On June 22, 2016, President Obama signed the Frank R. Lautenberg Chemical Safety for the 21st Century Act. This law updates the Toxic Substances Control Act (TSCA) for the first time since the law was first adopted in 1976. It makes a variety of changes to existing law, including a number of enhancements to EPA’s ability to gather information about, and regulate, chemicals.¹

A number of provisions in the Lautenberg Act are designed to make changes to the state-federal relationship. This information sheet summarizes one important category of these changes: federal preemption of state authorities. The law also creates new opportunities for federal-state collaboration; these are not covered in this information sheet.

TURI has developed this resource in response to questions the Institute has received related to the meaning and potential impact of the preemption provisions for chemical regulation in Massachusetts and in other states. It is designed to be useful to Massachusetts businesses, state agencies, and others who may wish to understand the new preemption provisions.

The Lautenberg Act does not affect the requirements of the Massachusetts Toxics Use Reduction Act (TURA). However, it is important for Massachusetts businesses and TURA program boards, committees, and stakeholders to understand the provisions of the Lautenberg Act. The Act is expected to lead to a variety of changes in chemical regulation across the United States.

Please note that this information sheet is provided strictly as an educational resource for TURA program stakeholders. It does NOT constitute legal advice or a formal legal analysis. If you need legal information or opinions, please consult appropriate experts.

What is preemption?

Preemption refers to a situation in which action at the federal level takes precedence over action at the state or local level. The Lautenberg Act specifies a variety of conditions under which federal action on chemicals will preempt states or local authorities from taking action. It also specifies clear boundaries around federal preemption of state and local actions.

This information sheet refers primarily to state actions, but many of the points noted here are applicable to municipalities as well.

Categories of preemption under the Lautenberg Act

The Lautenberg Act includes two types of preemption of states’ ability to restrict chemicals. For purposes of clarity in this information sheet, these will be referred to here as “long-term preemption” and “pause preemption.” Long-term preemption occurs at the point when EPA either determines that a chemical does not pose an unreasonable risk, or issues a rule to regulate a chemical. Pause preemption is temporary preemption that can apply while EPA is conducting a risk evaluation (i.e. before EPA has taken final action on a chemical).
Long-term preemption

The Lautenberg Act requires EPA to conduct a risk-based evaluation and determine whether a chemical poses an unreasonable risk to human health or the environment. For a substance that is found not to present an unreasonable risk, preemption is effective on the date of this EPA determination. For a substance that is found to present an unreasonable risk, preemption is effective on the effective date of the rule issued by EPA to regulate that chemical.

In both cases, there are several limitations on what state actions can be preempted, and states may also apply for a waiver from preemption. These limitations and waiver provisions are explained below.

Note that long-term preemption can apply to both new and existing state restrictions, subject to the various limitations described below.

Other important notes about long-term federal preemption:

- EPA approval, regulation or prohibition on manufacture of a new chemical for any or all uses of that chemical does not trigger preemption for any use of that chemical.
- If EPA requires notification of a chemical use under a significant new use rule, states are preempted from issuing similar notification requirements for the same uses.

Pause preemption

New state prohibitions or restrictions on a chemical are preempted, starting when EPA publishes the scope of a risk evaluation for that chemical, and ending when EPA either publishes the risk evaluation or reaches the statutory deadline for publication of the risk evaluation. The law establishes a time line for EPA to conduct its risk evaluation, as follows:

- EPA must publish the scope of the risk evaluation within 6 months of starting the evaluation. Publication of the scope triggers pause preemption.
- EPA must complete the risk evaluation within 3 years of starting the evaluation. This deadline may be extended by 6 months.

Thus, the precise duration of pause preemption depends on how quickly EPA publishes the scope of the risk evaluation and how quickly EPA completes the risk evaluation, but is likely to be between 2.5 and 3 years.

During this time, states will be prevented from adopting new prohibitions or restrictions, even though EPA will not yet have taken action. There are, however, a number of limitations on pause preemption, and states can also apply for waivers from pause preemption, as described further below.

Note that pause preemption applies only to new state restrictions, not existing restrictions.

Pause Preemption: Limitations

There are two special cases in which pause preemption does not apply.

- The Lautenberg Act includes a provision under which chemical manufacturers can request an EPA risk evaluation for a specific chemical. Chemicals for which EPA grants a manufacturer-requested risk evaluation are not subject to pause preemption.
- The Lautenberg Act directs EPA, in conducting risk evaluations, to prioritize chemicals listed on the 2014 Update to EPA’s TSCA Work Plan for Chemical Assessments. EPA is required to select ten Work Plan chemicals for
risk evaluation within 180 days from enactment of the Lautenberg Act. These first ten Work Plan chemicals for which EPA undertakes a risk evaluation are not subject to pause preemption.

It is important to note that these limitations are for pause preemption only, and do not apply to long-term federal preemption.

Types of state and local actions not subject to preemption

The Lautenberg Act explicitly identifies certain types of state and local actions that are not subject to preemption. These include the following:

- **Information obligations.** No preemption for a “reporting, monitoring, or other information obligation.”
- **Air, water, waste and related activities.** No preemption of actions undertaken under the authority of another Federal law, or adopted under an authority related to “water quality, air quality, or waste treatment or disposal.”

There are some exceptions to this provision, including if a restriction addresses the same hazards and exposures as EPA but is “inconsistent with the action of the Administrator.”

Scope of preemption

The Lautenberg Act also provides clear boundaries around the scope of preemption. The scope of preemption is limited to the uses and to the health and environmental concerns that have been addressed by EPA.

Specifically, the Act limits the scope of preemption to the “hazards, exposures, risks, and uses or conditions of use” included in the scope of the risk evaluation (for pause preemption) or included in the final EPA action (for long-term preemption).

Preservation of certain state laws

The Lautenberg Act explicitly protects (“grandfathers”) certain existing state laws from preemption:

- It preserves the full authority of state laws that were in place before August 31, 2003, including future regulations promulgated under those laws.
- It preserves state and local chemical restrictions that were in place before April 22, 2016.

Waivers

States have the option to apply for a waiver from preemption. There are separate waiver processes for pause preemption and for long-term preemption. For both processes, EPA is required to make a decision within a specified period of time, and the decisions are judicially reviewable (meaning that they can be challenged in court).

**Waivers from long-term preemption.** If a state applies for a waiver from long-term preemption, EPA is directed to make decisions based on factors including “compelling conditions” related to health or environment and an EPA evaluation of the state’s use of science in decision making. These waivers are referred to as “discretionary exemptions.”

**Waivers from pause preemption.** Waivers from pause preemption are referred to as “required exemptions.” There are two ways to obtain this type of waiver.

1. If a state applies for a waiver from pause preemption, considerations include an EPA determination that the state “has a concern” about the chemical “based in peer-reviewed science.”
2. In addition, the Act requires EPA to provide a waiver from pause preemption if a state is already working to regulate the chemical before pause preemption begins. Specifically, EPA must provide a waiver if a state or
political subdivision of a state “has enacted a statute or proposed or finalized an administrative action intended to prohibit or otherwise restrict the manufacture, processing, distribution in commerce, or use of the chemical substance” by either

- 18 months after the date when EPA initiated the prioritization process for that chemical, OR
- the date when EPA publishes the scope of its risk evaluation, whichever is sooner.

In other words, this second option creates a window of time during which a state can complete a process it has already begun and avoid pause preemption.

Note: For required exemptions from pause preemption, if EPA fails to make a waiver determination within the required time period, the waiver is automatically granted.

**Preemption under the original TSCA**

The original TSCA also included provisions related to state preemption. These provisions had little effect on states because EPA did not take many regulatory actions under the original law. The original TSCA preemption provisions differed from the provisions in the Lautenberg Act in several ways, including a different approach to waivers.

The Lautenberg Act specifies that it does not change the preemption provisions associated with past EPA actions. That is, for actions taken by EPA before the Lautenberg Act was adopted, the old preemption provisions will still apply (unless EPA subjects those chemicals to a new risk evaluation and regulatory process).

**Damage/liability claims**

The Lautenberg Act states explicitly that nothing in the law preempts the application of state statutory or common law claims, including in damage suits.

**Timing of compliance**

The Lautenberg Act includes provisions related to the timing of compliance with EPA rules. These are distinct from the preemption provisions, but they are also important for understanding the over-all time line of EPA actions in the context of preemption.

- For rules that are not bans or phaseouts, EPA is required to set compliance dates that are as soon as practicable but within 5 years.
- For bans or phaseouts, compliance dates must start “as soon as practicable, but not later than 5 years” after the rule is promulgated, and must be fully implemented as soon as practicable.

---

1 EPA has posted a copy of the Act, a summary of key provisions, and other information at https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/frank-r-lautenberg-chemical-safety-21st-century-act, The Act can also be viewed at https://www.congress.gov/bill/114th-congress/house-bill/2576/text?q=%7B%22search%22%3A%5B%22hr2576%22%5D%7D&resultIndex=1.