



A mixed bag: Comparing the preemption provisions of the House and Senate TSCA reform bills

There are some clear similarities, and some clear differences, between the preemption provisions of the TSCA Modernization Act of 2015 ([H.R. 2576](#)) and the Frank R. Lautenberg Chemical Safety for the 21st Century Act ([S. 697](#)), the House and Senate TSCA reform bills. Without getting too far into the weeds, I'll use this post to compare and contrast the controversial and complex aspects of the legislation.

Similarities

First, as is the case with current TSCA, both bills apply preemption only on a chemical-specific basis; that is, only when EPA is acting on a specific chemical is there any preemptive effect, and the effect is limited to that chemical.

Here's what else is the same or similar in both bills:

First, both bills grandfather in state actions taken before August of this year, as well as actions taken under laws in effect on August 31, 2003, an indirect way of preserving California's Proposition 65 warning/labeling law and Massachusetts' Toxics Use Reduction Act. (See below, however, for a concern about the House language.)

Second, under both bills, final actions by EPA generally preempt states, including both when EPA finds that a chemical "will not present an unreasonable risk" and when it finds such risk and issues a regulation imposing restrictions.

These final actions preempt both past state actions (unless grandfathered-in) and future state actions, unless the action taken by the state:

- is identical to the Federal requirement;
- is adopted under the authority of a federal law; or
- is adopted under a state air or water quality or waste treatment or disposal law.

Third, both bills generally tie the scope of any preemption to the scope of EPA's action on a chemical, leaving states free to act, for example, on uses of a chemical that EPA did not consider in its review.

Differences

All of the above is very similar in the two bills, with five significant exceptions that are worse in the House bill (we'll get to what's worse in the Senate bill below):

1. While the Senate bill's preemption applies only to state restrictions on a chemical, the House bill would preempt any state requirement "designed to protect against exposure" to a chemical. This broader reach could well apply to state requirements for things like reporting or disclosure,

not just to direct restrictions. In contrast, the Senate bill explicitly carves out such state actions from being preempted.

2. The House bill's preemption applies even if the state action is taken to address a health or environmental concern not considered by EPA; in contrast, the Senate bill only preempts state restrictions on uses EPA has addressed with respect to the same health or environmental concern.
3. The House bill's preemption applies to new chemicals just entering the market: If EPA has imposed any requirement on such a chemical, states could not ever impose requirements on any uses of that chemical proposed by the company, even long after it enters the market. The Senate bill has no such preemption for new chemicals. Note that about 700 new chemicals enter the market each year.
4. The wording of the House bill's grandfathering provision, including the addition of the phrase "requirement that has taken effect" (which is not in the Senate bill), creates ambiguity as to whether future actions taken under California's Proposition 65 and Massachusetts' Toxics Use Reduction Act are excluded from the scope of preemption.
5. The savings clause in the House bill preserves private rights of action only under tort or contract law, whereas the analogous provision in the Senate bill extends to all common law actions.

A positive aspect of the House bill (and a negative in the Senate bill) is that there is no preemption of new state requirements based on EPA initiating a risk evaluation of a chemical. In contrast, the Senate bill would block new state restrictions on a chemical at the point when EPA has defined the scope of and initiated a safety assessment for that chemical. Several amendments were made to significantly limit the effect of this provision just prior to the vote in the Senate Environment and Public Works Committee:

1. This "early" preemption lifts once EPA issues a final safety determination or misses its deadline for doing so. Once EPA issues its final determination: if EPA has found the chemical meets the safety standard, final preemption would apply; or if EPA has found the chemical does not meet the safety standard, states could impose new requirements while EPA develops its requisite regulation.
2. States can readily get a waiver to act during the assessment phase.
3. If EPA misses its deadline for deciding on a state waiver application, the waiver is automatically approved.

In our view, very few states are likely to act during this period when EPA is assessing a chemical, knowing that preemption would apply once EPA takes final action. The above changes restore the ability of states to act if they believe they need to, and avoid creating any perverse incentive to drag out the federal process.

Finally, while not directly related to preemption, the bills differ with respect to how long a chemical that EPA has regulated could continue to be produced and used before any federal requirements would apply (i.e., the length of time between final preemption of state requirements and required compliance with federal requirements). Under the Senate bill, compliance deadlines for all EPA chemical regulations

can be no longer than 4 years, subject to an 18-month extension where EPA finds compliance within 4 years is technologically or economically infeasible. In contrast, there is no maximum compliance deadline specified in the House bill, meaning that the length of time during which neither state nor federal requirements would apply to a chemical is indefinite.

Waivers

Finally the two bills differ with respect to waivers in two respects:

1. The House bill keeps current TSCA's waiver provision, which clearly sets a lower bar for EPA to grant a waiver than the Senate bill.
2. However, under the House bill, EPA does not have to act on a request from a state for a waiver and there is no deadline for a decision; if EPA fails to decide or denies the waiver, the state has no clear recourse or ability to appeal. If EPA grants a waiver, however, industry could sue EPA to try to get it overturned.

In contrast, in the Senate bill, there is a mandate and a deadline for EPA to decide on any waiver request. If EPA misses the deadline, a state or any other person can challenge EPA in court for its failure to perform a mandatory duty. (In addition, a waiver for a state to act during EPA review of a chemical is automatically approved if EPA misses its deadline to decide on the waiver request.) Finally, if EPA denies a waiver, the state can sue EPA to try to get the denial overturned.

In sum, both bills have more preemption than current law, and each is a mixed bag.