



TSCA Reform: Key Issues & Comments

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TSCA Modernization Act of 2015

- Adopted by the House on June 23, 2015
 - Hereafter referred to as “the House bill”

Frank R. Lautenberg Chemical Safety for the 21st Century Act

- Adopted by the Senate on December 17, 2015 (technically as an amendment to H.R. 2576)
 - Hereafter referred to as “the Senate bill”



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Toxic Substances Control Act (TSCA) Reform: Key Issues and Comments

January 7, 2016

The following table analyzes the bill adopted by the House on June 23, 2015 (The TSCA Modernization Act of 2015, referred to here as “the House bill”) and the bill adopted by the Senate on December 17, 2015 (the Frank R. Lautenberg Chemical Safety for the 21st Century Act, referred to here as “the Senate bill”).¹ The table presents a compilation of selected points that are of interest to a number of state agencies as well as local authorities. For the sake of brevity, the table makes reference primarily to “states,” but similar concerns generally apply both to state and to local authorities.

The table does not represent a formal consensus and legislation can be subject to varying interpretations; individual stakeholders and authorities may have differing views on points discussed here. The table also does not represent an exhaustive analysis of the elements of the bills that are of interest or concern, and may be revised or expanded based on additional discussion among interested parties. In short, the table is designed as a guide to selected issues of interest.

Points presented here were developed in part through discussions convened by the Northeast Waste Management Officials’ Association (NEWMOA). Background research and analysis was provided by the Massachusetts Toxics Use Reduction Institute in collaboration with the Washington Department of Ecology and agencies in other states.

This document does not represent a legal position or the official position of any entity. Individuals or agencies needing legal information or opinions should consult appropriate experts. Any comments or suggestions are welcomed, and can be sent to ecos@ecos.org which will collect and share input with the document’s collaborators.

1. PREEMPTION

	Summary	Senate Bill	House Bill	Comments
Preemption: General points	<ul style="list-style-type: none"> Many states feel strongly about retaining the ability to act to protect citizens after federal legislation is enacted. Preemption of state authorities reduces the states’ capacity to spur innovation and provide a level of protection that may go beyond federal requirements. The comments below are offered regarding the preemption provisions currently found in the Senate and House bills. 			
Timing of Preemption	<ul style="list-style-type: none"> Many states believe the regulatory pause (or pause preemption) in the Senate bill during EPA’s Safety Determination creates an unnecessary and 	<ul style="list-style-type: none"> <i>Permanent federal preemption:</i> For a substance that does not meet the safety standard, preemption is effective as of the effective date of the rule issued by EPA. The rule itself must be complied with within 4 years, 	<ul style="list-style-type: none"> Preemption occurs when EPA takes final action on the chemical in a rule. There is no expressed statutory deadline for industry to comply with a rule. 	<ul style="list-style-type: none"> Eliminating the regulatory pause in the Senate bill would make it possible for states to take action to protect their citizens while EPA analyses are under way. From this perspective, the timing of preemption under the House bill is preferable to the approach taken in the

	Summary	Senate	House	Comments
Topic	XXXXXXXXXX XXXXXXXXXX XXXXXXXXXX XXXXXXXXXX	XXXXXXXXXX XXXXXXXXXX XXXXXXXXXX XXXXXXXXXX	XXXXXXXXXX XXXXXXXXXX XXXXXXXXXX XXXXXXXXXX	XXXXXXXXXX XXXXXXXXXX XXXXXXXXXX XXXXXXXXXX
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Note:

- The table presents a compilation of selected points that are of interest to a number of state agencies as well as local authorities. It was developed in part through discussions convened by the Northeast Waste Management Officials' Association (NEWMOA).
- It does not represent a legal position or the official position of any entity.
- It does not represent a formal consensus.
- It is not a comprehensive or exhaustive analysis of the bills.
- Legislation can be subject to varying interpretations.

Broad Topic Areas Covered in the Table

1. PREEMPTION

**2. OTHER POINTS RELATED TO THE
STATE-FEDERAL RELATIONSHIP**

3. EPA AUTHORITIES

1. PREEMPTION

- **General points**
- **Timing**
 - **Preemption**
 - **Compliance**
- **Monitoring, disclosure, & related activities**
- Clean air & water & related activities
- Wording used to describe state actions
- **Scope of preemption**
- **“Grandfathering”**
- **Waivers**
- **Statutory & common law claims for damages**

Preemption: General points

Many states feel strongly about retaining the ability to act to protect citizens after federal legislation is enacted.

Preemption of state authorities reduces the states' capacity to spur innovation and provide a level of protection that may go beyond federal requirements.

Timing of Preemption

Senate Bill

Pause preemption: New state prohibitions or restrictions are preempted, starting when EPA publishes the scope of a safety assessment and safety determination, and ending when EPA either publishes a determination or reaches the statutory deadline for publication of the safety determination (max **3-4 years**).

Permanent federal preemption: effective date of the rule.

House Bill

Preemption occurs when EPA takes final action on the chemical in a rule.

Related issue: Timing of Compliance

Senate Bill	House Bill
The rule itself must be complied with within 4 years , with the possibility of an 18 month extension.	No expressed statutory deadline for industry to comply with a rule.

Timing: Comments

Comments

. . . From the perspective of states interested in taking prompt action on chemical hazards, it would be preferable to **eliminate the pause preemption** that appears in the Senate bill, but **include an appropriate, limited statutory time frame for compliance.**

State actions related to monitoring, disclosure & related activities

Senate Bill	House Bill
Specifies protection from preemption for a “reporting, monitoring, disclosure, or other information obligation.”	Does not specify this exemption as clearly as the Senate bill, although there is discussion of the issue in the House committee report.

State actions related to monitoring, disclosure & related activities: Comments

Comments

Retaining the language in the Senate bill is important to make these protections clear.

Scope of Preemption

Senate Bill

Specifies that preemption applies only to “the **hazards, exposure, risks, and uses or conditions of use**” considered in the safety assessment and determination.

House Bill

Specifies that preemption applies to “**any requirement** that applies to such substance or mixture...and is **designed to protect against exposure** to the chemical substance or mixture...”

Scope of Preemption: Comments

Comments

The language in the **Senate bill is clearer** than that of the House bill in limiting the scope of preemption for existing chemicals both to the **uses** and to the **health and environmental concerns** that have been considered by EPA.

Scope of Preemption – more considerations!

Senate Bill

Limited preemption related to significant new uses:

States are preempted from requiring **notification** of a use of a chemical that EPA has designated as a significant new use and for which EPA has required notification.

House Bill

Broad preemption related to significant new uses:

Broad state preemption can result if EPA imposes a requirement related to a new chemical or a significant new use.

Scope of Preemption – More Comments

Comments

New chemicals notification/significant new uses:

Many states believe the more limited approach in the Senate bill is preferable, based on the principle that the scope of preemption should correspond to the scope of the action taken by EPA.

“Grandfathering”

- **Summary:** Both bills contain language related to preserving pre-2003 laws and pre-August 2015 chemical prohibitions/restrictions.
- **Comments:**
 - Preferably, retain all existing statutes, rules, regulations, actions, etc.
 - At a minimum, one reasonable approach is to retain the Senate language on grandfathering, with the addition of the words “or requirement imposed” after the words “action taken” in both places where these words appear.

Waivers

Senate Bill

Two waiver processes: “discretionary exemptions” from permanent federal preemption, and “required waivers” from pause preemption. **Burdensome requirements related to EPA evaluation of state decision-making**, especially for “discretionary exemptions.” For both processes, the Senate bill includes a **requirement and deadline for EPA to act** on a waiver request.

House Bill

Retains the existing TSCA language regarding waivers from permanent federal preemption. **Does not include deadlines** for EPA to act on a waiver request.

Waivers - Comments

Comments

Many states feel the final language regarding waivers from permanent federal preemption should **retain the existing TSCA approach** to waivers, and should **also include a requirement and deadline** for EPA to act on a waiver request.

Statutory & common law claims for damages

Senate Bill	House Bill
<p>States explicitly that nothing in the bill is intended to preempt the application of state statutory or common law claims in any way, including damage suits.</p>	<p>The savings language in the House bill is not as clear in protecting remedies currently available to states, municipalities, and members of the public.</p>

1. PREEMPTION



**2. OTHER POINTS RELATED TO THE
STATE-FEDERAL RELATIONSHIP**

3. EPA AUTHORITIES

2. OTHER POINTS RELATED TO THE STATE-FEDERAL RELATIONSHIP

- State action on low-priority chemicals
- **Confidential business information**
- **Industry requests for safety determinations**
- State grants
- Safer choice

Confidential Business Information: Selected Points

- Senate *requires* CBI sharing with states for use related to development, administration or enforcement of a law under some circumstances. House *allows* sharing for administration or enforcement.
- Both include some requirements related to data sharing with health & other professionals, subject to restrictions.
- Senate includes resubstantiation requirements.

See full table for further comparisons.

Industry requests for safety determinations

- Concern: Significant amounts of EPA staff time could be consumed by responding to industry requests for safety determinations, rather than focusing on EPA-identified priorities.
- Senate specifies that industry-requested safety determinations are to account for 25% to 30% of EPA assessments. House does not specify a maximum.

1. PREEMPTION

**2. OTHER POINTS RELATED TO THE
STATE-FEDERAL RELATIONSHIP**

 **3. EPA AUTHORITIES**

3. POINTS RELATED TO EPA AUTHORITIES

- **Safety standard & determination of “unreasonable risk”**
- Role of cost analysis in decision making about regulations
- Breadth of EPA authority
- **Articles**
- **Fees**

Safety standard & determination of “unreasonable risk”

Senate Bill

States within the definition of the safety standard that cost is not to be considered. Also clarifies that cost is not to be considered in all instances where the phrase “unreasonable risk” is used.

House Bill

States that the risk evaluation is to be conducted without consideration of cost, but does not make conforming changes to the entire underlying TSCA statute.

Safety standard & determination of “unreasonable risk” - Comments

Comments

- To the extent that state actions on chemicals will be preempted, it is important to many states that EPA apply a safety standard that is adequate to protect public health.
- For the use of the unreasonable risk standard, many states believe a comprehensive approach to clarifying every regulatory provision in the TSCA statute should be adopted. This is done in the Senate bill.
- A standard of “reasonable certainty of no harm” would be more protective of public health than a standard of “unreasonable risk.”

Articles

Senate Bill

- Provides that EPA may restrict articles “only to the extent necessary to address the identified risks in order to determine that the chemical substance meets the safety standard.”
- Provides an exemption for replacement parts that were **manufactured** prior to the effective date of a restriction.

House Bill

- Provides for EPA to restrict articles “only to the extent necessary to protect against the identified risk.”
- Exempts replacement parts that were **designed** prior to the publication date of a rule.

Articles - Comments

Comments

- Many states believe it is important to provide EPA with broad authority to regulate articles with an adequate safety margin.
- An article may contain multiple chemicals, and may pose a threat to health or the environment based on the cumulative effects of those chemicals.
- Regarding replacement parts, any automatic exemption should apply to parts manufactured, not designed, prior to the date in question.

Articles – additional concerns

- EPA: “The Administration encourages Congress to look closely at provisions in both the Senate and House bills that may make it more difficult for EPA to review and regulate risks from chemicals contained in articles.”
 - Senate bill requires EPA to “find the notification requirement ...is warranted based on ‘reasonable potential for exposure’”

Fees

Senate Bill	House Bill
<p>Requires EPA to establish certain fees that will meet the lower of: 25% of specified implementation costs, or \$25 million.</p> <p>EPA's ability to assess fees is contingent upon a specified amount of funding being appropriated to EPA for the relevant fiscal year.</p>	<p>Retains the approach of current TSCA, which allows, but does not require, EPA to establish fees to defray costs of administering the act. Does not specify a percentage or a dollar amount.</p>

Note: Both bills provide for industry to cover full or partial costs related to evaluating industry-requested priorities.

Fees: Comments

Comments

Neither bill provides a mechanism for ensuring full funding of the new activities envisioned in the bills. The approach in the Senate bill is preferable from the perspective of increasing the likelihood that EPA's work will be adequately funded.

Wrap-up – Key points include:

1. PREEMPTION

Timing; Scope; “Grandfathering”; Waivers

2. OTHER POINTS RELATED TO THE STATE-FEDERAL RELATIONSHIP

CBI; Industry requests for safety determinations

3. EPA AUTHORITIES

Safety standard; Articles; Fees

More recommended reading

Recent letters with detailed comments on the bills:

- 1/19/2016: 12 AG's
- 1/20/2016: EPA Administrator
- 2/8/2016: 8 State Environmental Commissioners
- 2/12/2016: NGA, NCSL, ECOS, ASTHO



Thank you

