

# FEDERAL PREEMPTION of the STATES under TSCA REFORM

## On Balance, the House Bill Better Protects State Authority than the Senate Bill

Two bipartisan bills in Congress would overhaul the obsolete Toxic Substances Control Act of 1976 (TSCA). The public overwhelmingly believes that the federal government should assure the safety of chemicals.

But meaningful TSCA reform must strike a balance. The U.S. EPA should be given the new tools and mandates it currently lacks. And reform should preserve existing state authority to regulate chemicals when EPA doesn't act.

A side-by-side comparison on TSCA preemption (see next page) shows that:

### Both Bills Erode State Authority, Increasing Federal Preemption

Each bill eliminates the current authority of the States to ban the in-state use of a chemical regardless of federal action, a major concession to industry.

Each bill preempts the States after EPA determines that a chemical does *not* present an unreasonable risk, a design feature of the new federal authority.

### The Senate Bill Overreaches on Preemption in Critical Areas

S.697 weakens state authority under TSCA more so than H.R.2576. It would:

- Preempt the States *before* EPA even acts, creating a regulatory void during an EPA review of a high priority chemical that could last nearly 5 years
- For waivers from preemption, eliminate ability of States to provide greater protection, increase burden on State applicants, and add much complexity
- Eliminate the freedom of States to *always* restrict disposal of chemicals in products, and extend preemption retroactively for high priority chemicals

### The House Bill has Weaknesses on Preemption, but is Stronger Overall

On balance, H.R.2576 better preserves state authority, but it still would:

- Preempt the States from restricting most *new* chemicals, which may be a significant future loss even though States have not acted so in the past
- Preempt *new* State warning and labeling requirements *after* EPA acts, while still preserving warnings required by California's Proposition 65
- Limit grandfathering of State actions taken before Aug. 1, 2015 to those that do *not* actually conflict with an EPA action taken on the same chemical

See next page for color-coded side-by-side comparison

GREEN = Stronger    YELLOW = Intermediate    ROSE = Weaker

Environmental Health Strategy Center

## On Balance, the House Bill Protects State Authority Better than Senate

POLICY	Toxic Substances Control Act (TSCA)	H.R.2576 (Shimkus) (introduced May 26, 2015)	S.697 (Udall-Vitter) (as amended April 28, 2015)
Scope of Preemption	Limited to protections against same risk	Limited to same uses subject to EPA evaluation	Limited to same uses subject to EPA evaluation
State Air, Water and Waste Laws	States preempted <i>after</i> EPA restricts chemical use	States preempted for same uses, if in conflict w/EPA	Preemption for same uses & hazards, if inconsistent
Tort Actions	Not addressed	Preserves tort law and private remedies	Preserves tort law and private remedies
Federal Laws	States <i>always</i> free to act under other federal laws	States <i>always</i> free to act under other federal laws	States <i>always</i> free to act under other federal laws
Testing	State testing preempted after EPA requires testing	State testing preempted after EPA requires testing	State testing preempted after EPA requires testing
Unreasonable Risk Found	States preempted <i>after</i> effective date of EPA action	States preempted <i>after</i> effective date of EPA action	States preempted <i>after</i> effective date of EPA action
Unreasonable Risk <i>Not</i> Found	States <i>never</i> preempted	States preempted <i>after</i> EPA exonerates a chemical	States preempted <i>after</i> EPA exonerates a chemical
State Use Bans	States <i>always</i> free to ban the in-state use of chemicals	Eliminates exemption; State bans subject to preemption	Eliminates exemption; State bans subject to preemption
Co-Enforcement	States may adopt restriction identical to federal rule	Same as current law but penalties are capped	Same as current law but penalties are capped
Regulatory Void (the "Pause")	No preemption <i>before</i> final effective date of EPA action	No preemption <i>before</i> final effective date of EPA action	States preempted <i>during</i> EPA review of high priority chemicals (unless waived)
Waivers from Preemption	Easily available to provide higher level of protection	Easily available to provide higher level of protection	Reduces scope, increases burden, adds complexity
Waste Disposal	States <i>always</i> free to regulate product disposal	States <i>always</i> free to regulate product disposal	States preempted if action inconsistent with EPA rule
Retroactive Preemption	No "high priority" or retroactive preemption	No "high priority" or retroactive preemption	States preempted if an EPA-restricted chemical is later named a "high priority"
Savings Clause in §18(a)(1)	States <i>always</i> free to act unless explicitly preempted	States <i>always</i> free to act unless explicitly preempted	No upfront savings clause
Reporting, Info, and Monitoring	States may require, per savings clause above	States may require, per savings clause above	States <i>always</i> free to require, explicitly
Grandfathering	Preempts current State restrictions after EPA acts	Preserves State restrictions adopted before Aug. 1, 2015 except if in conflict w/ EPA	Preserves State restrictions adopted before Aug. 1, 2015
Warnings and Labeling	Might preempt warnings for new Prop 65 chemicals	Preserves Prop 65 warnings but preempts similar <i>future</i> requirements by others	Preserves <i>all</i> state warning and labeling requirements
Significant New Uses	States preempted <i>after</i> EPA Significant New Use Rule	States preempted <i>after</i> EPA notified of such new use	States preempted from requiring new use reporting
New Chemicals	States preempted <i>after</i> EPA adopts a Sec. 5 rule	States preempted <i>after</i> EPA adopts Sec. 5 rule or order	States <i>not</i> preempted unless new chemical prioritized

GREEN = Stronger    YELLOW = Intermediate    ROSE = Weaker

Environmental Health Strategy Center