



Analysis of POPs treaty implementing provisions in Senate and House TSCA reform bills

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I. Introduction

On April 15, 2010, Senator Frank Lautenberg introduced the “Safe Chemicals Act of 2010,” a bill to reform U.S. chemicals policy. Congressmen Bobby Rush and Henry Waxman introduced on the same day a discussion draft entitled the “Toxic Chemicals Safety Act of 2010.” Both of these proposals would amend the Toxic Substances Control Act (TSCA), the principal federal law for regulating tens of thousands of chemicals used in industrial, commercial, and consumer products.

The Lautenberg bill (S. 3209) and the Rush-Waxman discussion draft are substantially similar. Both would require manufacturers and processors to submit to EPA a “minimum data set” for every chemical substance in commerce. All existing and new chemicals would eventually be required to undergo a safety determination, in which the manufacturer or processor bears the burden of proving that the chemical meets the Act’s safety standard. Chemicals would undergo the safety determination after being placed on a priority list that EPA would prepare and periodically update. The legislative proposals also provide for greater public access to information, R&D funding and other incentives for green chemistry, and other significant improvements over TSCA.

Both the bill and discussion draft also aim to provide implementing authority to allow the United States to ratify the Stockholm Convention on Persistent Organic Pollutants (POPs) and the POPs Protocol to the Convention on Long-range Transboundary Air Pollution (LRTAP POPs Protocol), a regional accord among 51 countries including the United States, Canada, Russia and most of Europe. The bill and draft also include enabling legislation for the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. The United States has signed but not ratified these three agreements, pending needed implementing legislation.

All three of these chemicals treaties cover industrial chemicals and pesticides. In order for the United States to ratify them, the Congress must amend TSCA and the U.S. pesticides law, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Unless indicated otherwise, this analysis applies only to chemicals subject to TSCA jurisdiction.

This analysis centers on specific provisions of the Lautenberg bill and Rush-Waxman discussion draft that pertain to POPs implementing authority. It offers recommendations to ensure that the United States can meet its obligations under the two POPs treaties and can provide leadership on this pressing global issue. Part II provides background information about earlier debates in Congress over U.S. implementing legislation for the chemicals treaties. Part III analyzes provisions of the Lautenberg bill and Rush-Waxman discussion draft related to U.S. ratification and implementation of the POPs agreements. It does this by (A) evaluating specific provisions that could provide implementing authority necessary to enable the United States to ratify the two agreements; (B) reviewing provisions that are related to U.S. regulation of POPs chemicals, but not required for U.S. ratification; and (C) arguing for specific authority for eliminating chemicals that exhibit POPs characteristics, to enable EPA to protect present and future generations of Americans and to reassert international leadership. The analysis closes in Part IV with a summary of recommendations and conclusions.

II. Background

From 2002 to 2006, Congress considered several legislative proposals to enable the United States to ratify the Stockholm Convention, LRTAP POPs Protocol, and Rotterdam Convention. These proposals were offered as standalone amendments to TSCA and FIFRA. There was little controversy over the twelve POPs chemicals originally named in the Stockholm Convention.¹ Instead, the most contentious debates concerned EPA authority to regulate POPs that would be added to the Stockholm Convention or the LRTAP POPs Protocol in the future. While most stakeholders publicly concurred that POPs implementing legislation should not be used to reform TSCA more broadly, some of the tactical posturing around those bills was done in anticipation of how they might affect eventual TSCA reform. Now that the Senate and House TSCA reform proposals have been introduced, implementing legislation should no longer be seen as a proxy for fundamental reform. In both the Senate bill and House discussion draft, the POPs implementing passages are far shorter than earlier proposals, with fewer procedural requirements and less emphasis on creating obstacles to prompt EPA regulation of newly listed POPs.

¹ The Stockholm Convention contains three annexes for listing POPs that are subject to its controls. Annex A lists POPs destined for elimination. Nine of the original “dirty dozen” POPs were listed in Annex A, including the agricultural chemicals aldrin, chlordane, dieldrin, endrin, heptachlor, mirex, and toxaphene, as well as the industrial chemicals hexachlorobenzene (HCB) and polychlorinated biphenyls (PCBs). Annex B lists POPs subject to restrictions on production and use. It originally contained only the pesticide DDT. Annex C is for unintentionally produced POPs, which include polychlorinated dioxins, polychlorinated furans, PCBs, and HCB.

Another factor justifying the new approach for implementing legislation is that all three treaties have developed a significant track record over several years. During earlier debates about the implementing legislation, many stakeholders had what have turned out to be naive and unrealistic expectations of the impacts that the treaties might have on U.S. regulation of chemicals. Some public interest groups envisioned international action under the Stockholm Convention as a primary driver

for U.S. domestic POPs regulation and a catalyst to help the United States overcome TSCA's dysfunction. Industry representatives cited the prospects of a "wacky" United Nations decision—whereby the Stockholm Convention Parties could, hypothetically, decide to ban gasoline—as reasons why U.S. law needed to establish barriers between international decision-making and our domestic regulation.

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In fact, the consensus-driven decision making of the Stockholm Convention has proved to be extremely conservative: Six years after the treaty's entry into force, just nine POPs have been added to the original "dirty dozen."² Where the parties have agreed to list a POP that is still widely used in commerce, they have allowed exemptions for virtually every known use of the substance. In practice, the international decision-making process for regulating POPs leads toward the lowest common denominator, so it will likely never result in decisions with which the United States cannot comply easily.

Since the adoption of the Stockholm Convention in 2001, the United States has made clear that it will declare its right to abide by future POPs listings only when it affirmatively "opts in" to the listing amendment, as allowed under Article 25 of the Convention. With the opt-in declaration, the United States cannot be compelled to act on newly listed POPs against its wishes. In the context of TSCA reform, the most salient reason for the United States to ratify the Stockholm POPs Convention is to give the United States and EPA the authority needed to negotiate credibly with other countries to eliminate or reduce POPs that threaten human health and the environment.

² At the Fourth Conference of the Parties (COP4) in May 2009, nine POPs were added to the Stockholm Convention. Eight POPs chemicals or mixtures were added to Annex A: alpha and beta hexachlorocyclohexane (HCH); two mixtures of poly-brominated diphenyl ethers, commercial octaBDE and commercial pentaBDE; and chlordecone, hexabromobiphenyl (HBB), lindane, and pentachlorobenzene (PeCB). Perfluorooctane sulfonic acid (PFOS), along with its salts and perfluorooctane sulfonyl fluoride, was added to Annex B with multiple exemptions and acceptable purposes.

III. Analysis of provisions related to U.S. ratification and implementation of the POPs agreements

This part of the analysis first summarizes provisions in the Lautenberg bill and Rush-Waxman draft that could provide implementing authority necessary to enable the United States to ratify the Stockholm Convention and LRTAP POPs Protocol. Next, it reviews provisions that are related to U.S. regulation of POPs, but not required for U.S. ratification. Finally, it argues for stronger authorities in both the Lautenberg bill and Rush-Waxman draft for eliminating chemicals that exhibit POPs characteristics.

Unless described otherwise, section numbers are those that the bill and discussion draft indicate would appear in the re-authorized Act.

A. Provisions required to enable U.S. ratification of the POPs agreements

1. Scope: The two bills differ in important ways.

Lautenberg bill: As indicated in its section heading (“Implementation of [the] Stockholm Convention, the LRTAP POPs Protocol, and the Rotterdam Convention”), section 37 applies specifically to implementation of the three international agreements. All of the section’s provisions are designed to do that and only that.

Rush-Waxman draft: Section 37 (“International Cooperation and Agreements”) relates to chemicals agreements in general. Thus, its provisions could apply to chemicals treaties, in addition to these three, which the United States might join in the future.

Comment: This difference in scope has implications for the effectiveness of general implementing authority that may be contained in section 37. See discussion below.

2. General implementing authority: Both bills give EPA general authority to implement the three treaties.

Lautenberg bill: EPA shall implement provisions of the three named treaties that are applicable to the United States. Sect. 37(b)(1) at 164.

Rush-Waxman draft: EPA shall administer provisions of *international agreements* to which the United States becomes a party. Sect. 37(d) at 107. The Rush-Waxman draft would apply in general to present and future chemicals treaties, not just the Stockholm POPs, LRTAP POPs and Rotterdam PIC agreements. For example, the notice and comment requirements of subsection (d) and rulemaking authority of subsection (e) would apply to any chemicals treaty to which the United States becomes a party.

Comment: The Rush-Waxman “one size fits all” approach—including for future, unknown agreements—results in procedures that may not be well-tailored to the three treaties. Even though the provisions appear to allow for existing and future agreements, they may not be sufficient to allow implementation of future treaties without additional amendments. If that turns out to be the case, then there will have been no advantage in taking this open approach now. The Senate approach is more attuned to the three treaties in question.

“In order to ratify the Stockholm Convention, the United States must have the authority to prohibit production, use, import, and export of POPs that are both originally and subsequently listed in the Convention.”

Recommendation: Revise the Rush-Waxman discussion draft to apply specifically to the three international agreements.

3. Exports: Section 12(a) of TSCA currently exempts chemicals intended for export from nearly all of TSCA’s provisions. Both the Lautenberg bill and Rush-Waxman draft close this exemption by deleting section 12(a), and by expanding the Act’s definition of “distribute in commerce” to include the export of a chemical substance, mixture, or article. Lautenberg bill, sect. 3(4) at 7; Rush-Waxman draft sect. 3(4) at 7.

Comment: These amendments are necessary to allow the United States to comply with the Stockholm Convention, because the Convention prohibits the export of listed POPs in most cases.³

4. Prohibitions on listed POPs: In order to ratify the Stockholm Convention, the United States must have the authority to prohibit production, use, import, and export of POPs that are both originally and subsequently listed in the Convention. This and the next paragraph cover provisions applicable to the original “dirty dozen” POPs listed in the Convention; paragraph 6 below covers provisions applicable to POPs that have been added to the Convention or may be added in the future.⁴ The bill and discussion draft take very different approaches on POPs already listed in these agreements.

³ This and other provisions of the Senate bill and House draft are also relevant to implementation of the Rotterdam Convention.

⁴ This analysis is silent on whether the United States, in ratifying the Stockholm Convention, must accept all of the listed POPs as of the date of U.S. ratification, or may instead agree only to the “dirty dozen” that were listed in the original Convention that the United States signed in 2001. The Convention text is not clear on the point. The United States Government has expressed the view that it can ratify by agreeing only

Lautenberg bill: Prohibits manufacture, processing, use, distribution in commerce, etc. of a chemical if inconsistent with “applicable obligations” of the three treaties. Sect. 37(b)(2) at 164. All listings of POPs that have entered into force for the United States are subject to this requirement. Sect. 37(a)(4), (7) at 163. EPA can promulgate implementing rules “to ensure compliance with any obligations under [the three treaties].” Sect. 37(b)(4) at 167-68.

Rush-Waxman draft: Does not contain analogous prohibitions applicable to the original POPs. Instead, it names hexachlorobenzene (one of the POPs originally listed in both the Stockholm Convention and LRTAP POPs Protocol), and hexabromobiphenyl (originally listed only in the LRTAP POPs Protocol), and bans each chemical five years after enactment, unless they are exempted under section 6(e) of the Act. Sect. 37(b)(1) at 105.

Comment: The Lautenberg bill bans all of the original POPs chemicals and thus would allow the United States to ratify the Stockholm Convention and LRTAP POPs Protocol in respect to those POPs. The approach avoids the need to name specific POPs chemicals in the legislation.

The Rush-Waxman draft addresses only those original POPs that are intentionally produced industrial chemicals scheduled for elimination under the Stockholm Convention or LRTAP POPs Protocol, and which have not been restricted under other provisions of U.S. law. Thus, PCBs and the original seven POPs pesticides scheduled for elimination under the Stockholm Convention are not covered under section 37 of the Rush-Waxman draft. (PCBs are restricted under existing TSCA section 6(e); the seven POPs pesticides would presumably be addressed under a FIFRA amendment.) This differs from earlier POPs implementation legislation, which generally listed all of the intentionally produced dirty dozen and did not differentiate between whether they were POPs pesticides or industrial chemicals. The reasoning behind that original approach was that EPA could not be assured that there was no FIFRA/TSCA cross-use of any of these POPs and wanted to be absolutely certain that the implementing legislation would eliminate all production, use, and trade, even if some cross-use might exist or be subsequently proposed.

Aside from its failure to include a comprehensive prohibition for all existing POPs, the Rush-Waxman approach has two flaws that could interfere with the ability of the United States to ratify the Stockholm Convention and LRTAP POPs Protocol. First, hexachlorobenzene and hexabromobiphenyl are not banned under section 37(b)(1) until five years after enactment of the Act. Because the United States cannot ratify the agreements until it has banned these original POPs substances, that delay would

to the original twelve, and then could, if it chooses to do so, “opt in” to some or all of those POPs subsequently added to the Convention.

prevent U.S. ratification for at least five years. Second, the bans allow for the possibility of a critical use exemption under section 6(e) or continued use if done “in a manner determined by the Administrator to be protective of health and the environment.” Sect. 37(b)(1). The Stockholm and LRTAP POPs listings for these chemicals do not allow for critical use exemptions, nor do they allow for other uses other than an extremely narrow range of general exemptions. Implementing legislation for these agreements should not permit exemptions that could result in U.S. non-compliance with treaty requirements.

Recommendation: The Rush-Waxman draft should include the comprehensive prohibitions of the Lautenberg bill discussed above. If it does not, then the bans on hexachlorobenzene and hexabromobiphenyl should become effective immediately upon enactment of the TSCA rather than five years later, and should not be eligible for exemptions other than the general exemptions allowed under the treaties.

5. Polychlorinated biphenyls (PCBs): The Stockholm Convention and LRTAP POPs Protocol include PCBs among the original POPs listed for elimination.⁵ Due to the widespread, ongoing use of PCBs, especially in electrical equipment, both treaties provide for an extended phase-out period, rather than immediate elimination. TSCA section 6(e) generally prohibits the manufacture (including import), processing, and distribution in commerce of PCBs, unless the Administrator is petitioned for, and grants, an exemption. In considering the exemption, the Administrator must find that it will not result in an unreasonable risk of injury to health or environment. TSCA sect. 6(e)(3)(B). These prohibitions do not apply to the distribution in commerce of PCBs that were “sold for purposes other than resale” no later than April 1979. *Id.* However, all such distribution in commerce must be carried out in a “totally enclosed manner” unless the Administrator by rule authorizes otherwise. Sect. 6(e)(2)(A). As currently written, section 6(e) could provide sufficient authority to allow the United States to comply with the PCB provisions of the two treaties *provided* that (A) PCB exports are prohibited except for the purposes of environmentally sound disposal, and (B) the terms of any exemptions granted under section 6(e)(3)(B) comply with applicable requirements of the treaties.

Lautenberg bill: Expands the Act’s definition of “distribute in commerce” to include the export of a chemical substance, mixture, or article, thereby closing the TSCA export loophole. Sect. 3(4) at 7. The bill amends subsection 6(e) and redesignates it as subsection 6(f). Exemptions to the prohibition on manufacture, process, or distribution and to the “totally enclosed manner” requirement are allowed only upon

⁵ Unintentional production of PCBs from thermal processes such as incineration is also listed in Annex C of the Stockholm Convention. The United States regulates these types of emissions under the Clean Air Act, not TSCA.

the Administrator’s finding that “a substantial endangerment to health or environment would not result.” Sect. 6(f)(2)(C), (3)(B) at 82-83.

Rush-Waxman draft: Similarly to the Lautenberg bill, expands the definition of “distribute in commerce” to include export. Sect. 3(4) at 7. The draft also redesignates subsection 6(e) as 6(f), but does not amend it.

Comment: The Lautenberg bill generally enables U.S. compliance with the PCB provisions of the two POPs treaties. However, it allows possible conflicts where it retains the possibility of exemptions to PCB prohibitions and the potential of alternatives to the “totally enclosed manner” requirement. These possible conflicts can be avoided by inserting language requiring any exemptions or alternatives to comply with section 37.

The Rush-Waxman draft’s un-amended section 6(e) (redesignated 6(f)) conflicts with the reform provisions contained in the draft’s new subsections 6(a)-(c). The reform provisions replace the old section 6 “unreasonable risk” standard with the new “reasonable certainty of no harm” safety standard, yet the old standard is retained in the redesignated 6(f). Additionally, the redesignated 6(f) retains the old requirements that any rulemaking under the subsection must be done in accordance with paragraphs 2, 3, and 4 of the old section 6(c). The onerous procedures of these paragraphs no longer exist in the new section 6(c), making the continued reference to them in redesignated 6(f) inappropriate.

Recommendation: The Rush-Waxman draft should replace its redesignated section 6(f) on PCBs with the approach used in the Lautenberg bill.

The Lautenberg bill should be amended as follows to avoid possible conflicts between the applicable provisions of the two POPs treaties and rules or orders authorizing PCB exemptions and alternatives:

Section 6(f)(2)(C) should be amended at page 82 to read:

“(C) ALTERNATIVE MANNER.—The Administrator may by order or rule authorize the manufacture, processing, distribution in commerce, or use (or any combination of such activities) of any polychlorinated biphenyl in a manner other than in a totally enclosed manner if the Administrator finds that the manufacture, processing, distribution in commerce, or use (or combination of such activities)—

“(i) will not present a substantial endangerment to health or the environment; and

“(ii) will comply with section 37(b) of this Title and any regulations prescribed thereunder.”

Section 6(f)(3)(B) (“EXEMPTIONS”) should be amended at page 83 by deleting the word “and” at the end of subclause (I); replacing the period at the end of subclause (II) with “; and”; and adding a new subclause (III) at the end:

“(III) the terms of the exemption will comply with section 37(b) of this Title and any regulations prescribed thereunder.”

6. Prohibitions on new POPs listings: In addition to the original listings, U.S. implementing legislation must also provide regulatory authority for POPs that have been added to the treaties or may be added in the future. This issue was at the heart of previous disputes in Congress over POPs implementing legislation. Here, too, there are significant differences between the Senate bill and House draft.

Lautenberg bill: Prohibits manufacture, processing, use, distribution in commerce, etc. of a chemical if inconsistent with “applicable obligations” of the three treaties. Sect. 37(b)(2) at 164. All listings of POPs that have entered into force for the United States are subject to this requirement. Sect. 37(a)(4), (7) at 163. EPA can promulgate implementing rules “to ensure compliance with any obligations under [the three treaties].” Sect. 37(b)(4) at 167-68.

Rush-Waxman draft: Names four of the industrial chemicals that were added to the Stockholm Convention at the last Conference of the Parties (COP4), and bans them five years after enactment of the TCSA, unless they are exempted under section 6(e). Sect. 37(b)(1) at 105. (One of those four, hexabromobiphenyl, an original LRTAP POPs chemicals, is discussed above.) An additional industrial chemical that was listed at COP4, PFOS, is not mentioned in section 37(b)(1), perhaps because the Stockholm COP did not schedule it for elimination, but instead agreed to list it in the Convention annex of restricted POPs. However, PFOS is among the “chemical substances with documented risks” identified in section 33 and subject to “expedited action,” which requires EPA to determine within 12 months of enactment whether the substance meets the safety standard. Sect. 33 at 91-93.

The Rush-Waxman draft also provides that “Any chemical . . . listed under an international agreement to which the United States is a party that is not already subject to risk management under section 6(c) or already listed on the priority list under section 6(a) shall be promptly added to the priority list under section 6(a).” Sect. 37(d)(3) at 109.

Comment: Under the Rush-Waxman draft, the United States could not join in the listings for the chemicals named in section 37(b)(1) until five years after enactment of the TCSA. PFOS and each new Stockholm Convention or LRTAP POPs listing would need to go through the separate safety determination of section 6 before the EPA could act to eliminate or restrict their production and use. While such a safety

determination could result in U.S. regulation sufficient to enable the United States to opt in to a new listing (see sect. 6(c)(2)), it may not, because it is not linked in any way to achieving compliance with the international treaties. In any event, it would likely result in greater delays than under the Senate approach.

“To prohibit newly listed POP chemicals, the Senate approach is better: if a POP is listed in the Convention and the United States decides to opt in to the listing, then any production, use, etc. of the chemical is prohibited if it is inconsistent with the convention listing.”

In respect to authority to prohibit newly listed POP chemicals, the Senate approach is better: if a POP is listed in the Convention and the United States decides to opt in to the listing, then any production, use, etc. of the chemical is prohibited if it is inconsistent with the convention listing. If the United States chooses to allow continued production or use of a listed POP, then it would not agree to opt-in to the listing.

Recommendation: The Rush-Waxman draft should include the comprehensive prohibitions of the Lautenberg bill discussed above.

B. Provisions related to U.S. regulation of POPs, but not required for U.S. ratification

1. Preemption (section 18): Preemption in previous POPs implementing legislation was a key issue for NGOs and many state governments, because some proposals would have required federal action on POPs chemicals to preempt stronger action by the states. Both the Senate bill and House draft would amend TSCA section 18 so that TSCA generally will not preempt state or municipal chemicals laws and regulations. Each does so using a different standard.

Lautenberg bill: State laws that are “more stringent” than those provided for under the Act are not preempted. Sect. 18 at 131.

Rush-Waxman draft: State laws are not preempted “unless compliance with both [the Act] and the State . . . regulation . . . is impossible.” Sect. 18 at 81.

Comment: The Lautenberg bill’s “more stringent” requirement is consistent with past NGO advocacy that federal law should function as a floor, not a ceiling, for domestic chemical safety law. However, state law may differ from the federal requirement in ways that are useful but not necessarily more or less stringent, creating uncertainty and opportunities for litigation. For example, EPA could restrict

certain uses of a POP chemical, while a state law may require product labeling or reporting to state regulators. The Rush-Waxman approach could accommodate and respect such differences, unless a state chemical law directly contradicted the federal standard. This approach would be most protective of state interests regarding POPs.

Recommendation: The Lautenberg bill should be amended to use the Rush-Waxman preemption standard.

2. Notice and comment requirements for new POPs listings: In earlier POPs bills, there was bipartisan support for public notice and comment during the treaty considerations of new listings of a chemical. Unfortunately, these provisions became excessively detailed and burdensome, as industry and their congressional allies crafted complex procedures which could provide a basis for later legal challenges. In both the Lautenberg bill and Rush-Waxman discussion draft, these procedures are significantly streamlined, with fewer opportunities for delay.

Lautenberg bill: Includes notice and comment requirements at three points of the new listing process: submission/proposal of a chemical, recommendation by the expert committee to list it, and (for Stockholm only) the decision of the meeting of the parties to list. Throughout the process, EPA may require information from manufactures, users, or others involved with the chemical. Sect. 37(b)(3) at 164-67.

Rush-Waxman discussion draft: Notice and comment required for new listing proposal only; the notice must include additional information regarding the listing process, criteria, and records; EPA must require information from manufactures, users, or others involved with the chemical. Sect. 37(d)(2) at 108-09.

Comment: The streamlined notice and comment requirements in both the Lautenberg bill and the Rush-Waxman discussion draft are superior to notice and comment requirements that appeared in previous proposals for POPs implementing legislation. The Rush-Waxman draft requires notice and comment only once during the new listing process, but stipulates that EPA must provide more information in the notice than the Lautenberg bill does. The Lautenberg bill requirements are tailored to the specific procedures of the three conventions and could thus allow more timely and relevant input by stakeholders.

3. Savings clause: EPA needs statutory authority to regulate a newly listed POP in a timely fashion to enable U.S. compliance with the Stockholm Convention and LRTAP POPs Protocol. However, because these international agreements tend to be negotiated at the lowest common denominator, it will be even more important for EPA to have the ability to regulate beyond the minimum requirements of the treaties.

Lautenberg bill: Section 37 does not speak to whether EPA can use additional authorities to regulate POPs chemicals more ambitiously than required under the Stockholm Convention.

Rush-Waxman draft: This issue is not relevant to the House draft as presently written, because section 37 does not give EPA authority to regulate new listings of POPs. Instead, EPA must use its section 6 authority, relying on the safety standard.

Recommendation: The Rush-Waxman draft should be revised to give EPA the explicit authority to ensure U.S. compliance with a new Stockholm listing when the United States decides to opt-in. Each bill should also clearly indicate that EPA could regulate a new listing beyond the requirements of the treaty, by including a savings clause in section 37 such as:

“Effect on other provisions of law. Nothing in this section shall affect the authority of the Administrator to regulate a chemical under any other provision of law, provided that such regulation—

“(1) is not less stringent than regulations prescribed under this section, and

“(2) does not impair the ability of the United States to comply with its obligations under the Stockholm Convention, LRTAP POPs Protocol, or Rotterdam Convention.”

Additionally, the Lautenberg bill should include a provision similar to that in the Rush-Waxman draft, in which a new treaty listing would require EPA to place the chemical on the section 6(a) priority list, if it is not already there. Such a requirement would be in addition to the Lautenberg section 37(b)(2) requirement that manufacture, use, etc. of a chemical is prohibited if it is inconsistent with applicable obligations of the three treaties. The added provision could apply in the event that the new POP listing that triggered EPA regulation allowed continued use of the POPs substance. In that situation, a provision like that in the Rush-Waxman draft would ensure that the substance would be placed on track for possibly stricter domestic treatment than that required for compliance under either POPs agreement.

C. Provisions to restore U.S. leadership on persistent, bioaccumulative and toxic chemicals

The Stockholm Convention and LRTAP POPs Protocol are founded on a shared international understanding that chemicals that are especially toxic, bioaccumulative, persistent and prone to long distance environmental transport may warrant global action to eliminate their production, use, and trade except under exceptional circumstances. This understanding continues to inform Stockholm Convention and LRTAP POPs parties in their treatment of chemicals that are no longer widely used in commerce. However,

for those POPs that *are* still widely used, the consensus-driven international decision-making process has been incapable of taking strong action. Americans should not anticipate that the Stockholm Convention will drive strong domestic regulation of POPs. Instead, the authority to deal decisively with POPs must be grounded in domestic law that authorizes EPA to take prompt action against dangerous chemicals, including those with POPs characteristics. Such U.S. action can help inform and strengthen the prospects for global consensus.

While the United States once led the way internationally, our country is more often viewed now as a stumbling block, rather than champion, for effective global action on chemicals. TSCA reform provides an important opportunity to enable the United States to demonstrate international

leadership on these global pollutants. Renewed U.S. leadership can serve our national interest by contributing to greater control of chemicals that are produced and used abroad in ways that threaten health and the environment in the United States.

The Lautenberg bill and Rush-Waxman draft each contain potentially useful placeholders. However, neither provides EPA sufficient authority needed to re-establish U.S. leadership on POPs chemicals.

Lautenberg bill: Section 29 (Expedited Action on Chemicals of Highest Concern) offers a one-sentence placeholder: “The Administrator shall act quickly to manage risks from chemical substances that clearly pose the highest risks to human health or the environment.” Sect. 29 at 139. It does not specify what would trigger expedited action by EPA or what expedited action would entail.

Rush-Waxman draft: Section 32 requires EPA to establish a methodology for evaluating the risks of chemicals determined to be persistent or bioaccumulative and further requires EPA to use the methodology when conducting a safety determination for such chemicals under section 6. Section 33 allows for “expedited action” on a fixed set of chemicals with well-documented risks. For both section 32 and 33, EPA would take regulatory action on a chemical under its section 6 authorities.

“The authority to deal decisively with POPs must be grounded in domestic law that authorizes EPA to take prompt action against dangerous chemicals, including those with POPs characteristics.”

Comment: As introduced, neither the Lautenberg bill nor the Rush-Waxman discussion draft provides EPA with sufficient authority to re-establish U.S. leadership on POPs and other persistent, bioaccumulative and toxic chemicals. The Senate bill is silent on the nature of EPA authority to take prompt action

“An important function of TSCA reform should be to provide EPA with sufficient authority to re-establish international leadership on POPs and other persistent, bioaccumulative and toxic chemicals.”

on POPs that have not yet been added to one of the international treaties. The House draft offers more specific direction for expedited action in its section 33, which would accelerate reporting to six months after enactment and require an EPA safety determination within the first year, but only for the finite list of chemicals included in the draft. For chemicals determined to be persistent and bioaccumulative, section 32 requires development and use of a special risk evaluation methodology, but it does not establish any expedited timeframe or procedure for prohibiting or restricting such chemicals, or even for their assessment.

Recommendation: In the Lautenberg bill, the section 29 placeholder language on expedited action could be elaborated to require EPA to identify persistent, bioaccumulative and toxic chemicals to which people are exposed, and to initiate action for managing the risks of these substances.

Similarly, in the Rush-Waxman draft, sections 32 and 33 could be revised to require EPA to develop criteria for the identification of persistent, bioaccumulative and toxic chemicals to which humans may be exposed and to initiate risk management actions pending the eventual safety determination.

IV. Conclusion

The Lautenberg bill and Rush-Waxman discussion draft each contain provisions intended to allow the United States to ratify and implement the Stockholm Convention and LRTAP POPs Protocol. Both the bill and discussion draft provide the public with reasonable opportunities for notice and comment when chemicals are considered for addition to the treaties. Both the bill and draft would allow continued state action on POPs in many, or even most, situations. Additionally, both close the existing TSCA section 12 loophole that allows U.S. exports of domestically banned or restricted chemicals.

The Lautenberg bill bans all of the POPs chemicals originally listed in the Stockholm Convention and LRTAP POPs Protocol and thus would allow the United States to ratify

the treaties in respect to those POPs. Similarly, the bill gives EPA broad authority to regulate newly listed POPs to whatever extent may be necessary to ensure U.S. compliance with its obligations under the treaties.

In contrast, the Rush-Waxman draft does not contain a comprehensive prohibition for all of the original POPs; moreover, it would require a five-year delay before the United States could ratify the POPs treaties in respect to the originally listed POPs. For all new POPs listings, the draft would depend on EPA initiating an independent safety determination under section 6 of the Act, which could result in delay or even prevent the United States from “opting in” to new listing decisions under the treaties. The Rush-Waxman draft should be revised to include the comprehensive prohibitions on POPs found in the Lautenberg bill.

Because these international agreements tend to be negotiated at the lowest common denominator, both the Lautenberg bill and Rush-Waxman draft should include a savings clause to ensure that EPA can use additional authorities to regulate POPs chemicals more ambitiously than the Stockholm Convention or LRTAP POPs Protocol may require.

An important function of TSCA reform should be to provide EPA with sufficient authority to re-establish international leadership on POPs and other persistent, bioaccumulative and toxic chemicals. As introduced, neither the Lautenberg bill nor the Rush-Waxman discussion draft does that. Each should be revised to require EPA to develop criteria for the identification of persistent, bioaccumulative and toxic chemicals to which humans may be exposed, and to initiate risk management actions in advance of the safety standard determination. Such authority could allow EPA to protect present and future generations of Americans from these especially dangerous chemicals, while empowering the United States to reassert international leadership on environmental health.