

STATE PREEMPTION under Competing Reforms of the Toxic Substances Control Act (TSCA)

Issue	HOUSE Bill	SENATE Bill	Significance
Timing of Preemption	Preempts a State <i>after</i> the final effective date of a federal restriction on a chemical or a finding of “no unreasonable risk”	Preempts a State <i>before</i> EPA takes a final action, and after a high priority chemical is named and scoped for safety review	MAJOR. The Senate bill would chill States now poised to restrict chemical uses, e.g. methylene chloride in paint strippers (pending action in California), and TBBPA (Washington state) and phthalates (Maine) in children’s products
State Waivers from Preemption	Allows a State to seek a waiver so as to provide a greater level of health protection than the federal government	Raises the hurdle so that a State must now show “compelling conditions” to qualify for a waiver from preemption	MAJOR. The Senate bill would make it much harder for a state to qualify for an exemption (waiver) from federal preemption. The Senate waiver provisions for early (high priority) preemption can be easily gamed by legal tactics
State Air, Water and Waste Laws	Preserves the authority of other state laws to restrict chemical use unless they actually “conflict” with a federal chemical restriction	Preempts a State law on air and water quality or waste disposal that restricts a chemical use if “inconsistent” with a federal restriction	MAJOR. Chemical uses have been restricted under other State laws. For example, California banned hexavalent chromium in cooling towers under a state air quality law. The Senate bill could lead to more preemption if EPA simply deems such state restrictions as “inconsistent”
Scope of Preemption	Preemption limited to only the same uses of a chemical restricted or exonerated by the feds	Preemption limited to the same uses, hazards, exposures and risks subject to federal action	MODERATE. The Senate bill better limits the scope of preemption for a given chemical. In rare cases, this may lead to a State taking action on the same chemical but for a different reason
Grandfathering of State Laws (pre-Sept. 2003)	Same as Senate bill, <i>except</i> for a drafting error that may impair enforcement of Prop 65	Preserves authority to require future warnings of exposure under California’s Prop 65	MODERATE. Both bills preserve State authority to take future action under older laws, e.g. California Proposition 65. However, a drafting error in the House bill needs to be fixed
Warnings and Labeling	Except for Cal. Prop 65, could preempt other State warning and labeling requirements if EPA acted on a chemical	Would <i>not</i> preempt any State warning or labeling rule because preemption only applies to restrictions on use	MODERATE. While preserving California’s Prop 65 authority, the House bill could preempt other State warning and labeling requirements because federal preemption extends to such actions if designed to protect against exposure
State Reporting and Disclosure	Preserves State authority because preemption only applies to measures designed to protect against chemical exposure, <i>not</i> reporting	Explicitly preserves State authority to require reporting of chemical use and other information collection requirements	MINOR. Both bills preserve State authority to require product manufacturers to disclose their use of chemicals regulated by the federal government. The Senate bill does this explicitly, while the House bill accomplishes this more indirectly, which a bad court could misinterpret
New Chemicals	Preempts a State from any regulation of a new chemical that’s subject to a federal TSCA action or new use notice	Would <i>not</i> preempt a State from regulating a new chemical, unless it was later prioritized for a safety review	MINOR. No State has <i>ever</i> regulated a new TSCA chemical. A huge backlog of existing chemicals of concern will dominate State actions. A lack of safety data or public awareness means States are unlikely to act on new chemicals

Key: GREEN = Strongest YELLOW = Intermediate ROSE = Weakest

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