

TSCA and Worker Health and Safety

GlobalChem 2018

Timothy M. Serie
Beveridge & Diamond, P.C.

March 1, 2018



TSCA Prior to the LCSA

- EPA has always considered workers under TSCA
- EPA has significant new use rules (SNURs) under TSCA § 5 for about 2,800 chemicals
- Approximately a quarter of all SNURs include these worker protection provisions
 - Protection in the Workplace (40 C.F.R. § 721.63)
 - Hazard Communication Program (40 C.F.R. § 721.72)

The LCSA Increases EPA's Focus on Workplace Protection

- TSCA provisions that focus on worker exposure and risks:
 - **Section 3** – Key Terms: Potentially exposed or susceptible subpopulation; conditions of use; health and safety studies
 - **Section 5** – New chemicals and uses (SNURs)
 - **Section 6** – Existing chemicals
 - **Section 9** – TSCA's relationship with other federal laws
- **Conclusion**: EPA has broad authority, within certain bounds, to consider and regulate risks to health in the workplace

Section 3: Definitions

Key Terms Defined

- Potentially exposed or susceptible subpopulation: Individuals who “due to either greater susceptibility or greater exposure, may be at greater risk than the general population of adverse health effects from exposure to a chemical substance or mixture, such as...**workers**....”
- Conditions of use: “[T]he circumstances, as determined by [EPA], under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.”

Section 5: PMN Review

- Premanufacture notice (PMN) review to determine whether a new chemical presents/may present/is not likely to present an unreasonable risk
 - To a potentially exposed or susceptible subpopulation
 - Under the conditions of use
- Worker exposure is often a focus area
- To what extent does EPA consider and take into account exposure controls?



Section 5: EPA Restrictions on New Chemicals

- Section 5(e) Orders
- May contain the following requirements to address occupational risks:
 - Engineering and/or administrative controls
 - Personal protective equipment (PPE)
 - Exposure monitoring
 - Hazard communication
 - Use restrictions
- Lack of consideration of exposure levels

Section 5: Significant New Use Rules (SNURs)

SNUR regulations: a use may be treated as a significant new use if the chemical is subject to these provisions

- Protection in the Workplace (40 C.F.R. § 721.63)
- Hazard Communication Program (40 C.F.R. § 721.72)
- EPA proposed revised SNUR framework to align some of these requirements with the OSHA standards in July 2016

Example: Proposed Isocyanate-based SNURs

Section 5: EPA's Obligation to Consult with OSHA

- “To the extent practicable, [EPA] shall consult with [OSHA] prior to adopting any prohibition or other restriction relating to a chemical substance with respect to which [EPA] has made a determination ... to address workplace exposures.” TSCA § 5(f)(5).



Open question regarding what this provision does or should require

Section 6: Risk Management



- **Prioritization**
 - Designating “high-priority substances”
- **Risk Evaluation**
 - Risk evaluations to determine whether a chemical presents an unreasonable risk
- **Risk management rulemaking under § 6(a)**
 - EPA shall regulate a chemical so that it no longer presents such risk (including risk to workers)

Section 6: EPA's First Proposed Rules Target Worker Health and Safety

Trichloroethylene (TCE):

- Regulation of use in aerosol degreasing, vapor degreasing, spot cleaning in dry cleaning facilities under § 6(a)

Methylene Chloride and N-Methylpyrrolidone:

- Regulation of uses for consumer and most types of commercial paint and coating removal under § 6(a)

TSCA is Risk-Based

- TSCA is a risk-based regulatory framework
- EPA is required to evaluate the risk equation in its decision-making (not hazard and exposure in isolation)
- Must prevent *any* worker exposure where there is a hazard identified?
- No apparent reliance on exposure levels, other than New Chemical Exposure Limits (NCEs) in limited instances

New TSCA Provisions

- Past practice in addressing worker exposure vs. new standards under TSCA as amended
- **Section 26(h)**: Scientific standards
- **Section 26(k)**: Reasonably available hazard and exposure information
- **Section 26(j)**: Transparency

Section 9: Coordination Between EPA and Other Agencies

EPA must consult with other federal agencies about whether they can address a risk

EPA identifies and reports the presence of unreasonable risks to another agency, which administers another federal law that may prevent or reduce such risks – two potential outcomes.

- **Outcome 1:** If that agency finds there is no risk, or responds to EPA and takes action within 90 days to address such risk, EPA cannot regulate
- **Outcome 2:** If that agency does not respond within the specified time, or does not take action within 90 days to address such risk, EPA shall regulate

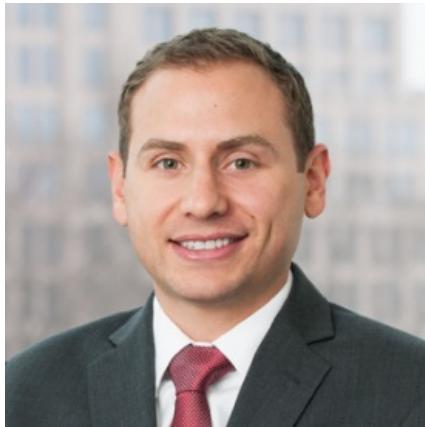
Section 9: Coordination Between EPA and Other Agencies

- EPA must consult and coordinate with other agencies to enforce TSCA *"while imposing the least burdens of duplicative requirements...."* TSCA § 9(d).
- OSHA had no objections to EPA addressing risks of methylene chloride, NMP, and trichloroethylene
 - OSHA has limited resources and scope
 - EPA has more resources and broader scope
- Do not expect OSHA to be a roadblock to EPA regulating worker protection under TSCA
- EPA regulations do not supersede OSHA standards. TSCA § 9(c).

Legal & Policy Issues

- What is (or should be) EPA's role in protecting worker health and safety under TSCA?
- What level of overlap with OSHA standards and/or duplicative requirements should be acceptable?
- Determinations and requirements under TSCA must be risk-based
- Decision-making must be transparent

Questions?



Tim Serie

Associate

Washington, DC

TSerie@bdlaw.com

202.789.6029