

## ***Regulatory Accountability Act: Implications for Implementation of the new TSCA<sup>1</sup>***

This paper is divided into two sections: First, it discusses provisions of S. 951, the Senate Regulatory Accountability Act (RAA) that would directly undo critical changes the Lautenberg Act made to TSCA when it passed just last year. Second, it describes a few examples of the many other provisions of RAA that could or would affect implementation of TSCA (as well as that of all of the dozens of other federal statutes to which RAA would apply).

### ***I. How the 2017 RAA would undo critical changes the Lautenberg Act (FRL) made to TSCA***

#### **1. COST-BENEFIT CONSIDERATIONS**

- a. FRL: Requires EPA only to “consider and publish a statement on” and “factor in” the economic effects of a rule (including costs/benefits and cost-effectiveness), and do so only: i) “to the extent practicable,” ii) “based on reasonably available information,” and iii) “for the 1 or more primary alternatives considered by the Administrator.” [section 6(c)(2)] Provides EPA with considerable discretion to bound the extent of analysis so that it is feasible.
- b. Old TSCA: As interpreted by the 5<sup>th</sup> Circuit in *Corrosion Proof Fittings v. EPA*, quantitative cost-benefit analysis (CBA) had to be conducted on a potentially limitless number of options, regardless of whether information was available. This requirement, coupled with the “least burdensome” requirement discussed next, as interpreted by the 5<sup>th</sup> Circuit in *Corrosion Proof Fittings v. EPA*, had imposed virtually impossible evidentiary and analytic burdens on EPA. See, for example, Georgetown Law Professor Lisa [Heinzerling’s 2004 Congressional testimony](#).
- c. RAA:
  - i. While the 2017 Senate RAA attempts to limit the number of options for which an agency would need to conduct CBA by limiting it to a “reasonable number” (with 3 alternatives presumed reasonable), it requires consideration of “substantial alternatives or other responses identified by interested persons” and provides for judicial challenge of EPA’s selection of alternatives.
  - ii. It lacks the critical caveats in FRL that limit EPA’s consideration of costs to that which can be undertaken “to the extent practicable” and “based on reasonably available information,” potentially leading to paralysis by analysis and more opportunity for judicial challenge.
  - iii. It requires EPA to go well beyond FRL’s requirement that EPA consider cost factors by imposing a cost test for all major or high-impact rules under TSCA, which the reforms to TSCA enacted last year entirely struck (see item 2 below). Formal CBA would be required to be conducted on each such alternative and EPA would have to demonstrate that the “benefits [of a rule] justify the costs.”

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<sup>1</sup> Based on Sen. Portman’s bill, the Regulatory Accountability Act of 2017 (S. 951), and the Frank R. Lautenberg Chemical Safety for the 21st Century Act ([H.R. 2576](#)) as enacted on June 22, 2016.

## 2. MOST COST-EFFECTIVE

- a. FRL: Struck the requirement that EPA show its regulation was the “least burdensome” of all possible options. [section 6(a)]
- b. Old TSCA: This requirement, coupled with the requirement that it be implemented through quantitative cost-benefit analysis (CBA), as interpreted by the 5<sup>th</sup> Circuit in *Corrosion Proof Fittings v. EPA*, had imposed virtually impossible evidentiary and analytic burdens on EPA. See, for example, Georgetown Law Professor Lisa [Heinzerling’s 2004 Congressional testimony](#).
- c. RAA: For major or high-impact rules, EPA would be required generally to adopt the “most cost-effective” rule and prove that no more cost-efficient option is sufficient, unless it could demonstrate that the additional benefits of a more costly rule justify the additional costs. The term “cost-effective” is not defined in the bill; however, the text in section 553(f)(1)(B) suggests it is equivalent to “least costly” by setting forth exceptions under which a “more costly” rule could be adopted.

## 3. STANDARD RULE MUST MEET

- a. FRL: Requires that a rule must impose conditions “to the extent necessary so that the chemical substance no longer presents” an unreasonable risk. [section 6(a)] Precludes a rule that does not eliminate the unreasonable risk, regardless of cost.
- b. Old TSCA: Required that the rule “protect adequately against such risk using the least burdensome requirements.” Allowed a rule that did not eliminate the unreasonable risk because to do so would be too costly.
- c. RAA: Generally indicates a rule and alternatives considered are to “meet relevant statutory objectives.” This term is not defined and is ambiguous at best. Section 2 of TSCA provides a set of broad policy objectives, but these are wholly distinct from the requirements in section 6(a) that a rule must meet. Hence, a conflict could arise if the most cost-effective rule met TSCA’s statutory objectives but failed to meet section 6(a) requirements – which requirement would trump?

## 4. REQUESTS FOR HEARINGS

- a. FRL: Struck provision allowing persons to request public hearings on rules. [section 6(c)(3)(C)] Struck based on broad agreement it was not needed and would make it impossible for EPA to meet the new law’s rulemaking deadlines.
- b. Old TSCA: Allowed any person to request a hearing on any rule.
- c. RAA:
  - i. Any person would be able to request a hearing on any major or high-impact rule. EPA must grant the petition if any factual issue is in genuine dispute and resolution of the disputed issues would likely have an effect on the costs and benefits of the proposed rule and whether or not it achieves its statutory purpose.
  - ii. Regardless of who petitioned for a hearing, any proponent of a rule has the burden of proof, which skews the hearing process against the rule.
  - iii. For a major rule, an agency could deny a petition for a hearing if it would “unreasonably delay” the rulemaking, but the denial would be subject to judicial review upon final agency action.

## **II. Other provisions of concern or note that would or could affect TSCA implementation:**

The changes RAA would make to the Administrative Procedure Act are sweeping in nature. The full implications of the changes would not become fully apparent for years after adoption, especially given the extent of litigation it is expected to engender.

Many provisions of RAA in addition to those discussed above would affect rulemaking activities under the new TSCA as well as those under all other federal statutes. A few of the many problematic provisions are discussed below.

### **INADEQUATE SAVING CLAUSE**

*The savings clauses don't necessarily preserve elements of the new TSCA or prevent it from being overridden by RAA:*

- The first clause [section 553(g)(1)(A)] does not clearly “save” TSCA’s requirements that a rulemaking only “consider” and “factor in” costs and does not ensure such provisions would prevail over RAA’s requirement that the rule impose the “most cost-effective” regulation: Would TSCA’s requirement be one that is “inconsistent with, or that conflicts with” RAA’s?
- The second clause [section 553(g)(1)(B)] does not clearly “save” TSCA’s requirement that EPA impose restrictions in a rulemaking that are sufficient to mitigate the unreasonable risk, even if they are not the most cost-effective: Would the TSCA requirement be one that is “inconsistent with, or that conflicts with” RAA’s?
- Given these uncertainties, both the “most cost-effective” language and the savings clause will serve to invite litigation.

### **DEFINITION OF RULES TO WHICH REQUIREMENTS WOULD APPLY**

*Many rules, even if they don't reach the traditional \$100,000,000 threshold, could be included.*

Relative to the definition of a “significant regulatory action” under EO 12866, the definitions of “major rule” and “high-impact rule” are much broader and more subjective and give OIRA wide latitude to so designate any rule. The cost triggers are now defined in terms of “annual effect on the economy,” the same term used in EO 12866. But rules could be classified as major based on numerous new factors, for example, those that are “likely to lead to a major increase in costs or prices for consumers, individual industries, Federal, State, local, or tribal government agencies, or geographic regions.”

### **ADDITION OF ENTIRELY NEW RULE IMPACT ASSESSMENT REQUIREMENT**

*The costs of rulemaking would increase significantly.*

RAA would add a new subsection (l) to section 553 that would require all major and high-impact rules to include a “framework” for assessing and measuring the effectiveness of the rule, including: a specific

methodology and metrics to be used to measure effectiveness, extent of achievement of the regulatory objective, benefits and costs; a plan to gather data on an ongoing basis needed to conduct such assessments of impact; and a timeframe not to exceed 10 years after promulgation for conducting the assessment. In conducting the assessment, the agency would need also to determine: whether the rule is no longer necessary or needs to be modified; whether it overlaps, duplicates or conflicts with other Federal, State or local rules; and whether other alternatives could better achieve the regulatory objective while imposing lower burden. Such assessments would generally need to be periodically redone not less than every 10 years. The assessments are to be overseen by OIRA and must conform with guidance it is to develop. Assessments would be subject to judicial review.

All of the requirements of this new subsection would greatly increase the overall costs of rulemaking.

#### ADDITION OF AN ENTIRELY NEW STAGE TO THE RULEMAKING PROCESS

*Rulemakings would take even longer.*

All major and high-impact rules would have to first go through the equivalent of an advanced notice of proposed rulemaking (ANPRM) step with notice and comment before they could be proposed.

#### “SECRET SCIENCE” TYPE PROVISION

*The science agencies could use could be limited.*

All studies, models, etc., considered by the agency would have to be made public at each stage of the process. Some but not all of these “accessibility” provisions exclude information exempt from disclosure under section 552(b), which includes CBI and personnel and medical records. Depending on how broadly the language is read, it could exclude EPA’s ability to use many existing models that are based on proprietary data or even computer coding.

#### ELIMINATION OF AGENCY DEFERENCE

Section 706(e) of APA as amended by RAA would largely eliminate the historical deference given the federal agencies by courts when agency actions are judicially challenged.

#### EFFECT ON PROCEDURAL RULES REQUIRED UNDER FRL IS UNCLEAR

Section 553(g)(2) of APA as amended by RAA seems to indicate that rules to establish agency procedures, such as those to prioritize, evaluate or regulate chemicals, may not be not subject to RAA. Where such rules may impose requirements on industry, they could be subject to RAA. In any case, any actions addressing specific chemical risks would be subject to RAA.