Safe Chemicals Act is a 'No-Brainer'

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Legislation recently introduced to overhaul the nation's outdated chemical law is a "no-brainer"—so much so that the industry itself largely supports the move. Given the complexities of the global marketplace, however, the Safe Chemicals Act of 2010 easily could lead to unintended consequences that harm the U.S. economy at the worst possible time.

As they begin hashing out this legislation, lawmakers will be forced to confront a host of thorny issues and balance manifold competing interests. These include the imperative to protect consumers amid very real safety concerns about untested substances; the need for our exports to comply with Europe's strict chemical regulations; the need to protect trade secrets, and the conundrum of what to do about trade partners who often give lip service to safety, but then turn a blind eye as businesses within their borders violate every chemical regulation known to man.

The Safe Chemicals Act of 2010, versions of which were introduced in both the House and Senate on April 15, would give the Environmental Protection Agency new regulatory powers over the U.S. chemical industry by modernizing the 1976 Toxic Substances Control Act (TSCA), which is widely recognized to have outlived its usefulness. It has not been amended in 34 years despite massive changes in chemical production and great leaps in our understanding of epidemiology and chemicals testing. TSCA is basically just an antiquated registry law, whereas the new bill would put the onus on businesses to justify the safety of their products.

As introduced, the bill's provisions include compelling manufacturers to develop and submit safety-testing data on any chemicals they produce, and requiring EPA to use this data to identify and rank hazardous chemicals based on a variety of factors. Only those chemicals shown to be safe would be allowed on the market. This could help protect American exports from being banned under the European Union's strict regulations known as REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals), passed in December 2006.

If you are selling chemical products in the eurozone, you have to register those chemicals and provide information on them. There is also a movement afoot in Europe to push companies to either make safer versions of dangerous chemicals or

find alternatives, and to make general improvements on how chemicals are made, shipped, used and disposed of. Our law could potentially harmonize with those efforts.

Along with those trade benefits, however, might come significant risks. One of the concerns about the current bill is that it could lessen protections for trade secrets. That is an issue under REACH as well. These chemical-safety databases will be public information. Companies will use them to disclose those factors that might make a given chemical unsafe under certain circumstances. That is all the information an enterprising plaintiff's attorney would need to file a lawsuit. That attorney might say, "Well, these circumstances might not exactly constitute a violation, but they are close enough for us to bring suit." Plaintiffs' attorneys already do this now by combing through the general chemical-safety literature.

The degree to which U.S. lawmakers will be willing to match the provisions of REACH also is unclear. REACH has something called "the precautionary principle" that sets an exceedingly high standard. Basically, if there is any risk at all of harm, the chemical is supposed to be kept off the market. Do we want to follow suit as a matter of policy? This could be a step in that direction.

Moreover, U.S. firms face stiff competition from businesses based in rising economies in Asia that have spotty records on chemical safety. The new bill would require U.S. companies to certify the safety of the chemicals they sell. But as recent scandals involving Chinese imports have amply illustrated, even those U.S.-based importers with the best of intentions have little control over whether their global manufacturing partners will keep their promises to refrain from using dangerous substances like melamine or lead-based paint.

The Chinese have laws on the books that mirror our safety and intellectual property regulations. However, uniform enforcement of those laws clearly has been a problem. The new regulatory hurdles thus could put serious pressure on U.S. businesses—including increased liability risk accruing from trade partners' lack of compliance with the regulations, additional product-testing costs and higher costs associated with finding alternatives to questionable chemicals—just as the battered economy is on the cusp of a recovery. Balancing all these competing interests will be quite a challenge for Congress, and the law of unintended consequences looms large.

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