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Preemption in Proposed Amendments to the Toxic Substances Control Act (TSCA): Side-by-Side Analysis of S. 697 and H.R. 2576

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Summary

The Toxic Substances Control Act (TSCA) was enacted in 1976 to govern the regulation of chemical substances in U.S. commerce. Its core provisions have not been significantly amended since that time. Under TSCA, the Environmental Protection Agency (EPA) has implemented a chemicals management program over the past four decades. EPA has issued a very limited number of risk management rules under TSCA to restrict chemicals it has found to present unreasonable risks of injury to human health or the environment. Meanwhile, states and, in a few cases, local subdivisions of states have enacted an increasing number of their own chemical programs and restrictions.

The federal preemption doctrine derives from the Supremacy Clause of the U.S. Constitution, which provides that federal laws "shall be the supreme Law of the Land." Congress can expressly preempt state and local laws by statute, and the scope of preemption is determined by Congress's intent. Because TSCA preemption is based on EPA's issuance of certain types of rules and orders targeting particular chemicals (subject to exceptions), state and local chemical programs and restrictions—for the most part targeting chemicals not subject to EPA risk management rules—generally have not faced preemption under TSCA. As legislative proposals to amend TSCA have been discussed in recent years, one major topic of debate has been the extent to which the scope of TSCA's preemption of state chemical regulations should be preserved, expanded, or reduced.

This report provides a brief background on preemption in current TSCA. The report then provides a side-by-side comparison of the preemption provisions of House and Senate bills in the 114th Congress to amend TSCA. S. 697, the Frank R. Lautenberg Chemical Safety for the 21st Century Act, was ordered to be reported out of the Senate Environment and Public Works Committee on April 28, 2015, on a 15-5 vote. It was reported, as amended, on June 17, 2015, and placed on the Senate Legislative Calendar. H.R. 2576, the TSCA Modernization Act of 2015, was first released as a discussion draft on April 7, 2015. It was introduced as H.R. 2576 on May 26, 2015, and passed the House as amended on June 23, 2015, on a 398-1 vote.

Both bills would expand EPA's authority to regulate chemicals in a number of ways, similar in some respects, although S. 697 is a longer and more detailed bill that would make more changes to TSCA's language than H.R. 2576. The preemption provisions of the two bills have many similarities as well, including in their overall structure, which retains TSCA's approach of only preempting state and local laws on a chemical-by-chemical basis after EPA action on a chemical. Both bills would also exclude from preemption state and some local chemical requirements in effect as of August 1, 2015, and any state or local requirements arising from long-standing state chemical laws such as California's Proposition 65. However, the bills have a number of differences with respect to preemption. For example, S. 697 would preempt new restrictions on a chemical while EPA prepared a safety assessment on that chemical, a period of up to several years; H.R. 2576 may impose somewhat broader preemption on the basis of EPA actions for new chemicals and new uses than S. 697. Various other similarities and differences between the two bills regarding preemptive EPA actions, exceptions, exemptions, and waivers are also compared.

A third proposal to amend TSCA, S. 725, the Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act, would eliminate express TSCA preemption entirely. S. 725 is not included in this report's comparison.

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Introduction to Preemption in TSCA

Preemption Under the Constitution

Preemption raises complex issues of law, policy, and federalism. Under the Supremacy Clause of the U.S. Constitution,[1] state law and policy (or law and policy of local subdivisions of states, acting under state law) that conflicts with federal law must yield to the exercise of Congress's powers. Whether a certain state action is preempted by federal law is a question of congressional intent.[2] When it acts, Congress can preempt state action within a field entirely, allow for states to act freely, or permit state action to any intermediate degree. Federal statutes relating to protection of the environment and public health have taken a diverse range of approaches to preemption ranging between these two extremes of field preemption and no preemption. The Toxic Substances Control Act (TSCA),[3] which defines the authority of the Environmental Protection Agency (EPA) to assess and regulate chemical substances in U.S. commerce, takes an intermediate approach.

Overview of TSCA

An overview of TSCA as a whole is necessary to place TSCA's preemption provisions in context. For more information, see CRS Report RL31905, *The Toxic Substances Control Act (TSCA): A Summary of the Act and Its Major Requirements*, by (name redacted)

TSCA establishes a chemical regulatory program allowing EPA to review new chemical substances before they enter U.S. commerce, as well as significant new uses of chemical substances as designated by EPA (§5);[4] to regulate chemicals in commerce that EPA determines to present unreasonable risks of injury to human health or the environment, using the least burdensome requirements that adequately protect against such risks (§6);[5] and to require testing on chemicals that may present an unreasonable risk, or that merit testing by virtue of certain high production volume or high exposure potential criteria (§4).[6] TSCA also authorizes and mandates that EPA require reporting of certain information on chemicals by manufacturers (including importers), processors, and sometimes distributors, and to maintain an inventory of chemicals and substances that have commenced non-exempt manufacture or import in the United States (§8).[7] In addition, among other provisions, TSCA requires EPA to maintain confidentiality of trade secrets and privileged or confidential business information in a particular manner (§14),[8] coordinate with

[1] U.S. CONST. art. VI, cl. 2.

[2] While this report focuses on express statutory provisions regarding preemption, preemption may be implied as well as express. "Conflict preemption" could be implied either because compliance with both the state rule and the TSCA rule would be impossible, or because the state rule would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See generally Article VI: Prior Debts, National Supremacy, and Oaths of Office, in* S. DOC. NO. 112-9, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, INTERIM EDITION: ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JULY 1, 2014, at 986-991, 100-1005 ((name redacted), ed., 2014), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CONAN-REV-2014/pdf/GPO-CONAN-REV-2014-9-7.pdf.

[3] 15 U.S.C. §§2601-2697.

[4] 15 U.S.C. §2604.

[5] 15 U.S.C. §2605.

[6] 15 U.S.C. §2603.

[7] 15 U.S.C. §2607.

[8] 15 U.S.C. §2613.

other federal agencies and EPA offices (§9),[9] and respond to citizens' petitions (§21).[10] TSCA's core provisions (Title I) have not been significantly amended since the law's enactment in 1976.[11]

It is also important to note that TSCA applies to "chemical substances" (defined in §3).[12] To avoid overlapping with other federal statutes, TSCA defines this term to exclude certain categories of materials and substances from its scope. Substances when used in pesticides, foods (including ingredients and additives), food contact substances (such as containers), personal care products, tobacco, nuclear materials, firearms, and shells and cartridges are not within the scope of TSCA—or consequently, within the scope of TSCA preemption.

Preemption Under TSCA

TSCA's preemption provisions (§18)[13] base preemption on certain actions taken by EPA under a handful of specified statutory provisions. So long as EPA has not specifically addressed a chemical under TSCA, there is no preemption of state regulation of that same chemical.[14] When EPA does take certain actions regarding a chemical, TSCA provides for preemption of duplicative testing requirements and of non-identical state regulations, other than total bans or disposal regulations, unless the state regulations are adopted under other federal laws or an exemption is granted.[15] Specifically, TSCA Section 18(a) provides the following:

- If EPA promulgates a rule under TSCA Section 4 requiring manufacturers or processors of a chemical substance to conduct testing on that substance to develop data on its health and environmental effects, then a state or political subdivision cannot establish or continue its own testing requirement rule for that chemical substance "for purposes similar to those for which testing is required" by EPA.[16]

  EPA has issued testing rules for several hundred chemicals under Section 4.[17] These would preempt similar testing requirements by states, but research has uncovered no cases finding preemption of state testing requirements by EPA testing rules.[18]
- If EPA prescribes a rule or order under TSCA Section 5 (new chemicals) or Section 6 (existing chemicals), which is designed to protect against a risk of injury to health or the environment associated with a chemical substance, then a state or political subdivision cannot establish or continue any non-identical requirement applicable to the same chemical substance (or article containing such

[9] 15 U.S.C. §2608.

[10] 15 U.S.C. §2620.

[11] Five titles have been added to deal with particular chemical concerns: asbestos (Title II), indoor radon (Title III), lead (Title IV), environmental exposures in schools (Title V), and formaldehyde in composite wood products (Title VI).

[12] 15 U.S.C. §2602(2)(B).

[13] 15 U.S.C. §2617.

[14] 15 U.S.C. §2617(a)(1).

[15] 15 U.S.C. §2617(a)(2), (b).

[16] 15 U.S.C. §2617(a)(2)(A).

[17] *See generally* 40 C.F.R. pt. 799.

[18] EPA also works with chemical companies to develop needed data via Enforceable Consent Agreements and Voluntary Testing Agreements; these do not have preemptive effect because TSCA's testing preemption applies only to rules, not orders or agreements. 15 U.S.C. §2617(a)(2)(A).

chemical substance) that is designed to protect against the same risk.[19]

Since 1976, EPA has promulgated rules imposing restrictions to protect against risk of injury to health or the environment from six existing chemicals under Section 6 of TSCA[20] and four new chemicals under Section 5(f).[21] These few EPA rules have not preempted many state or local requirements.[22]

Because these are the only bases for preemption, EPA information-gathering rules under Section 8, or actions under any other section of TSCA, do not preempt state or local actions. Pursuant to exceptions, any preemption by EPA rules or orders under Sections 5 or 6 would *not* extend to the following:

- State regulations on the manner or method of disposal of chemicals; an EPA rule pertaining to disposal has no preemptive effect.[23]
- State requirements that are identical to federal requirements,[24] enabling states to provide additional enforcement (co-enforcement) of those requirements.
- State requirements that are adopted under the authority of any other federal law.[25]
- Complete prohibitions on the use of particular chemicals within a state's jurisdiction. However, a state cannot prohibit the chemical's use in manufacturing or processing of other substances.[26]

TSCA Section 18(b) allows a state to apply to EPA for an exemption to allow a more stringent state chemical risk management regulation that would otherwise be preempted.[27] EPA may, by rule, grant such an exemption so long as compliance with the state requirement would not cause a violation of the federal requirements for the chemical; would provide a significantly higher

[19] 15 U.S.C. §2617(a)(2)(B).

[20] The section 6 rules are a ban on manufacturing, processing, distribution in commerce and use of PCBs, 40 C.F.R. pt. 761 (specifically required by TSCA section 6(e)); a ban on manufacture, processing, distribution in commerce of chlorofluorocarbons (CFCs) for aerosol propellants, 43 Fed. Reg. 11318 (Mar. 17, 1978) (other uses of CFCs were later phased out under the Clean Air Act); a ban on storage and disposal of waste contaminated with a certain dioxin at one facility in Arkansas (revoked five years later upon the effective date of the Resource Conservation and Recovery Act (RCRA), 50 Fed. Reg. 1978 (Jan. 14, 1985)); a limit on certain uses of metalworking fluids, 40 C.F.R. pt. 747; and a ban on hexavalent chromium chemicals in comfort (i.e., non-industrial) cooling towers, 40 C.F.R. §749.68. A ban on asbestos was largely struck down in 1991 (except with respect to certain new uses), because, among other reasons, the court held that EPA had not considered less burdensome alternatives as required by TSCA section 6. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

[21] *See* EPA, TSCA Chemical Substance Inventory, 2014 version, *available at* http://www.epa.gov/oppt/existingchemicals/pubs/tscainventory/ (search of "regulatory flags" in inventory file). The new chemicals regulated under TSCA section 5(f) are all used in metalworking. *See* 40 C.F.R. pt. 747; 49 Fed. Reg. 36846 (Sep. 20, 1984); 49 Fed. Reg. 24658 (June 14, 1984); 49 Fed. Reg. 2762 (Jan. 23, 1984).

[22] EPA has also issued a number of consent orders under Section 5(e) imposing restrictions on individual manufacturers, and Significant New Use Rules under Section 5(a) requiring notification to be submitted prior to manufacturing or processing chemicals for non-ongoing uses designated as "significant" by EPA, but these actions do not appear to have been subjected to judicial analysis as to their preemptive effect on any state or local requirements.

[23] 15 U.S.C. §2617(a)(2)(B) (citing 15 U.S.C. §2605(a)(6)).

[24] 15 U.S.C. §2617(a)(2)(B)(i).

[25] 15 U.S.C. §2617(a)(2)(B)(ii) (citing Clean Air Act as an example).

[26] 15 U.S.C. §2617(a)(2)(B)(iii).

[27] 15 U.S.C. §2617(b).

degree of protection from risk; and would not "unduly burden interstate commerce."[28] It appears that no exemption rule has ever been issued.[29]

Section 18 of TSCA does not expressly preempt or affect lawsuits regarding chemical exposures under common law.[30] Nonetheless, courts would generally interpret preempted "requirements" to include state common law.[31] Thus, it is possible, for example, that a defendant's compliance with TSCA could provide a viable preemption defense to a lawsuit, if the common law or statutory requirement forming the basis for the lawsuit were designed to protect against the same risk as an EPA rule or order under TSCA Sections 5 or 6.[32] The division of federal and state authority over chemicals is also affected by the lack of express authority, in Section 18 or elsewhere, for EPA to share with states any trade secret information that it collects that is confidential under TSCA Section 14.

TSCA Amendment Proposals in the 114th Congress

Legislative Background and Status

Legislative efforts to revise TSCA's chemical regulatory framework date back at least to 2005.[33] The legislative proposals that have been discussed over this time generally would preserve the basic organization of TSCA Title I; for example, provisions related to testing would remain in Section 4, new chemicals and new uses in Section 5, regulation of existing chemicals in Section 6, and preemption in Section 18. They would also generally continue TSCA's exclusion of specified categories of substances regulated under other laws. Yet the proposals would make significant changes to the operation of TSCA. The proposals differ in various respects from one another, however, including with respect to preemption.

In the 114th Congress, S. 697, the Frank R. Lautenberg Chemical Safety for the 21st Century Act, was introduced on March 10, 2015. A hearing on the bill was held before the Senate Environment and Public Works Committee on March 18, 2015.[34] Following a markup, an amended version of S. 697 was ordered to be reported out of the committee on April 28, 2015, on a 15-5 vote with bipartisan support. S. 697 was reported with an amendment in the nature of a substitute on June

[28] *Id.*

[29] The state of Connecticut applied for an exemption to pursue a state registration program for PCB transformers. This was not granted because EPA established a national registration requirement for PCB transformers at 40 C.F.R. §761.30(a)(1)(vi). *See* 63 Fed. Reg. 35384, 35393-94 (June 29, 1998) (discussing Connecticut petition and response).

[30] 15 U.S.C. §2617. However, preemption would apply only to the extent the common law requirement was "designed to protect against" the same risk as an EPA requirement for a chemical.

[31] *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) ("Absent other indication, reference to a State's 'requirements' includes its common-law duties.").

[32] *See Anderson v. Hackett*, 646 F. Supp. 2d 1041, 1053 (S.D. Ill. 2009) (stating in dicta that a showing by the defendant chemical manufacturers that they had complied with EPA's PCB regulations under TSCA "may provide them a defense to Plaintiffs's action" seeking damages and medical monitoring for alleged releases of PCB-containing oil). There have been few or no examples of such defenses outside the PCB context.

[33] Kid Safe Chemicals Act, S. 1391, H.R. 4308, 109th Cong. (2005). *See also* GOVERNMENT ACCOUNTABILITY OFFICE, GAO NO. 05-458, CHEMICAL REGULATION: OPTIONS EXIST TO IMPROVE EPA'S ABILITY TO ASSESS HEALTH RISKS AND MANAGE ITS CHEMICAL REVIEW PROGRAM (2005), *available at* http://www.gao.gov/new.items/d05458.pdf. The Kid Safe Chemicals Act was reintroduced with few substantive changes in 2008. S. 3040, H.R. 6100, 110th Cong. (2008).

[34] *Frank R Lautenberg Chemical Safety for the 21st Century Act: Hearing before the S. Comm. on Env't and Public Works*, 114th Cong. (2015), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_id=60d1e265-cdac-7629-3385-2d72dd8fe3eb.

17, 2015,[35] and placed on the Senate legislative calendar. An alternate proposal, S. 725, the Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act, has not been ordered to be reported out of committee. S. 725 would eliminate express preemption from TSCA entirely,[36] and is not included in this report's comparison.

In the House of Representatives, a discussion draft entitled the TSCA Modernization Act of 2015 was released in early April, and a hearing was held in the Subcommittee on Environment and the Economy of the Committee on Energy and Commerce on April 14, 2015.[37] After some revisions, the House discussion draft was approved by the subcommittee on May 14, 2015, on a 21-0 voice vote, also on a bipartisan basis. The TSCA Modernization Act of 2015 was formally introduced, with some amendments, on May 26, 2015, as H.R. 2576 and referred to the full committee on Energy and Commerce. The committee ordered the bill to be reported on June 3, 2015, on a 47-0 vote, with one abstaining, and the bill was reported on June 23, 2015. The bill, as amended, was debated on the House floor and passed the House on June 23, 2015, on a 398-1 vote.

Comparison

S. 697 and H.R. 2576 address many of the same topics and provisions of TSCA, with important similarities and differences in their approaches. For additional discussion of select issues addressed by the bills, see CRS Report R44434, *Proposed Amendments to the Toxic Substances Control Act (TSCA) in the 114th Congress: H.R. 2576 Compared with the Senate Substitute Amendment*, by (name redacted) and (name redacted) .

S. 697 generally takes a more comprehensive and detailed approach to amending TSCA. It would add, among other new definitions, a definition of the term "safety standard" to mean a standard that ensures, without taking into consideration cost or other nonrisk factors, that no unreasonable risk of injury to health or the environment, including to any relevant "potentially exposed or susceptible population," will result from exposure to a chemical substance under the conditions of use.[38] EPA would be required to establish a risk-based screening process to identify chemicals as high or low priorities for assessment, and then to conduct assessments on the high priority chemicals, with at least 25 assessments initiated by five years after enactment (along with other deadlines).[39] Chemicals found not to meet the safety standard would have to be regulated; EPA would not be limited to the "least burdensome requirements" as under current TSCA, although it would have to take into account costs, benefits, and alternatives.[40] S. 697 would make changes to the new chemical provisions, including imposing new duties on EPA to review such chemicals against the safety standard.[41] New provisions on policies and guidance, including pertaining to use of science, would also impose duties on EPA.[42] Based on amended reporting requirements,

[35] U.S. Congress, Senate Committee on Environment and Public Works, *Frank R. Lautenberg Chemical Safety for the 21st Century Act*, report to accompany S. 697, 114th Cong., 1st sess., June 18, 2015, S.Rept. 114-67 (Washington: GPO, 2015).

[36] S. 725, 114th Cong. §117 (2015).

[37] *H.R. ____, the TSCA Modernization Act of 2015: Hearing before the H. Subcomm. on Env't and the Economy*, 114th Cong. (2015), *available at* http://energycommerce.house.gov/hearing/hr-tsca-modernization-act-2015.

[38] S. 697, 114th Cong. §3(4) (adding new TSCA §3(16)).

[39] *Id.* §6 (adding new TSCA §4A(a)(2)).

[40] *Id.* §8(3) (adding new TSCA §6(a)-(e)).

[41] *Id.* §7 (amending TSCA §5).

[42] *See id.* §4 (adding new TSCA §3A), §23 (adding new TSCA §27(c)-(g)).

EPA would be required to identify chemicals that have not recently been in U.S. commerce as "inactive."[43]

H.R. 2576 would make fewer changes to TSCA. Unlike S. 697, it would not change TSCA's new chemical provisions. Nor would it add a detailed new prioritization scheme for evaluating chemicals (although EPA could likely continue its existing prioritization efforts, the TSCA Work Plan for Chemical Assessments).[44] Similar to S. 697, H.R. 2576 would prohibit EPA from taking into account information on cost and other factors not directly related to health or the environment in conducting risk evaluations, give EPA a mandate and framework to conduct such risk evaluations, and remove the "least burdensome requirements" language from TSCA's risk management provisions for chemicals found to present an unreasonable risk. H.R. 2576 would instead require that chemical rules be cost-effective, unless EPA determines that additional or different requirements are necessary to protect against the identified risk.[45] EPA would have to initiate at least 10 risk evaluations per year, subject to the availability of appropriations.[46]

While doing so in different ways, both bills would also generally expand EPA's testing authority; impose certain requirements pertaining to scientific standards; modify TSCA's confidentiality provisions; expand TSCA's fee provisions; and make certain other changes and additions to other sections of the law—although as noted above, S. 697 would make substantially more changes and additions.

Table 1 below provides a side-by-side comparison of the preemption provisions and other provisions related to the state-federal relationship in these two bills.[47] **Table 1** first describes limits on the universe of state or local rules that would potentially be subject to preemption by EPA actions by comparing the bills' overall preemption scope, exceptions, and savings clauses. These are broadly similar, with some differences at the margins; most notably, both would retain TSCA's chemical-by-chemical preemption approach. **Table 1** then compares the scope and timing of preemption (subject to the exceptions) based on various EPA actions under each proposal. Here, there are somewhat larger structural differences between the bills: for example, S. 697 preempts new state restrictions while a chemical is undergoing assessment by EPA, while H.R. 2576 has somewhat broader preemption on the basis of EPA actions on new chemicals and significant new uses of chemicals. Both bills would preempt state requirements after EPA either imposed requirements on a chemical found to present an unreasonable risk, or after EPA determined that a chemical did not present an unreasonable risk. **Table 1** then compares S. 697's new waiver provisions with those of H.R. 2576, which are retained from current TSCA. Finally, **Table 1** notes several other provisions not pertaining to preemption that nonetheless relate to the federal-state relationship under TSCA.

[43] *Id.* §10 (amending TSCA §8).

[44] *See* EPA, Chemical Safety and Pollution Prevention, Existing Chemicals—Current Chemical Activities (2015), http://www.epa.gov/oppt/existingchemicals/pubs/managechemrisk.html.

[45] H.R. 2576, 114th Cong. §4 (2015) (amending TSCA §6).

[46] *Id.*

[47] *Id.* §7, S. 697 §17 (both amending TSCA §18). Detailed legal analysis whether the bills would preempt any particular state chemical regulation is beyond the scope of this memorandum.

Table 1. Side-by-Side Comparison of TSCA Legislation in the 114th Congress: Preemption Provisions and State-Federal Relationship

Provision	S. 697, Frank R. Lautenberg Chemical Safety for the 21st Century Act (Ordered to be Reported out of Committee April 28, 2015)	H.R. 2576, the TSCA Modernization Act of 2015 (Ordered to be Reported out of Committee June 3, 2015)
State or Local Law Not Preempted—Baseline, Exceptions, and Savings Clauses		
Framework: No Preemption Until EPA Action on a Chemical	Broadly, both bills would retain the general structure of preemption under TSCA Section 18: there would be no effect on state chemical regulations or actions unless and until EPA took certain actions, and preemption would operate on a chemical-by-chemical basis. Current TSCA Section 18(a)(1) states that "[e]xcept as provided … nothing in this chapter shall affect the authority of any State or political subdivision of a State to establish or continue in effect regulation of any chemical…." While S. 697 does not retain this express language, as H.R. 2576 would, the effect of removing this provision would be minimal; it would still remain the case that nothing in TSCA as amended by S. 697 would affect state or local authority over chemicals except as specifically provided in the amended preemption provisions (or as required in narrow circumstances by the Supremacy Clause of the U.S. Constitution; see "Express Conflicts," below).	
Scope Limitation in Definition of Chemical Substances	Both bills would keep TSCA's definition of "chemical substance" and its exclusion from the scope of TSCA of categories including pesticides, tobacco products, nuclear materials, firearms, shells, cartridges, food, food contact substances in containers, drugs, medical devices, and personal care products. Thus, neither EPA actions under TSCA, nor preemption based on EPA actions, would apply to such categories.	
Preemptive Effect of EPA Actions Taken Before Enactment	S. 697 would not change the preemptive effect of any rule or order promulgated or issued by EPA prior to the date of its enactment, or of any rule or order issued after enactment for a chemical already subject to a Section 6 rule on the date of enactment, unless that post-enactment rule or order followed designation of the chemical as a high priority.	H.R. 2576 provides that nothing in it shall be construed as changing the preemptive effect of an action taken by EPA either prior to the date of its enactment, or under Section 6(e) (regarding regulation of polychlorinated biphenyls or PCBs).
Express Conflicts	The Supremacy Clause of the U.S. Constitution would operate in addition to express preemption: "conflict preemption" could be implied under certain circumstances.[a] S. 697 also addresses inconsistent restrictions in its exception for requirements under certain state or local environmental laws, discussed below.	H.R. 2576 would add to the background Supremacy Clause principles, in the provisions preserving existing state chemical programs and restrictions and the other exceptions described below, language allowing preemption if EPA's requirement "actually conflicts" with the state or local requirement.[b]
Preservation of Existing State Chemical Programs and Restrictions	Under both bills, states and localities could continue to enforce actions taken before August 1, 2015, under the authority of a state law, restricting manufacturing, processing, distribution in commerce, use, or disposal of a chemical, and would not be preempted by any EPA action on that chemical. (Local ordinances issued under general local government authority, as well as requirements that are not restrictions, could be subject to preemption.) This provision would grandfather many existing state chemical restrictions from the possibility of preemption by TSCA, but not, for example, any future chemical restrictions that might be issued under states' existing green chemistry statutes. States and localities could also continue to enforce actions taken at any time under long-standing state laws in effect by August 31, 2003, such as California's Proposition 65.	

Provision	S. 697, Frank R. Lautenberg Chemical Safety for the 21st Century Act (Ordered to be Reported out of Committee April 28, 2015)	H.R. 2576, the TSCA Modernization Act of 2015 (Ordered to be Reported out of Committee June 3, 2015)
Exceptions from Preemption for State Reporting and Monitoring Requirements	S. 697 would expressly exempt from preemption any state or local requirement or other action implementing a reporting, monitoring, disclosure, or other information obligation for the chemical substance not otherwise required under TSCA or other federal law.	To the extent state or local requirements for reporting or monitoring of chemicals were designed for information gathering, and not for testing for purposes similar to an EPA testing rule or for protection against exposure, they would not be within the scope of H.R. 2576's preemption. Courts would have to interpret whether particular state or local reporting or disclosure requirements were "designed to protect against exposure."
Exception from Preemption for State Requirements Identical to Federal Requirements	As in current TSCA, a state or local requirement identical to a requirement prescribed by EPA would not be preempted, allowing for co-enforcement. New provisions on penalties and sanctions would differ somewhat between the two bills but would generally aim to avoid duplicative penalties by preventing states from assessing a penalty for a violation for which EPA had already assessed a penalty.	
	S. 697 would cap the penalties and sanctions available to states at the level available to EPA. EPA could not assess a penalty for a violation for which a state had already assessed a penalty.	H.R. 2576 would allow available state penalties and sanctions to be more stringent than those available to EPA; it would also allow EPA to assess a penalty for a violation for which a state had already assessed a penalty so long as the combined total of the penalties did not exceed the maximum that EPA could assess. This exception would not extend to testing requirements for purposes similar to an EPA testing requirement.
Exception from Preemption for Requirements Under Other Federal Laws	State or local requirements or various other actions adopted or authorized under the authority of any other federal law, or adopted to satisfy or obtain authorization or approval under any other federal law, would be shielded from preemption. This language is somewhat broader than current TSCA, which is limited to "requirement[s] … adopted under" the authority of any other federal law.	The H.R. 2576 exception would be similar to current TSCA: state or local requirements adopted under the authority of any other federal law would be shielded from preemption. However, this exception would not extend to testing requirements for purposes similar to an EPA testing requirement.

Provision	**S. 697, Frank R. Lautenberg Chemical Safety for the 21st Century Act** (Ordered to be Reported out of Committee April 28, 2015)	**H.R. 2576, the TSCA Modernization Act of 2015** (Ordered to be Reported out of Committee June 3, 2015)
Exceptions from Preemption for Disposal-Related Requirements or Requirements Under Certain State or Local Environmental Laws	State or local chemical requirements or actions adopted pursuant to state or local authority related to waste treatment or disposal would not be preempted; restrictions on disposal are not included within the scope of preempted actions. Requirements or actions adopted pursuant to authority under a state or local law related to water quality or air quality also would not be preempted. However, to the extent such requirement or action, in fact, imposes a restriction on the manufacture, processing, distribution in commerce, or use of a chemical, it would be preempted if it (a) addresses the same hazards, exposures, and use conditions as EPA's safety determination, but is inconsistent with EPA's action; or (b) would cause a violation of the EPA action.	State or local requirements "related to waste treatment or waste disposal" would not be preempted, and EPA disposal-related requirements would not have preemptive effect. State or local chemical requirements "adopted to protect air or water quality" would not be preempted. This phrase is worded somewhat more narrowly than the comparable phrase in S. 697, because while S. 697 extends to actions under authorities "related to" air or water quality, H.R. 2576 would require the actions to be adopted "to protect" them; H.R. 2576 would thus require purpose, as opposed to relation. Like the exception above, these exceptions would not extend to any testing requirements for purposes similar to an EPA testing requirement.
Savings Clause for Various Rights, Causes of Action and Remedies	S. 697 would protect the following from being preempted by EPA actions under TSCA as amended by S. 697: - any federal or state common law rights or statute creating either a remedy for civil relief (including civil damages), or a penalty for a criminal conduct, - any cause of action for any injury based on any legal theory of liability. S. 697 does not address interpretation of contracts, except to the extent that contracts would be addressed by common law rights or statutes creating remedies or within any "legal theory of liability."	While similar in many respects to the comparable provision in S. 697, H.R. 2576's savings clause would protect the following from being preempted *or otherwise affected* by EPA actions under TSCA, as amended by H.R. 2576: - federal or state tort law or the law governing the interpretation of contracts, including any remedy for civil relief (including civil damages), whether under statutory or common law, and - any cause of action for any injury based on any "legal theory relating to tort law." "Requirements" do not include tort actions for damages under state law.
Savings Clause for Use of EPA Determinations as Evidence in Civil Actions	Actions by EPA under TSCA as amended by S. 697 (such as a determination that a chemical meets or does not meet the safety standard) cannot be interpreted as dispositive in any civil action in any federal or state court. (Note, however, that such EPA actions, while not dispositive, could still influence a federal or state court's determination if used as evidence.) TSCA as amended by S. 697 would not affect the authority of any court to make a determination in an adjudicatory proceeding with respect to the admissibility of evidence.	It is "not the intent of Congress" that actions by EPA under TSCA as amended by H.R. 2576 be interpreted as "influencing … the disposition" of any civil action for damages. However, use of EPA actions as evidence would be left to courts. In H.R. 2576, this provision is limited to state courts. As with S. 697, TSCA as amended by H.R. 2576 would not affect the authority of any state court to make a determination in an adjudicatory proceeding with respect to the admissibility of evidence.

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Scope and Timing of Preemption Based on EPA Actions		
New Chemicals	S. 697 does not provide for preemption on the basis of EPA orders or consent agreements under amended TSCA Section 5 for new chemicals, unless such actions require the development of information on the chemical (see "Testing," below). S. 697 contrasts in this respect with current TSCA, which provides that, subject to exceptions, any EPA rule or order for a new chemical under Section 5, designed to protect against a risk of injury to health or the environment, preempts state or local requirement designed to protect against that same risk.	H.R. 2576 would not substantively amend TSCA Section 5. Subject to exceptions (see above), any EPA rule or order for a new chemical under TSCA Section 5, promulgated or issued after enactment of H.R. 2576 and designed to protect against a risk of injury to health or the environment, would preempt state or local requirements designed to protect against exposure to that chemical from any use that had been identified in that chemical's premanufacture notification (PMN), as PMNs are "received by [EPA] under [TSCA] section 5(a)." This exposure- and use-based scope of preemption differs from current TSCA's preemption of requirements designed to protect against the same risk as an EPA requirement. (PMNs must contain information on proposed categories of use, to the extent known to or reasonably ascertainable by the submitter.)
Significant New Uses	Similar to current TSCA, Section 5 as amended by S. 697 would authorize EPA to declare certain non-ongoing uses of chemicals "significant new uses" by rule (Significant New Use Rule, or SNUR) and require a Significant New Use Notification (SNUN) 90 days prior to any manufacturing (including importing) or processing of that chemical for that significant new use. A SNUR issued by EPA for a chemical after enactment of S. 697 would narrowly preempt state or local requirements for notification of the use that EPA designated as a significant new use for that chemical, beginning on the effective date of the SNUR, and subject to exceptions (see above). Any state or local requirements for the chemical other than use notification requirements would not be preempted by the SNUR.	Preemption would depend in part on whether a SNUR was deemed to be "designed to protect against a risk of injury to health or the environment." If so, then subject to exceptions (see above), a SNUR for a chemical promulgated by EPA after enactment of H.R. 2576 would preempt requirements designed to protect against exposure to that chemical from "a use identified in a notice received by [EPA] under [TSCA] section 5(a)." As noted above, this would extend to ongoing uses identified in any PMN for the chemical as well as in any new uses identified in any SNUN submitted for the chemical. If a SNUR was deemed to be designed to give EPA an opportunity for evaluation and not to protect against risk, then it would not have preemptive effect. This interpretation, while possible, appears less likely given EPA's use of SNURs to date.

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Testing	If EPA promulgated a rule, issued an order, or entered into a consent agreement requiring development of information (such as by testing) on a chemical under Sections 4, 5, or 6 as amended by S. 697, that EPA requirement would preempt state or local information development requirements for that chemical that would be reasonably likely to produce the same information as the EPA requirement, subject to exceptions (see above).	H.R. 2576 would retain current TSCA Section 18(a)(2)(A), which provides that if EPA promulgates a rule under TSCA Section 4 requiring testing on a chemical, that rule would preempt state or local testing requirements for that chemical for purposes similar to those of the EPA rule. H.R. 2576 would change "rule" to "rule, order, or consent agreement" (but would not change the lack of preemptive effect of pre-enactment testing orders or consent agreements). Exceptions for identical requirements or for requirements under other federal or certain state laws would not apply, nor waivers for the most part (see below), but actions taken under state laws in effect in 2003 would be preserved (see above).
EPA Prioritization and Assessment; New State or Local Restrictions	Subject to exceptions (see above), S. 697 would preempt a state or locality from establishing a *new* restriction (other than on disposal) on a chemical designated by EPA as a high priority for safety assessment under new Section 4A, beginning when EPA defined the scope of the safety assessment, and continuing while EPA conducted the assessment. S. 697 would require EPA to publish the scope of the safety assessment and safety determination as soon as practicable and no later than six months after the date on which EPA designated the chemical a high priority. Until that publication, states and localities could enact new restrictions that would not be preempted. Preemption under this provision would last until EPA completed the safety assessment and safety determination for the chemical; at that time, preemption would either continue, if EPA found the chemical to meet the safety standard, or be temporarily lifted, if EPA found the chemical not to meet the safety standard, as described below. S. 697 would require EPA to complete a safety assessment and safety determination not later than three years after the date of a chemical's high-priority designation, subject to extension. EPA's designation of a chemical as a low priority would not preempt any state or local requirements.	No preemption provision. States and localities could establish new restrictions on chemicals during the period in which EPA evaluated a chemical. (H.R. 2576 does not set forth a specific prioritization process, although as discussed at a hearing, EPA could likely continue its existing prioritization efforts, the TSCA Work Plan for Chemical Assessments. Instead of high priority and low priority lists, EPA would be required to complete a risk evaluation within three years, subject to extension, after: - EPA determined the chemical may present an unreasonable risk of injury to health or the environment because of potential hazard and a potential route of exposure, - EPA began the evaluation on a chemical on its Work Plan, or - a manufacturer of the chemical requested a risk evaluation.)

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EPA Completion of Risk Assessment; Determination that Chemical Does Not Present Unreasonable Risk	If EPA made a final determination under amended Section 6(c) that a chemical meets the safety standard (that is, will not result in an unreasonable risk from exposure under the intended conditions of use, as further defined in S. 697), that safety determination would preempt state and local restrictions (but not disposal restrictions or other requirements) for the uses included within the scope of EPA's safety determination. Exceptions could apply (see above).	If EPA made a final determination under amended Section 6(b) that a chemical will not present an unreasonable risk under the intended condition of use, EPA's determination would preempt state and local requirements designed to protect against exposure to the chemical under intended conditions of use that EPA had considered in the risk evaluation, and to apply under such conditions of use. Requirements not designed to protect against exposure would therefore not be preempted, but state or local disposal requirements could potentially be preempted. Exceptions could apply (see above).
EPA Completion of Risk Assessment; Determination that Chemical Presents Unreasonable Risk	If EPA made a final determination under amended Section 6(c) that a chemical does not meet the safety standard (that is, presents an unreasonable risk from exposure under the intended conditions of use), the preemption of new state or local requirements by EPA's safety assessment of high priority chemicals (see above) would stop. EPA's negative safety determination would preclude preemption of new or existing state or local requirements until the effective date of an EPA rule restricting the chemical under amended TSCA Section 6(d). After a negative safety determination, EPA would be required to promulgate a rule within two years of completing the negative safety determination, subject to extension.	If EPA made a final determination under amended Section 6(b) that a chemical presents or will present an unreasonable risk from exposure under the intended conditions of use, that negative determination would *not* preempt state or local requirements. State or local requirements designed to protect against exposure to the chemical under intended conditions of use considered by EPA in the risk evaluation would *not* be preempted until the effective date of an EPA rule restricting the chemical under amended TSCA Section 6(a). After a negative determination, EPA would be required to promulgate a rule within 180 days after publication of the determination, subject to extension.
EPA Rulemaking and Imposition of Requirements on a Chemical; Scope of Preemption	If EPA imposed any requirement on a chemical by rule under amended Section 6, then any non-identical, non-disposal-related state or local prohibition or restriction also applicable to that chemical (or to an article containing the chemical) would be preempted consistent with the scope of the safety determination. Preemption would be limited to the uses or conditions of use included in the scope of the rule, but would apply to state or local requirements whether designed to protect against exposure (as under H.R. 2576) or designed to manage risk by some other means. Exceptions could apply (see above).	If EPA imposed any requirement by rule under amended Section 6 (other than a disposal-related requirement) designed to protect against a risk associated with a chemical, then any non-identical state or local requirement also applicable to that chemical (or to an article because the article contains the chemical), and designed to protect against exposure to the chemical under the intended conditions of use considered by EPA in the chemical's risk evaluation, would be preempted. The requirement would not necessarily have to be a "restriction" on the manufacture, processing, distribution in commerce or use of a chemical, as under S. 697, although presumably most "requirement[s] … designed to protect against exposure" would be restrictions. Exceptions could apply (see above).

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EPA Rulemaking and Imposition of Requirements on a Chemical; Timing of Preemption	Preemption would start on the EPA requirement's "effective date." It could be a matter of interpretation whether this would necessarily be the date that full compliance with the EPA rule's requirements would be mandatory, if EPA set an "effective date" earlier than when all requirements would be enforced. (Section 6 as amended by S. 697 would require rules under that section to include "dates by which compliance is mandatory," which must be "as soon as practicable.")	Preemption would start on the EPA requirement's "effective date" which possibly could differ from the date that compliance with all the EPA rule's requirements became mandatory. (H.R. 2576 would retain TSCA's requirement that EPA "specify in any [Section 6] rule … the date on which it shall take effect, which date shall be as soon as feasible," and would add a provision requiring that "any rule … shall provide for a reasonable transition period.")
Exemptions or Waivers from Otherwise Applicable Preemption		
Discretionary Exemptions for States or Localities	S. 697 would add a new TSCA Section 18(f) governing state exemptions (or waivers) in greater detail than current TSCA, with provisions for both discretionary and required waivers. Upon application of a state or locality, the EPA Administrator (non-delegable) could, in his or her discretion, promulgate a rule exempting from preemption a chemical restriction relating to effects of or exposure to a chemical, under such conditions as EPA would prescribe, if EPA determined that: (1) compelling state or local conditions warrant granting the waiver to protect health or the environment; (2) requirement would not unduly burden interstate commerce; (3) the requirement would not cause a violation of federal law; and (4) the requirement is consistent with sound objective scientific practices, the weight of the evidence, and the best available science. The Administrator would have to decide on an application within 180 days.	H.R. 2576 would retain current TSCA Section 18(b), which allows for discretionary waivers. EPA (not specifically limited to the Administrator in a non-delegable capacity) in its discretion, upon application of a state or locality, could issue a rule exempting a state or local chemical restriction (but not a testing requirement unless designed to protect against risk) from preemption, under such conditions as EPA may prescribe, if EPA determined that: (1) compliance with the state or local requirement would not cause a violation of the federal requirement; (2) the state or local requirement provides a significantly higher degree of protection from risk than the EPA requirement; and (3) the state or local requirement does not, through difficulties in marketing, distribution, or other factors, unduly burden interstate commerce. Unlike S. 697, there is no specific requirement for waivers to be consistent with any scientific criteria. No timeline for exemption decisions is provided.

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Required Exemptions for States or Localities	The Administrator would be required to grant an exemption application for a state or local requirement relating to the effects of exposure to a chemical if conditions (2) and (3) above were met and the state or locality "has a concern about the chemical substance or use of the chemical substance based in peer-reviewed science." Rulemaking would not be required, although public notice and opportunity for comment generally would be. The Administrator would have to decide on an application made on this basis within 90 days, or approval would be automatic. Approval would also be automatic if EPA missed its deadline for completing a safety determination.	No comparable provision.
Judicial Review of State or Local Waiver Decisions	Any person could petition for judicial review within 60 days of a decision of the administrator on exemptions, or a failure to meet the 180 or 90 day deadline.	Judicial review of EPA's exemption decisions would be governed by the Administrative Procedure Act;[c] TSCA does not have, and H.R. 2576 would not add, any specific provision regarding judicial review of EPA decisions on state exemptions.
Critical Use Exemptions from EPA Rules; Effect on Preemption	In general, EPA would be authorized to exempt uses of a chemical from any restriction in a Section 6 rule if EPA made any of several determinations and imposed conditions in a rule exempting such uses. State and local restrictions on the exempted uses apparently still would be preempted by the rule from which the uses were exempted, unless the uses were excluded from the scope of the Section 6 rule itself.	H.R. 2576 would authorize comparable critical use exemptions, but with different EPA determinations. Also, a rule would not be required, but the exemption could be granted only after public notice and opportunity for comment. State and local restrictions on the exempted uses apparently still would be preempted by the rule from which the uses were exempted. Exclusion of any uses from the scope of the Section 6 rule also apparently would not affect preemption.

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Other Provisions Related to State-Federal Relationship		
Consideration of State Recommendations	S. 697, in a new Section 4A of TSCA on prioritization of chemicals for evaluation, would require EPA to consider information and recommendations submitted by a state governor or agency regarding a chemical in making prioritization decisions regarding that chemical.	No comparable provision.
State Notification Duty	Under new Section 4A, states would be required to inform EPA if they proposed or enacted a new restriction on a chemical EPA had not designated as high priority.	No comparable provision.
Disclosure of Confidential Information to States	Under amended Section 14, EPA would be required to disclose confidential information to a state or locality (S. 697 does not include tribes), on written request, for development, administration, or enforcement of a law if agreements ensure that the state or locality can and will protect the information, and EPA notifies the submitter of the disclosure. EPA would also have to disclose confidential information on request in emergency situations, subject to certain conditions, or to state health or environmental professionals who provided an adequate statement of need.	Under amended Section 14, EPA would be authorized to disclose confidential information to a state, on request, to a state, local, or tribal official for administration or enforcement (but not development) of a law. EPA would also have to disclose confidential information on request to state health or environmental professionals in response to an environmental release.

Source: CRS analysis of S. 697 and H.R. 2576.

Notes: S. 725, the Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act, would eliminate express preemption from TSCA entirely and is not included in this Table.

a. U.S. CONST. art. VI, cl. 2; report footnote 2, *supra*.

b. An amendment changing the "[EPA action] actually conflicts with …" standard to a standard of "impossible … to comply with both the State requirement and" an EPA action was withdrawn at the committee markup. See House Energy and Commerce Committee, Full Committee Vote on the TSCA Modernization Act and FCC Process Reform Act (June 3, 2015), https://energycommerce.house.gov/markup/full-committee-vote-tsca-modernization-act-and-fcc-process-reform-act.

c. 5 U.S.C. tit. 7.

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