



THE LAUTENBERG CHEMICAL SAFETY ACT AND PREEMPTION OF STATE LAWS

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ISSUE

You asked about the impact of the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Lautenberg Act) on state laws prohibiting or restricting the use of certain chemicals. The Office of Legislative Research is not authorized to issue legal opinions and this response should not be considered one. We base the following analysis on the act itself and summaries prepared by the U.S. Senate Environment and Public Works Committee and various advocacy groups.

SUMMARY

In general, the Lautenberg Act, signed into law by President Obama on June 22, 2016, does not preempt state laws enacted before April 22, 2016 that restrict or ban chemicals. Therefore, it appears that it would not preempt PA [14-140](#), an act concerning cadmium levels in children's jewelry (although it is possible a question could be raised about the law's effective date, see below). The Lautenberg Act's impact on future laws depends on several factors, which we discuss below.

BACKGROUND

The Lautenberg Act amends the 1976 Toxic Substances Control Act and requires the U.S. Environmental Protection Agency (EPA) to review chemicals in active commerce. EPA must designate these chemicals as either high priority chemicals (those that may present an unreasonable risk of injury to health or the environment) or low priority chemicals (all others). EPA must evaluate the risks posed by high priority chemicals; risk evaluations are not necessary for low priority chemicals.

The risk evaluation must consider such factors as the high priority chemical's hazards and exposure potential, including to particularly vulnerable populations, such as infants, children, pregnant women, workers, and the elderly; its persistence and bioaccumulation; storage near drinking water supplies; and conditions of use.



Subject to some exemptions, such as for chemicals used for national defense, EPA must restrict the use of any high priority chemical that it finds presents an unreasonable risk. Possible restrictions include imposing warning requirements, restricting specific uses, or phasing out or banning chemicals.

PREEMPTION

The Lautenberg Act does not preempt any state chemical ban or restriction enacted before April 22, 2016. Thus, it would appear that the federal law will not affect PA [14-140](#), Connecticut's ban on cadmium in children's jewelry, signed into law by the governor on June 6, 2014.

Cadmium Law

PA [14-140](#), codified as CGS § [21a-12d](#), delayed, from July 1, 2014 until July 1, 2016, a ban on manufacturing, selling, or offering for sale or distribution in the state, children's jewelry containing more than .0075% (by weight) of elemental cadmium, or compounds or alloys containing it.

As noted above, the Lautenberg Act does not preempt state restrictions enacted before April 22, 2016. It states:

"Nothing in this Act, subject to subsection (g) of this section shall (A) be construed to preempt or otherwise affect the authority of a state or political subdivision of a State to continue to enforce any action taken or requirement imposed or requirement enacted relating to the specific chemical substance before April 22, 2016, under the authority of a law of the state or political subdivision of the State that prohibits or otherwise restricts manufacturing, processing, distribution in commerce, use or disposal of a chemical substance" (H.R. 2576 § 13 (e) (1) (A)).

One question that may arise is whether the controlling date is 2014 (when PA [14-140](#) was approved) or July 1, 2016, the date the law took effect. If the earlier date controls the state law would stand. On the other hand, if the federal law is read so that the controlling date is the date the restriction was imposed (July 1, 2016) then the Lautenberg Act would preempt state law.

PREEMPTION OF STATE LAWS UNDER THE LAUTENBERG ACT

The Lautenberg Act bars states from establishing or continuing to enforce a:

1. law requiring the development of information about a chemical likely to produce the same information EPA requires;

2. law, criminal penalty, or administrative action banning or otherwise restricting the manufacture, processing, distribution, or use of a chemical that EPA has determined (a) does not pose an unreasonable risk or (b) is high priority and for which it has issued a rule; or
3. law requiring notice of the use of a chemical that EPA has specified as new and for which EPA has required notification from the manufacturer (H.R. 2576 § 13 (a) (1)).

The above restrictions are subject to the following conditions:

- States may impose new restrictions on a chemical until the EPA publishes the scope of a risk evaluation of that chemical and again after the risk evaluation is complete and before a final rule is issued, as noted in Table 1, below.
- A state may not enact a law barring or otherwise restricting the manufacture, processing, distribution, or use of a high priority chemical between the time the EPA publishes the scope of the risk evaluation and the (1) statutory deadline for the evaluation's completion or (2) date on which EPA publishes the evaluation, whichever is earlier, (but a state may continue to enforce a law it enacted before EPA published the scope of the risk evaluation) (H.R. 2576 § 13 (b) (1) & (2)).
- If EPA's risk evaluation finds a chemical does not pose an unreasonable risk, its finding preempts state regulation. If the risk evaluation finds the chemical presents an unreasonable risk, a state may impose its own restrictions from that point until EPA issues a rule regulating that chemical. Once EPA issues the rule, states are barred from imposing stricter laws (H.R. 2576 § 13 (a) (1) (B)).
- Federal preemption is limited to the scope of the EPA risk evaluation (e.g., the hazards, exposures, risks, and uses or conditions of use EPA considered). A state law that addresses risks or uses EPA did not consider is not preempted (H.R. 2576 § 13 (c) (2) & (3)).
- Preemption applies only to restrictions on the chemical's manufacture, processing, distribution, or use. It does not apply to state laws on reporting, monitoring, or other information requirements.
- A state may obtain a waiver from federal preemption if it meets certain conditions (see below).

Table 1: When can a state issue a law restricting a chemical’s manufacture, processing, distribution, or use?

EPA Action	Can State Act?
Before EPA Publishes Scope of Risk Evaluation	Yes
Between the date EPA publishes the scope and the date it publishes the risk evaluation, or the statutory deadline for completing it, whichever is earlier	No*
Between the date EPA publishes the risk evaluation and it issues its rule regulating the chemical	Yes
After the date EPA publishes the rule	No*

* Unless it receives a waiver (see below)

Under the Lautenberg Act (H.R. 2576 § 13 (d) (1) (A)), a state also may adopt or enforce any rule, risk evaluation, scientific assessment, or any public health protection that:

1. is adopted or authorized under any other federal law;
2. implements a reporting, monitoring, or other information obligation the Lautenberg Act does not require;
3. is adopted under a state law related to water quality, air quality, or waste treatment or disposal, except to the extent it restricts manufacture, processing, distribution or use of a chemical, or addresses the same hazards and conditions of use included in the Lautenberg acts risk evaluation; or
4. is identical to EPA requirements, except that a state cannot impose a penalty for a violation if EPA already assessed an adequate penalty.

WAIVERS

The Lautenberg Act provides for mandatory and discretionary exemptions from preemption, each of which requires a state to request a waiver.

Required Waiver

EPA must exempt a state restriction if:

1. (a) it is not unduly burdensome to interstate commerce,
- (b) compliance would not violate federal law, and

(c) the state has concerns about the chemical's use based on peer-reviewed science; or

2. no later than the date EPA published the scope of the risk evaluation, or 18 months after EPA began the prioritization process, whichever is sooner, the state enacted a law intended to prohibit or otherwise restrict the chemical's manufacture, processing, distribution, or use (H.R. 2576 § 13 (f) (2)).

EPA must either grant or deny an application for a mandatory waiver no later than 110 days after it is submitted. The mandatory waiver is automatically approved if EPA fails to act on it by the deadline.

A required waiver remains in effect until EPA publishes its risk evaluation. At that point a state may request a discretionary waiver, below.

EPA's decision on an application for a required waiver is subject to judicial review. The act allows a state to file a petition for judicial review within 60 days after EPA decides on the application. The U.S. Court of Appeals for the D.C. Circuit has exclusive jurisdiction in such matters.

Discretionary Waiver

EPA may exempt a state restriction from preemption if it makes the following determinations:

1. there are compelling conditions that make it necessary for the state to protect health or the environment;
2. compliance with the state restriction would not unduly burden interstate commerce or violate any federal law; and
3. in EPA's judgment, the restriction is designed to address a risk in a way that is (a) consistent with the best available science, (b) supported by sound and objective studies, and (c) based on the weight of the evidence (H.R. 2576 § 13 (f) (1)).

EPA must grant or deny an application for a discretionary waiver no later than 180 days after it is submitted.

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