

TSCA REFORM AND PREEMPTION: A WALK ON THE THIRD RAIL

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Over the last 30 months, an impressive array of public sector, private sector, and nongovernmental organizations (NGOs) have endorsed the need for federal chemical control and product safety reform. Most of this attention has focused on the 1976 Toxic Substances Control Act (TSCA), the nation's primary (but hardly the only) statute regulating the manufacture, import, and use of chemicals in the United States. The White House has released "principles" for reform. Committees in the House and Senate have introduced bills, held hearings, and conducted stakeholder meetings on many key issues. Stakeholders from industry, the NGO community, and academia have conferred, written, and opined extensively on the substantive merit, and political likelihood of new chemical control legislation.

Yet, despite a robust debate and even occasional signs of stakeholder consensus on the need for reform/modernization, the public discussion has largely shied away from the issue of preemption—i.e., whether a stronger federal statute would affect the need for, and role of, the many state-specific chemical control programs in place and under development. Indeed, if bashing the current federal chemical control statute has become fashionable, broaching federal preemption in the context of an updated statute has become taboo.

This reticence is unfortunate and, in the long term, counterproductive. Preemption is not a "yes or no" proposition—it is one of several constitutional principles, along with federalism, that policymakers must consider in developing workable environmental policies. Federal preemption can take different forms and be applied in varying degrees. In fact, given the technical complexity of the risks and the economic signifi-

cance of regulatory action, a truly comprehensive chemical control law might need to incorporate multiple preemption standards to address different federal/state policy conflicts.

The preemption discussion is also important for a more pragmatic and political reason. One of the primary incentives for industry to support strengthened federal legislation is concern about the proliferation of state and local standards imposing disparate substantive, procedural, and legal obligations on retailers, manufacturers, and supply chains. Supporters argue that these state-level programs are a necessary response to TSCA's failure to provide EPA with the authority it needs. Critics argue that the unfettered growth of state-specific labeling requirements and use restrictions undermines interstate commerce, reduces customer choice, encourages scientifically unsubstantiated blacklists, and creates public distrust in the safety of domestic products.

There are many different ways policymakers can resolve the tension between preemption and federalism—without undermining the traditional partnership between federal and state governments in protecting the public. The first step is to start the discussion.

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