

The First National Conference on Precaution

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University of Maryland School of Nursing, Baltimore MD

**Pre-emption by Congress of California's Proposition
65 & other State Laws**

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Message

- Every progressive law passed by a state or local government can be voided by Congress
- Congress can do this pursuant to its power to preempt state laws under the Constitution's Supremacy Clause

National Uniformity for Food Act

H.R. 4167 introduced in 2005

S. 3167 introduced in 2006

- “To amend the Federal Food, Drug and Cosmetic Act to provide for uniform food safety warning notification requirements, and for other purposes.”
- March 8, 2006: H.R. 4167 passed House of Representatives (283-189)
 - Never any hearings (or in any Congress)
 - California Delegation: 32-18 against
- May 25, 2006: S. 3128 introduced into Senate (HELP Committee - Health, Education, Labor and Pensions)
 - Hearings possible in July

Opponents of National Uniformity for Food Act

- 39 State Attorneys General
- Association of Food and Drug Officials
- National Conference of State Legislatures
- National Association of State Departments of Agriculture
- Numerous consumer, public interest groups (NRDC, NET, PIRG, CSPI, CU, LCV, CLEEN, ED, CAT, CFS, ELF, many others)
- Dozens of Newspapers

“The target of this bill is California’s Proposition 65.”

“Important consumer warnings dealing with mercury in fish, arsenic in drinking water, and lead in cans are just a few examples of state food labeling requirements that would be eviscerated by this bill.”

(Letter to Congress from National Assoc. of Attorneys General (March 1, 2006))

(available at www.henrywaxman.house.gov)

Supporters of National Uniformity for Food Act

- **Food Companies**

“Citizens of all 50 states deserve consistent and reliable food safety guidance, rather than a confusing and erratic patchwork of state and federal labeling requirements.”

National Uniformity for Food Coalition (www.uniformityforfood.org)

Pre-emption is the Issue

- “The bill says states would be allowed to keep their safety standard if the FDA fails to take a position . . .”
Jane Zhang, “Food Industry Advances in Labeling Fight,” Wall Street Journal (Jan. 9, 2006)
- “Indeed, under this bill, states would be forbidden from adopting their own policies, even if the federal government had not acted in a particular area or adopted a particular warning.”
Letter to Congress from National Association of Attorneys General, signed by 39 AG’s (March 1, 2006)

The proposed uniformity provision for warnings

Proposed new FFDCCA Section 403B(a)(1) for warnings:

“[Unless a state petitions for an exemption]

no State . . . may . . . establish or continue in effect . . . any notification requirement for a food that provides for a warning concerning the safety of the food. . .

unless such notification has been prescribed under the authority of this Act and the State . . . notification requirement is identical to the notification requirement prescribed under the authority of this Act.”

This is not your usual uniformity provision

1. Under National Food Uniformity Act, uniformity is required with actual FDA notification requirements, not just with FDA authority under FFDCA
Cf. FIFRA (7 U.S.C. § 136v(b)): States “shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.” (*Bates v. Dow*, 125 S.Ct. 1788 (2005)).
2. The FDA is not required to approve food labels under the FFDCA (Unlike for pesticides under FIFRA or drugs under FFDCA, which require EPA and FDA to approve labels before marketing)

RESULT

- State food safety and warning requirements (with some exceptions) will be voided unless they are specifically required by FDA, *whether or not FDA acts, studies the issue or makes any determination at all.*
- States perform more than 80% of food safety work in the U.S.
- At least 200 state food safety laws will be voided (www.cspinet.org).
- The “uniformity” this law will achieve is, in many areas, the uniform absence of food safety laws
- This law represents an assertion of federal power to void state laws in an entire area of law, even where the federal government has made no affirmative decisions that differ from the voided state laws.

National Uniformity for Food Act has limited petition provisions

- States have limited opportunity to petition to save their laws from preemption
- Petitions must be filed within 6 months of effective date, and state must establish:
 - State law protects important public interest and does not unduly burden interstate commerce, or
 - State law should be a national standard, or
 - State law addresses an imminent hazard and the State has complied with various procedural requirements, including notice to FDA

POPs Treaty Implementing Legislation

- President Bush signed Stockholm Convention in 2001. Senate has not ratified it. TSCA and FIFRA must be amended before US can ratify and become full participating member.
- Two competing bills to amend TSCA are in the House
 - Gillmor H.R. 4591(will be voted on by Energy and Commerce Committee in a few weeks).
 - Solis H.R. 4800

Preemption of State laws by Gillmor bill

- Gillmor H.R. 4591 would void any state law that regulates a Stockholm Convention POP differently than EPA does
- “As soon as a Treaty POP listing goes into force for any non-pesticidal chemical in the United States, State regulation of the listed chemical would, under the Gillmor bill, be immediately preempted -- regardless of whether State regulation was the same as, or more stringent than, EPA regulation, and even where EPA declined to regulate the chemical in any significant way.”

Testimony before the House Subcommittee on Environment and Hazardous Materials, on behalf of Bill Lockyer, Attorney General, State of California, by Claudia Polsky, Deputy AG (March 2, 2006)
- Recent amendment to H.R. 4591 allows States to petition EPA for permission to have their own laws

This is not a theoretical problem:
Additional chemicals regulated by the States will
soon added to the Stockholm Convention

- The first 5 chemicals being considered by the POPs Review Committee:
PBDE, chlordecone, hexabromobiphenyl, PFOS, lindane
- Of these 5, the first four are subject to TSCA (and Gillmor)
- California laws governing three of these four would be pre-empted
 - chlordecone, hexabromobiphenyl (Proposition 65)
 - PBDE (AB 302 -- California's brominated fire retardant ban)

Key Allies Opposing Gillmor and Supporting Solis

Center for International Environmental Law

Steelworkers

American Nurses Association

National Environmental Trust

Breast Cancer Fund

Sierra Club

Pesticide Action Network

PIRG

NRDC

Oceana

What you can do

- Food Uniformity
 - Get your Senator to oppose S.3128
 - Get in touch with CLEEN (jguth@cleenca.org)
- POPs (Gillmor)
 - Get your Congresspeople to oppose H.R. 4591
 - See Daryl Ditz and sign NGO POP's letter
 - Attend this afternoon's Cross-Fertilization session at 1:00 pm.