

TSCA Preemption under Frank R. Lautenberg Chemical Safety Act

- The Toxic Substances Control Act (TSCA) is the federal law regarding the regulation of chemicals in the country.
- TSCA provides the U.S. Environmental Protection Agency (EPA) with authority to:
 - Require reporting, record-keeping and testing for chemicals;
 - Restrict the use or distribution of specific chemical substances, chemical classes, or mixtures of chemicals, including restrictions on production of products.
- Over the past 20 years, TSCA has been criticized for its lack of effectiveness and for EPA lack of action under the act.
- In that timeframe, states started to increasingly regulate specific chemicals under state laws—e.g. brominated flame retardants, BPA in children’s products, etc.
- Some states also enacted more comprehensive programs implementing systems for review of all toxic chemicals or classes of chemicals. For example, the California Safer Consumer Products Regulations (aka Green Chemistry rules).
- Interested parties were concerned that state efforts at chemical regulation would create a patchwork of varying laws and requirements.
- Other interested parties advocated for more EPA authority and directives for chemical review.
- Consequently, Congress enacted a TSCA reform bill—the Frank R. Lautenberg Chemical Safety Act in 2016.
- Under the revised TSCA, EPA must evaluate new and existing chemicals against a new risk-based standard that includes considerations for vulnerable populations (such as infants, children, pregnant women, workers, or the elderly).
 - Under this new standard, EPA must designate as a high-priority substance, a chemical substance that EPA concludes—without consideration of costs or other nonrisk factors—may present an unreasonable risk of injury to health or the environment, including an unreasonable risk to vulnerable populations.
- EPA now has authority to require the testing and information collection necessary to support those evaluations.
 - The new legislation eliminates a requirement that EPA must first make a preliminary finding about risk before EPA can require testing by manufacturers or processors.
- The revised TSCA also has a preemption clause—i.e. a directive that federal law shall supersede or control over state law.
 - There was concern during the debate on TSCA reform that many, if not all, state efforts to regulate chemicals would be preempted.
 - The new TSCA preemption clause is unique, but will have little effect on Vermont’s existing laws.

- Under the new TSCA preemption clause, preemption of state authority applies only on a chemical-specific basis.
 - Only when EPA is acting on a specific chemical is there any preemptive effect.
 - The preemption is limited to the chemical EPA is acting on; and
 - The preemption is limited only to the scope of the action taken by EPA.
- All state actions taken before April 22 of 2016.
- Past and future actions taken under laws in effect on August 31, 2003, are also preserved.
- Final actions on a chemical by EPA generally preempt states' restrictions on that same chemical, including both when EPA finds that a chemical "does 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.
- Where there is preemption, it applies only to state restrictions on a chemical, and not to other requirements states might impose, such as reporting, monitoring or disclosure.
- There is also something called "pause preemption" under which EPA's initiation of a review of a high-priority chemical generally preempts states from imposing new restrictions during the review period.
 - But the preemption only applies during EPA review—i.e. the pause--and only to restrictions, requirements, uses, or risks EPA is considering in its review.
 - Any action a state takes to restrict a chemical during the pause would be preempted once EPA takes final action at most a few years later.
- A state may seek a waiver of final preemption or from pause preemption.