

Understanding Preemption in the Lautenberg Act

[UPDATED 12-21-15: This is a new version of [earlier posts](#) that I've updated to reflect changes made to the preemption provisions in the bill as passed by the Senate on December 17, 2015.]

By far the most difficult and contentious aspect of the debate over reform of the Toxic Substances Control Act (TSCA) is the extent of federal preemption of state authority. The range of positions on this is truly gigantic, from zero preemption at one end of the spectrum to full-field preemption effective upon enactment (the position espoused by some in industry).

The [Frank R. Lautenberg Chemical Safety for the 21st Century Act](#) (S. 697) has landed somewhere in the middle of this spectrum, with some stakeholders saying it still goes too far and others saying not far enough. And wherever you land on that question, it should be acknowledged that preemption in the bill is more extensive than under current TSCA, but much less extensive than it was in the predecessor to the Lautenberg Act, 2013's Chemical Safety Improvement Act (CSIA).

There has been a lot of confusion surrounding preemption in the Lautenberg Act. So in this post, I describe how preemption works under the bill, and what is and is not preempted.

In the sidebar is a summary of the key preemption provisions of the Lautenberg Act. The rest of this post is a deeper dive for those who want one.

Preemption under the Lautenberg Act

The first thing to recognize is that any preemption that applies is always chemical-

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What is preempted:

- States cannot take new actions to restrict a high-priority chemical starting when EPA sets the scope of and initiates an assessment of the chemical, until EPA either completes its safety determination or misses its deadline for doing so.
 - If EPA finds the chemical meets the safety standard, states could not impose new or continue to enforce existing restrictions on that chemical from that point forward, except pursuant to a waiver (see below).
 - If EPA finds the chemical does not meet the safety standard, states could impose new or continue to enforce existing restrictions on that chemical until EPA promulgates the required regulation.
- If a state has a restriction put in place after August 1, 2015 but before EPA initiates and sets the scope of an assessment of a high-priority chemical, that action is preempted once EPA completes its safety determination and any required regulation.

What is not preempted:

- All state actions taken on chemicals before August 1, 2015 stay on the books regardless of subsequent EPA action.
- State actions taken after August 1, 2015 on a chemical stay in effect unless and until EPA lists that chemical as a high priority and takes final action to address the same uses and health and environmental concerns.
- States can take any actions on a chemical that EPA lists as "low priority."
- Even after EPA takes final action on a chemical, federal preemption is limited:
 - Only states' restrictions on chemicals are preempted. Other types of information requirements such as reporting, disclosure or monitoring are not preempted unless already required under TSCA or another Federal law.
 - States can act to restrict a high priority chemical to address uses or health or environmental concerns that fall outside of the scope of EPA's review of that chemical.
 - States can co-enforce, i.e., enact and enforce requirements identical to those taken by EPA.
- Any action a state takes via delegated authority under another federal law (Clean Air Act, Clean Water Act, etc.) is never preempted.
- Any action a state takes via a state law governing air quality, water quality, etc. taken for a different purpose than the toxicity/health risk focus of TSCA is not preempted (e.g., to address ozone depletion or greenhouse gases).
- States can apply for waivers to restrict a chemical both before and after final EPA action on the chemical.
 - If EPA fails to meet the 110-day deadline for deciding on a state's waiver application to act before final EPA action, the waiver is automatically approved.

specific and directly matches the nature and scope of the triggering federal action. That is, preemption attaches only when EPA acts on the same chemical that has been or would be subject to a state action, and only when EPA considers the need for or takes the same type of action as has been or would be taken by a state. And preemption is limited to the scope of the EPA action (for example, the specific uses of a chemical considered by EPA).

Outside of these boundaries, states are free to act on chemicals. The new system would be basically the same as the current system except when EPA decides a chemical is a high priority and may require federal action.

Below I discuss the major components to the preemption provisions of the Lautenberg Act.

(1) State actions subject and not subject to preemption

Types of state actions that are subject to preemption:

- If EPA requires a company to do testing, states can't require it to test to generate the same information.
- If EPA requires a company to notify EPA before beginning a particular use of a chemical, states can't require notification of that same use.
- If EPA places prohibitions or other restrictions on the production, processing, distribution or use a chemical, or decides that such restrictions are not necessary, states cannot place restrictions on the same uses or to address the same health/environmental concerns.

Types of state actions that are not preempted:

- State requirements for reporting, monitoring or biomonitoring, disclosure or other information requirements, unless already required under TSCA or another Federal law.
 - State actions to prohibit or restrict a chemical EPA has acted on if:
 - the state is acting on a hazard, exposure or use of the chemical that EPA did not consider or that does not fall under EPA's TSCA jurisdiction (Note: TSCA does not cover personal care products, cosmetics, food packaging and food additives, which are uses regulated by FDA, or pesticides, which are regulated by EPA under a different law);
 - the state is acting under delegated authority under another federal law (e.g., the Clean Air Act);
 - the state is acting under a state law but to address a different health or environmental concern than EPA's action under TSCA addresses (e.g., a restriction on a greenhouse gas); or
 - the state obtains a waiver from EPA to act even where EPA intends to act or has acted.
- In other words, even if EPA acts on a high-priority chemical, states can still restrict it to deal with other goals – like limiting global warming, clean air or water, or some use not covered by the federal action.
- States can co-enforce, i.e., enact and enforce requirements identical to those taken by EPA.

State actions grandfathered in:

Finally, the Lautenberg Act grandfathers in, regardless of subsequent EPA action, all state actions:

- taken before August 1, 2015; or
- taken under a state law adopted on or before August 31, 2003 (this provision has the effect of grandfathering in, among other laws, California's Proposition 65, which requires warning of the presence of certain chemicals in products or other settings).

(2) Preemption of state actions on high-priority chemicals

Preemption can occur at two distinct points in the bill's process for EPA evaluation of high-priority chemicals:

- Preemption of certain *pre-existing as well as new* state actions on a chemical occurs when EPA takes final action on that same chemical.
- Preemption of certain *new* state actions on a chemical occurs after EPA starts work on that same chemical until it completes its safety determination or misses its deadline for doing so.

Preemption that occurs at final agency action on a high-priority chemical

Under the Lautenberg Act, a final agency action on a high-priority chemical triggers preemption of certain state actions, including actions taken after August 1, 2015 or taken under a law adopted after August 31, 2003, as well as potential future actions. Final agency action is either: (1) a final safety determination by EPA that a chemical meets the bill's safety standard, or (2) if EPA finds a chemical does not meet the safety standard, a final rule regulating that chemical (which must either ban/phase out the chemical or impose restrictions sufficient for it to meet the safety standard), as of its effective date.

This trigger for preemption is similar to that provided under current TSCA. Importantly, the scope of this preemption is directly tied to the scope of EPA's safety assessment and determination and, where required, its rule regulating the chemical. States remain free to act on any uses or health or environmental concerns not explicitly addressed by EPA.

All of the exceptions described earlier apply, as well as the ability of a state to obtain a waiver. Designations of a chemical as low-priority no longer have any preemptive effect, which was the case under the original 2013 bill, CSIA.

Preemption that occurs when EPA starts work on a high-priority chemical

Perhaps the most controversial aspect of preemption under the Lautenberg Act is that once EPA initiates work on a chemical it has designated as high-priority and until it completes its safety determination or misses its deadline for doing so, states cannot undertake *new* actions to restrict that chemical. (Note, however, that states can take new actions to address hazards, exposures or uses that are not included in the scope of EPA's assessment, and can continue to take other actions that do not restrict the chemical. All of the exceptions described earlier apply, as well as the ability of a state to obtain a waiver.)

The trigger for preemption of new state actions is the commencement of EPA's safety assessment of a chemical, an early step in the process. That preemption lifts once EPA completes its safety determination or misses its deadline for doing so. Once EPA completes its safety determination:

- If EPA finds the chemical meets the safety standard, states could not impose new or continue to enforce existing restrictions on that chemical from that point forward, except pursuant to a waiver (see below).
- If EPA finds the chemical does not meet the safety standard, states could impose new or continue to enforce existing restrictions on that chemical until the effective date of EPA's required regulation.

Under the bill, deadlines apply to each step in EPA's evaluation of a high-priority chemical: EPA has up to 3 years to complete a safety assessment and determination, and up to 2 more years to issue a risk management rule where required. The first deadline can be extended for a maximum of 1 year and only if certain conditions are met, and the deadline for the entire review and regulatory process can be extended for a maximum of 2 years upon showing of cause by EPA.

(3) Waivers

States can apply for waivers to restrict a chemical both before and after final EPA action on the chemical. Here is how it works:

Waivers during EPA safety determinations

- Before EPA completes a safety determination on a chemical, EPA "shall" grant, within 110 days, a waiver requested by a state if EPA finds the state requirement: will not unduly burden interstate commerce, would not cause a violation of federal law, and is based on a concern supported by peer-reviewed science.
 - If EPA grants such a waiver, the waiver stays in effect until the final safety determination is published, unless a court directs EPA to deny the waiver in response to a judicial challenge.
- If EPA fails to decide on a waiver request within 110 days, the requested waiver is automatically approved and remains in effect until the final safety determination is published.

Waivers after final EPA actions

- After the effective date of a final EPA action on a chemical, EPA "may" grant a waiver requested by a state if EPA finds compelling conditions warrant granting the waiver and that the state requirement: will not unduly burden interstate commerce, would not cause a violation of federal law, and "is designed to address a risk of a chemical substance, under the conditions of use, that was identified consistent with the best available science; using supporting studies conducted in accordance with sound and objective scientific practices; and based on the weight of the scientific evidence." EPA must decide on the waiver request within 180 days.
 - If EPA grants such a waiver, the waiver stays in effect unless a court directs EPA to deny the waiver in response to a judicial challenge.

Judicial review and citizens' civil actions

- Except as noted below, any person may seek judicial review of EPA's decision to grant or deny a waiver. Any person may also file a citizen's civil action to compel a decision if EPA fails to decide on a waiver by the applicable deadline.
 - A 60-day deadline applies to persons seeking judicial review of EPA's decision on a waiver, and to persons filing a citizen's civil action in response to EPA missing its deadline to decide on a waiver for a state to act before EPA completes a safety determination.
 - If EPA fails to meet its deadline to decide on a waiver for a state to act before EPA completes a safety determination, any resulting waiver (which, as noted above, is automatically approved) is not subject to judicial review.
- If a citizen's civil action is brought in response to EPA's failure to decide, within 110 days, on a state request for a waiver to act before EPA completes a safety determination, the waiver (which, again, is automatic) stays in effect until EPA publishes the final safety determination, unless EPA subsequently denies the waiver, or EPA grants the waiver and judicial review of that decision is sought and a court directs EPA to deny the waiver.

In this post, I've tried to provide as straightforward as possible an analysis of how preemption would work under the Lautenberg Act. Striking the right balance on this issue has proven to be both exceedingly difficult and critical to garnering the bipartisan support needed to pass a law. As with many compromises, no one is likely to be totally happy with the outcome.

Of course, preemption is only one part of the Lautenberg Act, and needs to be viewed in the broader context of all of the new authorities and mandates it would provide EPA. Click [here](#) for our broader analysis of the bill.