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## Amended Udall-Vitter TSCA Reform Bill Reaches Senate Floor

On April 28, a modified version of the Frank R. Lautenberg Chemical Safety for the 21st Century Act (S. 697), also known as the “Udall-Vitter” Toxic Substances Control Act (TSCA) reform bill,<sup>[1]</sup> was approved by the Senate Environment and Public Works Committee and sent to the full Senate. Four Democratic Senators (Jeff Merkley (D-OR), Sheldon Whitehouse (D-RI), Cory Booker (D-NJ), and Tom Carper (D-DE)) joined Republicans in a 15-5 Committee vote supporting the bill. No vote has been scheduled by the full Senate, but Senator Barbara Boxer (D-CA), who earlier co-sponsored competing legislation,<sup>[2]</sup> is expected to offer multiple amendments on the Senate floor. The biggest changes to the modified Udall-Vitter bill, relative to the previous version introduced on March 10, include somewhat narrower state preemption provisions.

### Summary of Changes to Udall-Vitter Bill

Below, we summarize the most significant changes to the Udall-Vitter bill as negotiated by Senators Udall, Vitter, Merkley, Whitehouse, and Booker and approved by the full Committee.

#### 1. Preemption.

- a. **Preemption Based on Designation as a High-Priority Substance.** Between the time EPA defines the scope of a safety assessment and safety determination for a high-priority substance (within six months of high-priority designation) and the time the safety assessment and safety determination are published (within five years after high-priority designation), states would be preempted from adopting new restrictions for the substance. Under the previous draft of the Udall-Vitter bill, this “high priority pause” (which Senator Whitehouse had previously dubbed a “death zone” of non-regulation) began when a chemical was designated as high priority and had no endpoint. If EPA should fail to timely publish a safety assessment and safety determination for a high-priority substance, states could seek – and EPA would have to approve – preemption waivers to regulate that substance.
- b. **Co-Enforcement.** The marked-up Udall-Vitter bill would allow states to implement requirements identical to EPA-enacted requirements. Either states or the federal government – but not both – would be able to collect penalties for violations.

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c. **Grandfather Date.** The marked-up bill would exempt from preemption state restrictions adopted prior to August 1, 2015. The previous grandfather date was January 1, 2015.

d. **State Waivers.** States could seek waivers from federal preemption for certain restrictions. Under the marked-up bill, EPA decisions on waiver applications would be reviewable by the D.C. Circuit if a petition was filed within 60 days of EPA's decision. As noted above, under the marked-up bill, EPA would be required to approve waiver applications for high-priority substances for which it has failed to timely publish a safety assessment and safety determination. Approval of a waiver application under these circumstances would not be judicially reviewable.

2. **High-Priority Substances.** In the mark-up, the criteria for designation as a high-priority substance were made less stringent. Previously, either "high" hazard or "high" exposure, or both, were needed. That language has been changed to refer to "significant" hazard or "significant" exposure, or both.
3. **SNURs Applicable to Chemicals in Articles.** The bill would authorize EPA to apply a SNUR to chemicals in articles only if it makes a finding that "the reasonable potential for exposure to the chemical substance through the article or category of articles...warrants notification." Previously, the Udall-Vitter bill did not address the application of SNURs to chemicals in articles.
4. **Restrictions on Chemicals in Articles.** The original bill would have allowed EPA to apply restrictions to chemicals in articles "only to the extent necessary to mitigate the identified risk." The new language would authorize such restrictions "only to the extent necessary to address the identified risks in order to determine that the chemical substance meets the safety standard."
5. **Persistent and Bioaccumulative Substances.** If EPA should determine that a substance ranks high in persistence and bioaccumulation, it would have to enact a ban or restrictions to reduce potential exposure "to the maximum extent practicable." The previous draft of the Udall-Vitter bill did not contain provisions specific to persistent or bioaccumulative substances.
6. **Imports.** The section on imports in the previous Udall-Vitter bill was deleted. If the updated Udall-Vitter bill passes, the current TSCA import section would remain effective.
7. **Replacement Parts.** In adopting restrictions for chemicals found not to meet the safety standard, EPA would be required to exempt replacement parts manufactured before the effective date of the restriction. Previously, exemption of replacement parts was discretionary with EPA.

### Discussion During the Mark-Up Session

It was clear during the April 28 Committee hearing that the compromise announced the previous day had addressed Democratic concerns sufficiently to win the support of three key Democrats, Senators Booker, Merkley, and Whitehouse.

The hearing featured efforts by Senators Boxer, Markey (D-MA), and Gillibrand (D-NY) to add provisions from the Boxer-Markey bill. They offered a limited number of amendments, all of which were rejected by the Committee. Senator Boxer vowed to offer many more amendments on the floor of the Senate once the bill as approved by the Committee comes up for a vote.

### TSCA Reform in the House

As reported previously,<sup>[3]</sup> a discussion draft of the TSCA Modernization Act<sup>[4]</sup> is currently being considered by the Environment and Energy Subcommittee of the House Energy and Commerce Committee. A markup of the House bill is tentatively scheduled for May 14, another indication that TSCA legislation is likely to move fairly rapidly this year.

*Beveridge & Diamond's Chemicals, Products & Nanotechnology Practice Group provides strategic, business-focused advice to the global chemicals industry. We work with large and small chemical companies from industries including basic and specialty chemicals, pharmaceuticals, electronics, crop protection, food contact materials and additives, and consumer products, and have substantial experience representing clients whose products and activities are subject to EPA's broad chemical regulatory authority under the Toxic Substances Control Act. For more information, please contact the authors or any member of our [Toxic Substances/TSCA](#) practice group.*



[1] The Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, 114th Cong. (2015). *See also* the B&D Client Alert [Udall-Vitter TSCA Reform Bill Builds Momentum for Passage; Senators Boxer, Markey Respond with Competing Legislation](#) (March 25, 2015).

[2] Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act, S. 725 114th Cong. (2015). *See also* B&D Client Alert, *id.*

[3] B&D Client Alert, [House Subcommittee to Revise Draft TSCA Reform Bill for May 14 Markup](#) (April 27, 2015). *See also* other recent B&D Client Alerts on TSCA reform legislation: [House Republicans Release Draft TSCA Modernization Legislation](#) (March 6, 2014); [Senate TSCA Hearing Highlights Perils of Path Forward for Updated Chemicals Management Framework](#) (August 15, 2013); [Bipartisan TSCA Modernization Bill, Chemical Safety Improvement Act, Introduced in Senate](#) (May 24, 2013); ["Safe Chemicals Act," First TSCA Reform Bill of 113th Congress, Reintroduced](#) (April 16, 2013).

[4] [The TSCA Modernization Act of 2015](#) [Discussion Draft], H.R. \_\_\_, 114th Cong. (2015).