10.5 million below the \$25 million alternate ceiling in the amendment. For the \$25 million ceiling to become relevant, EPA’s budget for Chemical Risk Review and Reduction would have to rise to above \$100 million.

[14] [Pub. L. 110-414](#) (Oct. 14, 2008). Then-Senator Obama had sponsored the legislation.

[15] 42 U.S.C. § 6939f.

[16] Senator Boxer had previously introduced stand-alone bills entitled the “Strengthening Protections for Children and Communities From Disease Clusters Act,” [S.76](#) (2011), and [S. 50](#) (2013), as well as the “[Community Disease Cluster Act](#),” S. 53 (2013).

[17] Dan Fagin, *Toms River: A Story of Science and Salvation* (2013), and Jonathan Harr, *A Civil Action* (1996). The latter was made into a movie featuring John Travolta (1998).

[18] On September 3, 2015, Louise Wise, EPA Deputy Administrator for Chemical Safety and Pollution Prevention, told an audience, “Preemption has been a big concern. We don’t want to have the hard work of the states preempted.” Nevertheless, she said that “We are hopeful that something will

happen because TSCA at this point is totally inadequate.” Bloomberg BNA Daily Environment Report (Sept. 3, 2015).

[19] 161 Cong. Rec. S8877-78 (daily ed. Dec. 18, 2015). The colloquy referred only to S. 697 as passed by the EPW Committee, so it is not clear that it reflected the provisions of H.R. 2576 as passed the previous day by the Senate.

[20] A useful guide to how the two Houses of Congress reconcile differences is [Congressional Research Service, Resolving Legislative Differences in Congress: Conference Committees and Amendments Between the Houses](#) (Aug. 2015).

[21] 161 Cong. Rec. H10697 (daily ed. Dec. 18, 2015).

[22] Environment & Energy Daily, “[Lawmakers try to get ball rolling on TSCA conference](#)” (Jan. 7, 2016).

[23] *Id.*

[24] [61 Cong. Reg. S8791](#) (daily ed. Dec. 17, 2015).

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National Law Review, Volume VI, Number 7

Source URL: <https://natlawreview.com/article/tsca-legislation-passes-senate-nears-final-passage>