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EXECUTIVE SUMMARY

In reviewing the statute, regulations, guidance and case law utilized in implementing the Toxic Substances Control Act (TSCA), the ABA SEER Pesticide, Chemical Regulation and Right-to-Know Committee, with the support of the Section’s Special Committee on Congressional Relations (SCCR), developed this paper outlining the preemption of state law and regulations to provide a frame of reference for underlying issues of policy.

Any preemption analysis begins with the Supremacy Clause of the U.S. Constitution. Article VI of the Constitution states:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

When determining whether a federal statute preempts state law, courts look specifically to the intent expressed by Congress when adopting the statute as the “ultimate touchstone” of preemption analysis. Such intent may be explicitly stated in the federal statute or implicitly contained in the statute’s structure and purpose.

There are generally two types of preemption that are relevant to TSCA and the Chemical Safety Improvement Act (CSIA), S.1009. “Express preemption” is relatively straightforward and occurs when there is an explicit command from Congress or a federal agency stating a clear intention to preempt state law.

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2 The ABA is a diverse, non-partisan nongovernmental organization that includes legal practitioners from private sector, public sector, non-profit world, and academia, reflecting a wide diversity of political and policy views. As such, the Section has not taken a formal position endorsing or opposing non-ABA policy proposals or legislation.

3 This report was prepared by Warren Lehrenbaum, Crowell & Moring, Group Leader; Lynn L. Bergeson, Bergeson & Campbell, P.C.; Lawrence E. Culleen, Arnold & Porter LLP; Mark N. Duvall, Beveridge & Diamond, P.C.; Eric P. Gotting, Keller and Heckman LLP; Joanne Thelmo, American Cleaning Institute; and Sarah Beth Watson, Steptoe & Johnson, with contributions from the SEER PCRRTK TSCA Briefing Paper Team, which the authors gratefully acknowledge.

4 U.S. Const. art. VI, cl. 2.


6 Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). It is also important to note that regulations adopted by federal agencies, in addition to federal statutes, can have preemptive effect. Fidelity Fed. Sav. & Loan Ass’n v. De La Cuesta, 458 U.S. 141, 153 (1982).

Express Preemption Example: Congress passes a law governing the sale and use of pesticides which provides that “States shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this” act.\(^8\) Pursuant to this statutory provision, EPA adopts a regulation requiring that warning labels for certain pesticides only use the signal word “CAUTION.”\(^9\) State A then passes a law requiring that the same pesticide must have a label containing the signal word “DANGER.” The state law would be expressly preempted as inconsistent with federal requirements.\(^10\)

“Implied preemption,” on the other hand, takes several forms and is often more difficult to identify.\(^11\) One type is called “field preemption,” which is where federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.”\(^12\) Neither TSCA nor the CSIA would fall under this form of preemption since both allow states to regulate chemicals to some extent. However, another form of implied preemption, called “conflict preemption,” is relevant to the analysis. One type of conflict preemption occurs when it is physically impossible to comply with both federal and state regulations.\(^13\) This is often called “impossibility preemption.”

Conflict (Impossibility) Preemption Example: Federal law and regulations require generic drug manufacturers to use warning labels that are identical to those approved by the government for their brand-name counterparts. Plaintiff A brings a state tort lawsuit claiming personal injuries resulting from her use of a generic drug and argues that the generic manufacturers should have used stronger warning language on their labels. Plaintiff’s failure to warn claim would be preempted. It would be impossible for the generic manufacturers to comply with their duty under federal law to use labels identical to those appearing on the brand-name drug, while at the same time complying with their state-law duty to amend the labels and strengthen the warnings.\(^14\)

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\(^9\) See 40 C.F.R. § 156.64.


\(^12\) Id.

\(^13\) Id.; Cipollone, 505 U.S. at 516.

Conflict preemption also arises where state law prevents “the accomplishment and execution of the full purposes and objectives” of federal law. This is often called “obstacle preemption.” Under this form of preemption courts look specifically to the goals underlying a given regulatory scheme and ask whether the state law would frustrate the federal agency’s efforts to reach those goals.

| Conflict (Obstacle) Preemption Example: | Federal regulations require auto manufacturers to install passive restraints in some, but not all, of their vehicles, and provide a range of passive restraint devices to be introduced by manufacturers into vehicles gradually over time. Plaintiff A, an injured motorist, brings a state design defect lawsuit arguing that her car should have had a driver’s side airbag. Plaintiff’s product liability claim would be preempted. A state tort law requiring airbags in all vehicles would upset the compromise struck by the federal regulations that, on the one hand, attempt to have the auto industry address immediate safety needs while, on the other hand, allow manufacturers to gradually phase-in new passive restraint technologies. |

As discussed in the following sections, both TSCA and the CSIA contain express preemption clauses, as well as provisions that could give rise to conflict preemption.

I. TSCA’S PREEMPTION APPROACH

TSCA contains a limited express preemption provision under which states may regulate chemical substances in a wide range of circumstances. In fact, states are generally free to impose restrictions on any chemical substance if EPA has not specifically addressed that substance under the statute. Section 18 begins with the premise that no state regulation is preempted until EPA adopts a rule governing a specific chemical substance. TSCA states that “[e]xcept as provided in paragraph (2), nothing in this [Act] shall affect the authority of any State or political subdivision of a State to establish or continue in effect regulation of any chemical substance, mixture, or article containing a chemical substance or mixture.”

Paragraph (2) of section 18 then sets forth two types of federal regulation that would have preemptive effect.

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If EPA promulgates a regulation under section 4 requiring that a certain chemical or mixture be tested, a state cannot adopt a similar rule; or\(^\text{18}\)

Where EPA prescribes a regulation or order under sections 5 or 6 that is designed to protect health or the environment against a risk posed by a particular chemical substance or mixture (e.g., limiting a chemical to certain uses), a state cannot adopt a rule guarding against the same risk.\(^\text{19}\)

Absent these two scenarios, however, a state will typically be free to regulate chemical substances.

Even where EPA adopts a rule protecting against a risk to health or the environment regarding a particular chemical substance, TSCA sets forth three exceptions to preemption that allow a state to regulate that substance.\(^\text{20}\)

- The state requirement is identical to the federal regulation;
- The state adopts its regulation under the authority of another federal law (e.g., the Clean Air Act); or
- The state prohibits (i.e., bans) the use of a chemical substance or mixture within its borders (other than its use in the manufacture or processing of other substances or mixtures).

In addition, section 18 allows a state to apply to EPA for an exemption or waiver where a state regulation protecting against a risk to health or the environment would otherwise be preempted. To qualify, the state must show that its requirement:

- Would not cause the manufacturing, processing, distribution, or use of the substance, mixture, or article to violate a TSCA rule governing the same risk;
- Provides for a significantly higher degree of protection from such risk when compared to the TSCA rule; and
- Would not, through difficulties in marketing, distribution, or other factors, unduly burden interstate commerce.\(^\text{21}\)

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\(^\text{19}\) 15 U.S.C. § 2617(a)(2)(B). This provision, however, does not apply to EPA rules promulgated under section 6(a)(6) that prohibit or regulate “any manner or method of disposal” of such chemical.

Given the limited scope of section 18, there have been only a few instances in which courts have found preemption under TSCA. Virtually all federal court decisions addressing preemption focus on just one chemical – polychlorinated biphenyls (PCBs) – which, unlike most other chemical substances, are subject to specific manufacturing, use, and disposal restrictions under the statute and, as a consequence, are more likely to give rise to preemption.22

Finally, in addition to TSCA’s express preemption clause, there are certain provisions in the statute that could result in conflict preemption. For instance, section 6 allows EPA to impose use restrictions on an existing chemical substance if the Agency determines that the substance “presents or will present an unreasonable risk of injury to health or the environment.”23 One such requirement could be a warning label prescribed by EPA.24 If a state were to promulgate a regulation which required the manufacturer to use a different label, conflict preemption might come into play.

II. CASE LAW ON PREEMPTION OF STATE LAW AND REGULATIONS

When considering whether a federal statute preempts state tort law, one must be familiar with the general approach courts take in any preemption analysis.

Judges employ various interpretive devices when considering preemption provisions. These include the following:

- Courts look to the plain language of the statute and apply rules of statutory construction, such as giving every word or phrase meaning and avoiding interpretations that render statutory text superfluous;25

- Judges consider the overall structure and purpose of the statute, including Congressional findings and statements of intent appearing in the statute’s preamble;26 and

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21 15 U.S.C. § 2617(b). This waiver provision, however, has been used only sparingly by states seeking to regulate a chemical where EPA is already regulating the substance under TSCA.

22 15 U.S.C. § 2605(e); see, e.g., Rollins Envtl. Serv., Inc. v. Parish of St. James, 775 F.2d 627 (5th Cir. 1985) (holding preempted a local ordinance effectively prohibiting PCB disposal operations); SED, Inc. v. City of Dayton, 519 F. Supp. 979 (S.D. Ohio 1981) (holding not preempted a local ordinance regulating the storage of PCBs because it was adopted under authority granted by the Clean Water Act).


• Courts apply a strong presumption against preemption where Congress has legislated in an area that is traditionally left to the police powers of the States, such as health and safety matters.27

It is also important to keep in mind that courts will typically give significant deference to agency interpretations of ambiguous statutory language. Under what is known as the “Chevron doctrine,” so named after the Supreme Court case in which the doctrine was first articulated, courts will engage in a two-step inquiry when deciding whether to defer to an agency’s interpretation of a statute.28 Specifically, a court begins by asking whether “Congress has directly spoken to the issue” and if the “intent of Congress is clear.” If so, then the court (and the agency) “must give effect to the unambiguously expressed intent of Congress.” However, if the court determines that the statutory provision is silent or ambiguous on a given matter, it will not substitute its own construction of the statute, but rather defer to an agency’s interpretation if it is “based on a permissible construction of the statute.”29 Thus, to the extent that an agency regulation, whether expressly or implicitly, helps define the scope of a statutory preemption clause, a court may give substantial weight to the agency’s interpretation.30

All of these principles have the potential to influence whether section 15 of the CSIA will have the effect of preempting state laws.

III. CSIA’S PREEMPTION APPROACH31

Section 15 of the CSIA would amend section 18 of TSCA to include an express preemption provision that differs in scope from the express preemption provision currently found in TSCA.32 While the CSIA is similar to TSCA in that it does not preempt the entire field of chemical control, but is only triggered where EPA has taken some type of action with regard to a specific chemical substance, the potential for preemption under the CSIA is more varied.

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27 Id. at 485.


29 Id. at 842-43.


32 S. 1009, § 15.
Section 15 begins by striking TSCA’s prefatory language reciting a general rule of non-preemption regarding states’ authority to regulate chemicals and, instead, provides that “no State or political subdivision of a State may establish or continue to enforce” the following:

- A requirement for the development of test data or information for a certain chemical substance or category of substances if it is reasonably likely to produce the same data or information already required by EPA under sections 4, 5, or 6 of the CSIA, whether by rule, consent agreement or order;

- A prohibition or restriction on the manufacture, processing, or distribution in commerce or use of a chemical substance after EPA has completed a safety determination for that substance under section 6; or

- A requirement for the notification of a use of a chemical substance that EPA has specified as a significant new use and for which the Agency has required notification under section 5.

Moreover, with respect to new state prohibitions or restrictions established after the CSIA is enacted, states cannot adopt:

- A prohibition or restriction on the manufacture, processing, distribution in commerce or use of a chemical substance that has been designated by EPA as a high priority substance under section 4 (as of the date on which the Agency publishes a schedule for the safety assessment under section 6); or

- A prohibition or restriction on the manufacture, processing, distribution in commerce or use of a chemical substance that has been designated by EPA as a low priority substance under section 4.

These provisions, covering both existing and new state chemical regulations, contrast with TSCA’s preemption scheme in several respects.

First, under TSCA, a state can regulate a chemical substance up and until EPA adopts a rule imposing restrictions on that substance. Under the CSIA, however, preemption may be triggered at an earlier point in the regulatory process. For example, with regard to state regulations established after the CSIA is enacted, preemption would apply if EPA has designated the chemical substance as high priority, but before EPA has completed a safety assessment or imposed any restrictions.

Second, TSCA allows states to regulate a chemical where EPA has not taken any affirmative action adopting restrictions to protect human health or the environment. Under the CSIA, however, a state regulation established after the CSIA is passed would be preempted as soon as EPA has designated a chemical as low priority, even though this means the Agency has not done a safety assessment or imposed any restrictions on that substance.
Third, under TSCA, even where EPA has placed restrictions on a chemical substance, a state can adopt an identical regulation or impose an outright ban within its borders. Under the CSIA, the exceptions to preemption are more limited. Specifically, a state may only enforce “a requirement, prohibition, or restriction” that:

- Is adopted under the authority of any other federal law;
- Implements a reporting or information collection requirement not otherwise required by EPA under the CSIA or other federal law; or
- Is adopted under state law related to water quality, air quality, or waste treatment, and which (i) does not impose a restriction on the manufacture, processing, distribution in commerce, or use of the chemical substance and (ii) is not otherwise inconsistent with an action taken by EPA under sections 5 or 6.

Section 15 of the CSIA, like TSCA, also contains a state waiver provision. Specifically, EPA may grant a preemption waiver for a state regulation that “relates to the effects or exposure to any chemical substance under the intended conditions of use” if:

- The state determines that it cannot wait until EPA completes a full safety assessment and determination for a given substance and the Agency determines that “compelling State or local conditions warrant granting the waiver to protect human health or the environment”; or
- EPA determines that a safety assessment or determination “has been unreasonably delayed” and the state certifies that it has “a compelling local interest to protect human health or the environment.”

In the event that a waiver is granted by EPA, section 15 would also place time limitations on how long the waiver will apply. The first type of waiver would remain in effect “unless the waiver is found to be in conflict with a completed safety assessment and determination.” The second type would remain in effect “until such time as the safety assessment and determination is completed.”

The CSIA’s state waiver provision would take a different approach than the waiver clause under TSCA. For instance, when filing a waiver application under TSCA, the state is not required to justify the need for additional state regulation, as long as it is more stringent than the federal requirement and meets several other conditions. Under the CSIA, however, there would have to be a finding that, as a practical matter, the safety assessment and determination process

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33 Id. (emphasis added). Both forms of waiver also generally require that compliance with the state requirement will not unduly burden interstate or foreign commerce, or violate any federal law, rule, or order. Each type of waiver also requires that the state requirement is based on certain scientific principles.

34 Applications for waivers are also subject to public notice and comment, with any decision made by EPA on such application also subject to judicial review.
is, in essence, taking too long, and that there is a compelling state or local interest justifying the state regulation. Moreover, a waiver under TSCA may last indefinitely (if not otherwise limited by EPA), whereas under the CSIA a waiver would be subject to specific time limitations.

Finally, conflict preemption could also be implicated under the CSIA in certain circumstances. For example, if EPA were to determine that a chemical substance does not satisfy the safety standard under the intended conditions of use, EPA would have to impose additional restrictions, which could include prescribed warning labels. Just as under TSCA, a state law requiring a different label might conflict with actions taken by EPA under the CSIA and any implementing regulations.

IV. APPLYING THE LAW TO PROPOSED POLICY

The extensive testimony and comments that have been submitted to Congress by interested parties since the CSIA was introduced reveal different views of the preemption provision and its potential impact on state chemical control law. While section 15 is detailed in many respects, and provides substantial direction as to when EPA actions would (or would not) preempt state action, as with any legislation some ambiguity remains. If these ambiguities are not clarified, EPA and judges would be left to interpret various portions of the preemption clause and to fill in these gaps, thus allowing them to define, at least to some extent, the nature and scope of CSIA preemption as it would actually be applied.

The following sections identify some of these apparent ambiguities, examine how they could affect efforts by states to regulate chemical substances and, where appropriate, offer some simple suggestions for clarifying Congressional intent.

A. CSIA Findings and Intent

Since the CSIA has not been passed, many of the sources that agencies and courts typically turn to when gauging Congressional intent, such as legislative history, agency interpretations, and other judicial opinions regarding the statute, are not yet available. However, some guidance is provided by the various statements of findings, policy, and intent made in the preamble sections to the CSIA, which could be used by EPA and courts when interpreting the nature and scope of the legislation’s preemption provision.

These statements reveal the intent to have a strong federal presence in the area of chemical control. Section 2 provides that TSCA “should be modernized to create a robust

35 S. 1009, adding § 6(c)(9) to TSCA.

36 Both TSCA and the CSIA also have provisions that would determine whether a state tort action is preempted. In a state tort suit, plaintiffs typically allege that they were harmed by an exposure to a chemical substance or other hazardous material. Because the Committee is providing an in-depth analysis of preemption as applied to tort actions in a separate White Paper, this document does not address the issue further.
Federal system for assessing and managing chemical risks” and “to build public confidence in the ability of the Federal regulatory system to protect health and the environment.” This approach is designed, moreover, to alleviate burdens placed on manufacturers by having to comply with different chemical control laws adopted by various states. Section 2 explains that the CSIA aims at “promoting uniform protections through regulation of chemical substances in commerce, to minimize undue burdens on commerce.” In addition, section 2 explicitly provides that the CSIA is intended to “minimize burdens on States” and thus “specified actions by [EPA] should preempt requirements by States . . . that relate to the effects of or exposure to a chemical substance.” Also, when discussing the role of states under the legislation, the CSIA provides some examples that are somewhat limited in scope, like “recommending priorities for Federal assessment and regulation, [and] providing safety assessment information.”

At the same time, however, there are indications that states should retain some degree of authority over chemical control notwithstanding the legislation. Section 2, for instance, says that “States have an important role in protecting health and the environment from the unmanaged risks of chemical substances” and that this includes “fostering programs to protect consumers.” As discussed below, this brings to mind Green Chemistry initiatives or labeling programs like California’s Proposition 65. Moreover, the structure of the CSIA reveals that states will have at least some room to directly regulate chemical substances. States will be able to act on substances that have not yet been addressed under the CSIA, and the preemption clause sets forth a number of exceptions allowing state regulation.

As discussed below, these competing interests, as expressed in the legislation’s preamble language, would have to be reconciled by EPA and the courts when dealing with any ambiguities in the CSIA’s preemption provision.

**B. Warnings and Use Instructions**

One area of ambiguity raised in testimony and comments submitted to Congress relates to the potential preemption of state-required labels or other warnings and use instructions. The CSIA preemption provision does not explicitly address labels or other types of warnings or use instructions. Instead, section 15 expressly preempts state action that constitutes “a prohibition or restriction on the manufacture, processing, or distribution in commerce or use of a chemical substance” where EPA has addressed the chemical substance at issue (e.g., where the Agency has issued a completed safety determination). Moreover, for those chemical substances found not to comply with the CSIA’s safety standard, EPA would be directed under section 6 to impose additional use restrictions, which may include “a requirement that a chemical substance be marked with, or accompanied by, clear and adequate warnings and instructions with respect to use, distribution in commerce, or disposal . . . with the form and content of the warnings and

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37 S. 1009, § 2(b).

38 S. 1009, § 2(b) (see also statement of intent that EPA shall “implement this Act . . . in such a manner as not to unduly impede commerce or create unnecessary economic barriers to technological innovation”).
instructions to be prescribed by” the Agency. As discussed below, sections 6 and 15 both have the potential to preempt State labeling or warning requirements in at least some circumstances.

Two examples of state labeling and warning requirements that have been mentioned by commenters are California’s Proposition 65 (Prop 65) and its recently adopted Green Chemistry regulations. Prop 65 requires businesses to provide “clear and reasonable” warnings regarding exposures to chemicals in consumer products that are known to cause cancer or reproductive harm. This provision is self-executing, with warnings required for any chemical placed on California’s Prop 65 list. Businesses are not necessarily required, however, to use a packaging label. They can also rely on shelf labeling, signs, or other methods, provided the alternative is reasonably calculated to reach the user prior to exposure.

California’s Green Chemistry initiative takes a different approach. Under the applicable regulations, California has compiled a list of substances known as “Candidate Chemicals.” However, unlike Prop 65, the mere listing of a chemical does not trigger labeling or other responsibilities to warn or provide use instructions. Instead, California’s Department of Toxic Substances Control (DTSC) will select various consumer products containing such chemicals (which, at that point, are then re-designated as “Chemicals of Concern” or “CoCs”) and require the submission of extensive information regarding the product/CoC combinations (called “Priority Products”), including the availability of potentially safer alternatives. The DTSC then has an opportunity to impose “Regulatory Responses” on Priority Products that do not eliminate the CoC. These responses may include package labeling or point of sale displays that identify known hazards and any safe handling steps or other precautions aimed at preventing or limiting exposure to the chemical.

Depending on how broadly or narrowly terms like “use” and “distribution” are interpreted as they appear in the CSIA, Prop 65 or Green Chemistry warnings or instructions might or might not be expressly preempted. For example, one might argue that a state labeling requirement obligating a manufacturer to provide health warnings does not explicitly regulate how a product is distributed or used, and thus the express preemption clause would not be implicated. Prop 65, for instance, specifies language like “WARNING: This product contains a

39 S. 1009, § 6(2), adding § 6(c)(9)(B)(i) to TSCA.
43 Cal. Code Regs. tit. 22, § 69502.3.
45 Cal. Code Regs. tit. 22, § 69506.3.
chemical known to the State of California to cause cancer.”

Nothing in that language goes directly to the management of a chemical. Thus, under this interpretation of the preemption provision, states would be free to impose these or similar warning requirements and would not be subject to section 15’s express preemption provision. On the other hand, a manufacturer might claim that, as a practical matter, the health warnings will compel distributors to take certain precautions or consumers to use (or not use) a product in a certain manner, even if the CSIA is otherwise silent as to these issues. In that respect, the labeling does implicate “distribution” and “use,” and it could be argued that preemption should apply if EPA were to take certain actions.

Another example involves a product label that goes beyond mere warnings and, instead, outlines various use restrictions placed on the chemical substance or consumer product. For example, under the Green Chemistry initiative, DTSC may impose use restrictions on high priority chemicals that do not meet the safety standard, such as requiring consumers to wear protective clothing or to only use the product in ventilated areas.

In those circumstances, the label might be preempted under CSIA section 15 as a restriction or prohibition on a particular “use” with respect to a chemical substance for which EPA has taken prescribed action, again dependent on how EPA or the courts apply that term.

Furthermore, if EPA were to prescribe a certain label or other type of warning or instruction under the CSIA that directly conflicts with a Prop 65 or Green Chemistry requirement, thereby making it impossible for a manufacturer to comply with both standards, then conflict preemption would also come into play. For instance, it may be that EPA prescribes a warning that is specifically limited to identifying all of the risks found during the safety assessment, none of which include a cancer risk identified under Prop 65.

Finally, it is not entirely clear what form of warning or use instruction is envisioned under section 6 of the CSIA. That provision allows EPA, where the safety standard is not met, to require that “a chemical substance [be] marked with, or accompanied by, clear and adequate warnings and instructions.” One interpretation of that language might be that it is limited to labels – in other words, warnings and use instructions that are attached to and follow the product.

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46 Cal. Code Regs. tit. 27, § 25603.2.

47 Cal. Code Regs. tit. 22, § 69506.3.

48 It should be noted, however, that the mere fact that the CSIA could preempt California warnings or use instructions in certain circumstances does not mean that the legislation would completely preempt all labeling or other similar requirements under Prop 65 or the Green Chemistry initiative. CSIA’s preemption provision would only take effect when EPA has taken prescribed action with respect to a specific chemical substance. So if the Agency has not yet taken a prescribed action on a particular chemical substance, California would be free to require labeling or instructions for such substance.

49 See, e.g., Tri-Union Seafoods, 2006 WL 1544384, at **60-61 (holding that it would be impossible for tuna canners to comply with a Prop 65 warning where the FDA said such warning would conflict with federal requirements by warning of a risk not on the federal label).

50 S. 1009, § 6(2), adding § 6(c)(9)(B)(i) to TSCA.
as it makes its way to the ultimate consumer. It could be argued, therefore, that point of sale signs, which are permitted under Prop 65 or the Green Chemistry initiative, would not fall under that provision given that they are not part of the packaging or product. Some courts have reached this conclusion when considering other federal statutes with similar preemption language in the context of Prop 65. But at this point, it is not evident whether a point of sale sign would fall under section 6’s use restriction provisions.

These are a few examples of how state labeling or other warning or use instruction requirements might be subject to preemption under the CSIA. They illustrate in particular how the CSIA’s language, when coupled with various ambiguities in the legislation, could affect preemption depending on how EPA and the courts interpret sections 6 and 15.

If Congress does not intend to preempt these types of state requirements, however, this could be clarified through the use of a “savings clause.” The CSIA could explicitly state that Prop 65, the labeling requirements under the California Green Chemistry program, and similar regulations in other states are not preempted. This is the approach, for example, that was taken under the Consumer Product Safety Improvement Act (CPSIA), which provides that:

Nothing in this Act or the Federal Hazardous Substances Act shall be construed to preempt or otherwise affect any warning requirement relating to consumer products or substances that is established pursuant to State law that was in effect on August 31, 2003.

Congress should consider, however, the scope of any savings clause. Would it only apply to requirements for straight-forward warnings (e.g., “DANGER – this product could result in injury if ingested”), as the CPSIA appears to do, or would it be worded more broadly to include requirements for explicit use instructions or restrictions (e.g., “Do not use in enclosed spaces”)? Depending on where Congress draws this line, the extent of preemption under the CSIA could vary dramatically.

C. Reporting and Information Collection Exception

The CSIA also contains several exceptions to preemption that may leave room for different interpretations. One such exception provides that preemption would not apply to a state requirement that “implements a reporting or information collection requirement not otherwise required by the Administrator under this Act or required under any other Federal law.”

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51 See, e.g., Chem. Specialties Mfrs. Ass’n v. Allenby, 958 F.2d 941, 945-46 (9th Cir. 1992) (finding that Prop 65 point of sale signs are not “labeling” as that term is defined under FIFRA because such signs are not written on or attached to the packaging).


53 S. 1009, § 15, adding § 18(c)(2) to TSCA.
phrase “reporting or information collection requirement,” however, is not defined in the CSIA or TSCA, and therefore could conceivably be applied in various ways.

By way of example, one category of state laws that may be affected by this exception is state Green Chemistry statutes, which have been adopted by at least six states to date.\(^{54}\) While these programs differ in terms of scope and requirements, they share the same underlying goals of identifying and evaluating potentially hazardous chemicals in consumer products and using this information to minimize or eliminate the risk of consumer harm. These programs typically require manufacturers of regulated products to report the presence of specific chemicals in those products and, at least in some states, to evaluate and report on potentially safer alternatives to the chemicals used in those products.

The previous section briefly summarized California’s recently adopted Green Chemistry regulations. At the heart of this program is a requirement that manufacturers of Priority Products (i.e., designated consumer products that contain a Chemical of Concern or CoC) prepare and submit to the DTSC an Alternatives Analysis (AA). Each AA must compare the potential risks posed by the Priority Product and CoC with product design alternatives that minimize or eliminate the CoC, and then select a product design going forward. When conducting an AA, the manufacturer must consider and compare numerous factors with regard to the Priority Product and any potential alternatives, including health and environmental risks, physical chemical hazards, exposure pathways, and waste and disposal impacts. The AA reports themselves must include substantial information, such as a list of all information used to support the AA (e.g., health and safety studies, toxicological evaluations, risk assessments, and exposure information), and an explanation of the rationale underlying the comparison and ultimate decision to either retain the CoC in the product or use an alternative design.\(^{55}\)

For purposes of the present analysis, the question is whether the AA process would be exempted from preemption under the “reporting or information collection” exception. In answering this question, EPA and the courts might look to other parts of the CSIA to see how Congress has described “reporting” and other similar requirements. For example, under section 8 of TSCA, which is largely kept intact under the CSIA and would now be titled “Information Collection and Reporting,” chemical manufacturers are required to keep records and “report” or “submit” to EPA extensive amounts of information, including existing health and safety studies, reports of adverse reactions, intended uses, production volumes, exposure information, and disposal practices.\(^{56}\)

It is possible, therefore, that EPA or a court would equate the scope of section 15’s “reporting and collection information” preemption exception with section 8 of TSCA. If so, one might argue that what product manufacturers are doing under the California regulations generally

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\(^{54}\) Those states include California, Connecticut, Maine, Michigan, Minnesota, and Washington.


resembles obligations imposed on chemical manufacturers under TSCA as amended by the CSIA – in other words, assembling and reporting extensive amounts of existing chemical data to a regulatory body. Under this interpretation, it may be that large portions of the AA process would qualify under section 15’s “reporting and collection information” exemption.  

We also know that “reporting and information collection” does not include “a requirement for the development of test data or information on a chemical substance,” as those types of state laws would be expressly preempted under the CSIA if EPA were to take prescribed actions. Specifically, under section 4 of the Act, EPA could require manufacturers and processors to develop additional information regarding toxicity, potential exposures, and health and environmental risks. Notably, California’s Green Chemistry regulations do not require product manufacturers to develop new test data or information.

There are differences, however, between section 8 of TSCA and the Green Chemistry regulations that might lead EPA or a court to apply the “reporting and information collection” exception more narrowly. As discussed, the Green Chemistry regulations require responsible entities to provide existing chemical information during the AA process; however, they are also charged with doing much more. Specifically, the AA reports will be the culmination of an extensive analysis of the Priority Products, various CoCs, and design alternatives. In that respect, new information is being generated and provided to DTSC. Although it might not be new testing data that is being produced, it may be that the AA process moves beyond what is typically thought of as a reporting requirement. Under that interpretation, with the possible exception of providing existing data, some of the AA process and the related reports could be preempted with respect to a CoC for which EPA has taken prescribed action.

If Congress does not intend to preempt Green Chemistry programs, the CSIA could include a “savings clause” that expressly preserves such initiatives, as suggested above with respect to labeling and warning requirements. The “savings clause” would have to be drafted carefully so as to cover the different types of Green Chemistry programs that are out there. One

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57 This would not hold true, however, with respect to a product manufacturer’s duty under the Green Chemistry regulations to select a product design that retains, minimizes, or eliminates the CoC. In the event that EPA has addressed the chemical substance under the CSIA, that requirement would not be considered a “reporting” obligation, and would likely be expressly preempted as a “prohibition or restriction” on the manufacture, processing, distribution, or use of the chemical substance. Moreover, as briefly noted above, the DTSC may also impose use restrictions on CoCs and consumer products following the AA process, including limiting the amount of CoC used, prohibiting certain uses, and requiring various administrative controls or engineered safety measures to control exposure. See, e.g., Cal. Code Regs. tit. 22, §§ 69506.4-69506.6. At a minimum, if EPA has taken action with regard to that CoC under the CSIA, DTSC’s restrictions would arguably be preempted under section 15’s express preemption clause prohibiting State requirements on the manufacture, processing, distribution, or use of a chemical substance where EPA has taken a prescribed action with respect to the chemical substance involved.

58 S. 1009 § 15. Indeed, section 15’s preemption exception generally provides that the express preemption clauses, including the provision prohibiting state requirements for the development of additional test data, “shall not apply to” state “reporting or information collection” requirements.

59 See, e.g., S. 1009, § 4(4), adding § 4(f)-(j) to TSCA.
option might be to explicitly refer to the California regulations and exempt any similar types of state requirements (e.g., listing CoCs, selecting priority products, requiring AAs).

D. Environmental Law Exception

Another potentially ambiguous exception to the CSIA’s preemption provision involves state environmental laws. Under the CSIA, a state requirement “related to water quality, air quality, or waste treatment or disposal” is not preempted.60 However, there are several conditions that must be satisfied for this exception to apply, including that the state law does not “impose a restriction on the manufacture, processing, distribution in commerce, or use of a chemical substance.”61 As discussed above in the context of labeling, warnings, and use instructions, terms like “manufacture” and “use” could be interpreted broadly so as to preempt state laws even where they do not directly regulate production processes or how consumers use a given product. The same analysis applies here.

Many state environmental laws limit discharges or emissions of chemical substances by placing restrictions on the manufacture, processing, distribution, or use of a chemical substance. For instance, California has adopted “best management practices” (BMPs) for perchlorate and perchlorate-containing material to prevent releases into the air, surface waters, groundwater, and soils.62 Some of the BMPs, therefore, might not qualify under the preemption exception for environmental laws if EPA were to take prescribed action on such chemical substances. The implementing regulations, for example, require that perchlorate materials be distributed in special packaging (e.g., water-proof materials) or otherwise stored in weather-resistant structures.63 As such, they may relate to the manufacture and distribution of the chemical substance. Moreover, the regulations require perchlorate material to be labeled or marked clearly with language that could be interpreted as going beyond merely reporting the presence of perchlorate and, instead, referencing use restrictions. Specifically, the label must provide: “Perchlorate Material – special handling may apply.”64

Confusion may arise, however, where a state environmental law does not directly impose use restrictions on a chemical substance, like California’s perchlorate BMPs do, but as a practical matter would still compel a manufacturer to alter its production processes or make other changes.

60 S. 1009 § 15.

61 Id. The state environmental law also must not be “required by or inconsistent with an action by the Administrator under section 5 or 6” of the CSIA.


64 Cal. Code Regs. tit. 22, § 67384.4. Some other BMPs, however, might qualify under several CSIA preemption exemptions. For instance, businesses that manage larger amounts of perchlorate materials must submit a one-time notification to DTSC containing certain information. This requirement would arguably fall under both the exception for reporting obligations, as well as the exception for environmental laws.
For instance, California’s Prop 65 prohibits the discharge of chemicals known to cause cancer or reproductive toxicity into water or onto land where such chemical “passes or probably will pass into any source of drinking water.”

65 It does not instruct manufacturers on how to comply, aside from proscribing releases. But it is conceivable that a manufacturer might reduce the amount of chemicals used in its production process or redesign its product in an effort to limit environmental exposures. There is a question, therefore, whether these types of incentives, potentially created under Prop 65, would run afoul of the exception’s limiting condition, even though the state statute is clearly intended to protect drinking water and never explicitly mentions manufacturing practices or use restrictions.

There are other examples as well. For instance, it might be argued that a state requirement to monitor air or water quality falls outside general notions of manufacturing, processing, distribution, or use. But what happens if extensive and costly monitoring obligations compel a manufacturer to change its manufacturing process so as to avoid certain releases altogether that would fall under the monitoring requirements? Would this be preempted under the limiting condition? Similarly, one might claim that end-of-life issues, such as recycling obligations and disposal restrictions, could be construed as taking effect after a consumer has finished using a product as intended, and thus would not be preempted. But what if a manufacturer has to change a product design to satisfy recycling requirements? Again, does this fall under the limiting language regarding “manufacturing” or “use” restrictions?

Whether Congress intends for the preemption exception governing state environmental laws to apply broadly or not is a choice it will have to make. Regardless, the above examples demonstrate that the exception could be interpreted by EPA and the courts in various ways, provided the limiting condition remains in the legislation in its current form.

E. State Waiver Provision

Yet another area of potential ambiguity involves the state waiver provision. Section 15 would allow states to file an application with EPA for a preemption waiver in which they must demonstrate, in part, that “compelling State or local conditions warrant granting the waiver to protect human health or the environment.” In addition, EPA on its own initiative may grant a waiver where the state certifies that it “has a compelling local interest to protect human health or

65 Cal. Health & Safety Code § 25249.5. Prop 65 does contain several exceptions to this prohibition, including where the discharge or release is not significant and it is otherwise in compliance with other laws. Cal. Health & Safety Code § 25249.9.

66 This exception should also be read in conjunction with another exception in the CSIA’s preemption provision, which allows a state prohibition or restriction on a chemical where it is “adopted under the authority of any other Federal law.” S. 1009 § 15. For instance, if a state limits emissions of a certain air pollutant, which might otherwise be considered as a restriction on the manufacture of a product, there would be no preemption if such restriction was adopted pursuant to the federal Clean Air Act.
the environment.”\textsuperscript{67} Testimony and comments submitted to Congress have noted that it is unclear what is meant by compelling state or local conditions or interests.\textsuperscript{68}

On the one hand, the waiver provision might be interpreted as requiring that any conditions or interests be unique to that state or locality and not seen anywhere else in the country. This is somewhat analogous to the approach taken by EPA under FIFRA when applying similar language. Specifically, section 24 of FIFRA allows States to require registration for additional uses of federally registered pesticides to “meet special local needs.”\textsuperscript{69} EPA’s regulations implementing this section interpret the phrase “special local need” in the following manner:

\begin{quote}
Situations which a State may consider as not involving a special local need may include, but are not limited to, applications for registrations to control a pest problem present on a nationwide basis.\textsuperscript{70}
\end{quote}

On the other hand, the CSIA’s waiver provision could be interpreted more broadly to mean that it only requires a compelling issue or problem that needs to be addressed, regardless of whether the problem is also occurring in other parts of the country. This is the approach taken by the Occupational Safety and Health Administration (OSHA) when interpreting a similar phrase found in the Occupational Safety and Health Act (OSH Act). Under the OSH Act, states are generally preempted from adopting and enforcing occupational health and safety standards in areas where OSHA has already regulated.\textsuperscript{71} However, states may seek OSHA’s approval to implement their own state plans and assume responsibility for carrying out occupational health

\textsuperscript{67} S. 1009 § 15, adding § 18(d)(2)(B)(i) to TSCA.

\textsuperscript{68} It should also be noted that a state’s application for a waiver would have to show “compelling State or local conditions,” while a waiver granted by EPA on its own initiative would require a “compelling local interest.” There is no indication whether the CSIA intends to draw a distinction between “conditions” or “interests,” or if there is a difference between a showing made on a “State” or “local” level. Rules of statutory construction may convince a court that it should interpret these terms differently, for example, by giving each word meaning and effect. Thus, it might be that a court would hold that EPA’s authority to act on its own, absent an application from a state, is limited to just local interests and thus deemed to be more narrow than its authority to grant an application based on broader state conditions.

\textsuperscript{69} 7 U.S.C. § 136v.

\textsuperscript{70} 40 C.F.R. § 162.153(b). Another example is seen in the Department of Energy (DOE) regulations establishing federal energy conservation standards for various commercial and industrial equipment. A state may petition DOE for an exemption from preemption if it can show that a state energy conservation standard “is needed to meet unusual and compelling State or local energy interests.” 10 C.F.R. § 431.422(a) (emphasis added). DOE defines that phrase to mean “interests which are substantially different in nature or magnitude from those prevailing in the U.S. generally.” Id. Of course, this phrase differs from the CSIA in that it uses the term “unusual,” in addition to the word “compelling,” which may have prompted DOE’s narrow definition.

\textsuperscript{71} 29 U.S.C. § 667(a).
and safety programs in lieu of existing federal standards. \(^{72}\) In particular, where a state proposes to enforce standards that are applicable to products which are distributed or used in interstate commerce, it must show that there are “compelling local conditions” justifying such regulation.

In approving California’s incorporation of Prop 65 into the State’s Hazard Communication Standard, OSHA articulated the following interpretation:

OSHAnotes that many commenters opposing the standard interpret the phrase “compelling local conditions” to be limited to interests which are “unique” to California. OSHA disagrees. Conditions unique to a given State are a sufficient, but not a necessary, basis for a finding of compelling local conditions . . . . OSHA has never said that a State must establish that the conditions of concern to the State’s lawmakers are not prevalent in any other State as well. Such an interpretation would be inconsistent with the plain meaning of “compelling”; more than one State may have a compelling interest in regulating particular safety issues. Simply put, “compelling local conditions” are compelling conditions which exist locally.\(^{73}\)

While it is impossible, now, to say with certainty how EPA would ultimately interpret the CSIA’s waiver provision, there is a chance that the Agency could adopt a narrow view and only grant waivers in rare circumstances. As noted above, the CSIA seeks to promote uniform chemical regulation across the country and describes the role of states in somewhat limited terms (at least where EPA has addressed a particular chemical).\(^{74}\) Applying the state waiver provision in anything but unique circumstances might jeopardize that goal.\(^{75}\)

That said, there are also grounds for EPA to adopt a broader interpretation and grant waivers regardless of whether “compelling” conditions are seen elsewhere. The waiver provision, in addition to demanding some type of compelling condition or interest, also requires a showing that there will be no undue burden placed on interstate or foreign commerce with

\(^{72}\) 29 U.S.C. § 667(b).

\(^{73}\) 62 Fed. Reg. 31159, 31164 (June 6, 1997). The Federal Food, Drug, and Cosmetic Act also contains several provisions allowing state regulation of pesticide residues and medical devices where there are “compelling local conditions.” 21 U.S.C. §§ 346a(5), 360k. With regard to medical devices, the FDA defines “compelling local conditions” as including “any factors, considerations, or circumstances prevailing in, or characteristic of, the geographic area or population of the State or political subdivision that justify exemption from preemption.” 21 C.F.R. § 808.3.

\(^{74}\) S. 1009, § 2(b).

\(^{75}\) Indeed, at least one federal court upheld OSHA’s broader interpretation as reasonable under the *Chevron* doctrine because the OSH Act seeks to maximize the use of “state machinery” under OSHA-approved state plans, a dynamic that is not present under the CSIA. *Shell Oil Co. v. U.S. Dept. of Labor*, 106 F. Supp. 2d 15, 20 (D.D.C. 2000).
regard to the manufacture, processing, distribution or use of the chemical.\textsuperscript{76} When that requirement is factored into the analysis, there is less risk that a more expansive view of the waiver provision would upset one of the CSIA’s stated objectives.

The point here, however, is that absent a clear statement by Congress in the CSIA or some indication in the legislative history regarding how EPA should interpret the waiver provision, it will be left up to the Agency and the courts to define what “compelling” conditions or interests mean.

\textsuperscript{76} S. 1009 § 15.