



# PREEMPTION MONITOR

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## Introduction

The volume of federal legislation that preempts state authority has increased. Pressure is mounting for Congress and the White House to support federal usurpation of state authority in a variety of areas such as immigration reform, criminal law, tort reform, driver's license security, and the environment. Judicial challenges to the exercise of state authority have made their way up to the U.S. Supreme Court. Federal preemptions adopted through regulation such as the recent FDA prescription drug labeling rule and the NHTSA roof crush rule, legislative enactments, or adverse judicial determinations have far-reaching consequences. They impose liabilities on states. They curtail state creativity and state authority, and they often seek uniformity when uniformity is not necessarily the most effective means for resolving issues. This Monitor provides an update and analysis of pending and recently finalized federal preemption proposals. It discusses how these proposals might affect the states.

Despite sometimes daunting odds, states can protect and preserve traditional and historic state authority. In recent years, NCSL worked hard to defeat federal bills that: (1) sought to require state legislators to file duplicative and onerous campaign finance reports with the IRS; (2) would have circumvented state administrative and court processes in 5<sup>th</sup> Amendment Takings cases; and (3) would have forced state and local police to enforce federal civil immigration laws. However, these issues continue to resurface in congressional legislation. States have also recently witnessed passage of several major pieces of federal preemptive legislation that erode traditional state authority. These include the No Child Left Behind Act, the Help America Vote Act, the Class Action Fairness Act, and the REAL ID Act.

The Preemption Monitor reviews recently enacted federal legislation that preempts state authority, describes pending legislation that would preempt state authority if enacted, and examines U.S. Supreme Court cases that have implications for state authority. It also tracks the status of federal preemption activities in Congress, the executive branch, the Supreme Court and the international arena.

## Recently Enacted Federal Legislation

- **Combat Meth Act – H.R. 3199 PATRIOT Act Amendment**

Preempts state laws regulating the sale of pseudoephedrine, the main ingredient of methamphetamine, by requiring that all substances containing pseudoephedrine be sold behind the pharmacy counter. Purchasers must produce a photo ID showing date of birth, enter their address into a logbook, and no person shall acquire more than 3.6 grams of pseudoephedrine daily, without regard to the number of transactions. 40 states currently have laws regulating the sale of pseudoephedrine; however, fewer than 10 states regulate in the manner prescribed by the federal bill.

**Status:** Passed by both Houses of Congress as an amendment to the U.S. PATRIOT Act conference committee report, and became Public Law 109-177 on March 9, 2006.

- **Pensions – H.R. 2830, S. 1783**

The House and Senate have both passed pension bills (H.R. 2830 and S. 1783). Each bill contains a provision that would facilitate the adoption of automatic enrollment arrangements by employers. Under such arrangements, employees who are eligible to participate in their employer's savings plan – such as a 401(k), 403(b), or 457(b) plan – would be automatically enrolled in the plan unless they elect not to participate in the plan. The employees would be treated as having elected to contribute a specified percentage of compensation, such as 3%, unless they elect a different amount. No employer would be required to adopt an automatic enrollment arrangement, and any employee participating in such an arrangement could elect out of it at any time. To facilitate the adoption of automatic enrollment arrangements, the House and Senate bills declare that state laws are preempted by ERISA to the extent that the state laws would prohibit or restrict automatic enrollment provisions. For example, a state law might prohibit withholding from an employee's wages without his or her express consent, subject to specified exceptions.

**Status:** H.R. 2830 passed the U.S. House of Representatives on December 15, 2005 with a vote of 294-132, and passed in the Senate on a voice vote with amendments on March 3, 2006. It is in conference with S. 1783, which passed the Senate on November 15, 2005 with a vote of 97-2.

## Recently Introduced Federal Legislation

- **Food Safety – H.R. 4167, “To amend the Federal Food, Drug, and Cosmetic Act to provide for uniform food safety warning notification requirements, and for other purposes.”**

This bill would eliminate all applicable current state laws, and prevent states from establishing any laws in the future relating to “any notification requirement for a food that provides for a warning concerning the safety of the food, or any component of package of the food.” Any state laws relating to consumer notification, warnings, or safety requirements on food would have to be identical to any federal regulations created as a result of this bill. For example, this bill would preempt food safety laws in California, Florida, Louisiana, and Rhode Island requiring warning labels on shellfish; laws in Illinois and Pennsylvania regulating egg safety; a law in Alaska requiring labeling of genetically modified fish or fish products; and state mercury warnings, such as California’s strong point-of-purchase mercury warnings for fish. One particular target of the food industry is California’s Proposition 65, which requires warnings on products containing chemicals known to cause cancer or birth defects.

In addition to nullifying proven food safety laws, H.R. 4167 would effectively eliminate states’ and municipalities’ abilities to address emerging food safety issues, whether or not the federal government has addressed public health concerns. Among other things, states and localities would not be able to regulate and label food products that contain irradiated ingredients, pesticides, antibiotics, or genetically modified organisms.

**Status:** Passed the House of Representatives on March 2, 2006 with a vote of 283-139 and referred to Senate Committee on Health, Education, Labor and Pensions

- **Immigration Reform – Chairman’s Mark (Senator Arlen Specter, R-PA), S. 2454, “Securing America’s Borders Act”**

The Judiciary Chairman’s Mark for immigration reform does not have a bill number, and is one of two major vehicles for immigration reform in the Senate. S. 2454 is the Senator Bill Frist (R-TN) version that closely replicates HR 4437, the House-passed bill. S.2454 addresses border and interior enforcement issues only, and contains potentially preemptive language that makes unlawful presence a crime. Under current immigration law, this is a civil violation, not a criminal offense. Because unlawful presence is not a matter of criminal law, state and local law enforcement are not required to stop, detain, or arrest people simply to check their status in the country because civil enforcement is not included in the local responsibility of public safety and criminal jurisdiction. If the bill proceeds with the proposed language, state and local law enforcement personnel will be required to stop, detain and even arrest people for the “crime” of unlawful presence, and in so doing, would be enforcing civil immigration laws. Amendments have been introduced to strike this language.

The Chairman’s Mark is a more comprehensive reform bill, containing provisions addressing legalization, temporary worker, agricultural worker, visa backlog reduction, border and interior enforcement, civic integration and education issues. This language is substantially less onerous on states than S. 2454 in the law enforcement provisions.

**Status:** Debate on both S. 2454 and the Chairman’s Mark began on the Senate floor the week of March 27. It was anticipated that the Chairman’s Mark would be the Manager’s amendment to S. 2454 and replace it

entirely; however, this status remained in flux at the beginning of the week of April 3. Cloture votes on both bills are scheduled for Thursday, April 6.

- **Health – S. 1955, the “Health Insurance Marketplace Modernization and Affordability Act of 2005.”**

This bill would permit small business health plans to purchase health insurance coverage that does not comply with state insurance requirements as long as the plans also offer an alternative containing the covered benefits offered in a state employee health plan in one of the five most populous states – California, Texas, Illinois, Florida, and New York. The bill also calls for the creation of uniform model standards relating to ratings in the small business health insurance market. States will be forced to adopt these model standards within two years of their promulgation. Any state law that is stricter or different from the model standards will be preempted.

**Status:** Passed out of the Senate Health, Education, Labor and Pensions Committee on March 15, 2006.

- **Tort Reform/Disaster Assistance – H.R. 4698, the “Disaster Relief Volunteer Protection Act of 2006.”**

This bill is a massive preemption of Good Samaritan laws in virtually every state. It seeks to enhance the provisions of the Volunteer Protection Act of 1997 (which already grants certain immunities to volunteers in disaster relief situations) by providing immunity for disaster relief volunteers and their employers or partners for any act or omission of the volunteer. Nonprofits and governmental entities are given immunity for volunteer acts or omissions if the injury was not caused by willful, wanton or reckless misconduct. Acts or omissions of gross negligence, which is the state standard for liability in almost every state, are given immunity under this bill.

**Status:** Passed out of the House Judiciary Committee on March 15, 2006 and will be brought to the House floor during the week of March 27.

- **Takings – H.R. 4772, the “Private Property Rights Implementation Act of 2006.”**

Ohio Rep. Steve Chabot introduced this new federal regulatory takings bill in March. The bill would overrule current Supreme Court precedent in the area of takings law by allowing property owners to sue state and local governments in federal court without first pursuing available state compensation procedures. This bill, in effect, preempts state administrative and judicial procedures in the area of 5<sup>th</sup> Amendment takings. It would also modify existing Supreme Court finality ripeness standards by establishing a narrow, statutory definition of a “final decision,” applicable to both state governments and the federal government.

**Status:** Pending in the House Judiciary Committee, Subcommittee on the Constitution.

- **Environment – H.R. 4591, Proposed Amendment to the Toxic Substances Control Act (15 U.S.C. 2601 *et seq.*)**

In order to ratify the Stockholm Treaty on Persistent Organic Pollutants (POPs), which was negotiated between 1998-2000, Congress needs to amend the Toxic Substance Control Act. The bill, which amends

the Toxic Substances Control Act (TSCA), contains sweeping language that would preempt and invalidate all state standards on a POPs chemical whenever an international listing for that chemical becomes binding for the United States. Even if the United States obtained an exemption under the international listing so it did not have to take any action on the chemical, the bill would invalidate all state laws regulating the chemical. If parties to the treaty decide to add polybrominated diphenyl ethers (PBDEs) to the list of target chemicals, for example, this proposed legislation would nullify bans on PBDEs recently enacted at the state level, including in California, Hawaii, Maine, Michigan, New York, and Washington. PBDEs are a class of widely used flame retardants, often added to the plastic material in televisions and computers, construction materials, furniture, and textiles. Studies indicate that these chemicals are akin to PCBs and may pose similar health risks to humans as they bioaccumulate in the body.

Representative Hilda Solis (D-CA) introduced H.R. 4800 in February 2006. This bill amends TSCA and implements the POPs treaty without compromising states' rights.

**Status:** Both bills have been referred to the House Committee on Energy and Commerce.

- **Financial Services/Predatory Lending – H.R. 4471, the “Responsible Lending Act”**

In December 2005, Representative William Lacey Clay (D-MO) introduced H.R. 4471 intended to amend the Home Ownership and Equity Protection Act of 1994 and other sections of the Truth in Lending Act. H.R. 4471 contains a sweepingly broad preemption provision, which states that it “shall supersede any provision of the law of any State, whether enacted before, on, or after the effective date of this Act, to the extent that such provision of law attempts, directly or indirectly, to regulate, or has the effect of regulating, mortgage lending activities....”

**Status:** Pending in the House Committee on Financial Services.

- **Technology/Courts – H.R. 4845, the “Innovation and Competitiveness Act**

This bill is a compilation bill for various pieces of legislation that have been introduced before in the House as stand-alone bills. Title I would require that state business activity taxes be based on the entity's physical presence in a state. Physical presence would be triggered in a state if a company has property or employees in a state for more than 21 days, and sports figures and entertainers would be exempted from the 21-day rule. It would preempt those states that have gone to an economic presence for business activity taxes. Title II is a restatement of H.R. 420 (*see chart below*) which preempts state civil procedure laws by requiring states to be subject to Rule 11 of the Federal Rules of Civil Procedure in purely state legal proceedings. State judges would be required to apply the sanctions provisions of Rule 11 when a determination was made that a state civil lawsuit was frivolous and affected interstate commerce. Title IV is a restatement of H.R. 2355 and S. 1015 (*see chart below*), amending the Public Health Service Act to provide that the laws of a health insurer's primary state of licensure apply to individual health insurance coverage offered by that issuer both in the primary state and in any secondary state. This preempts state law in that it establishes base federal standards for states to meet for an insurer to designate them as primary states, including risk-based capital formulas to determine insurers' fiscal solvency and the enactment of legislation or regulations to establish independent review process.

**Status:** Referred to the House Committees on the Judiciary, Ways & Means, Energy & Commerce, and Science Education and & Workforce.

- **Financial Services – H.R. 3997 and S. 2169, the “Financial Data Protection Act of 2005.”**

H.R. 3997 was introduced by Rep. Steve LaTourette (R-OH) and S. 2169 was introduced by Sen. Tom Carper (D-DE). The bills are identical and both seek to amend the Fair Credit Reporting Act to prescribe safeguards for data security. They declare that each consumer reporter shall have an affirmative obligation to implement policies and procedures to protect the security and confidentiality of any consumer's sensitive financial personal information maintained, serviced, or communicated by or on the reporter's behalf against any unauthorized use reasonably likely to result in substantial harm or inconvenience to the consumer. A consumer reporter is defined as any consumer reporting agency, financial institution, or person: (1) which, for monetary fees, dues, on a cooperative nonprofit basis, or otherwise regularly engages in the practice of assembling or evaluating consumer information for the purpose of furnishing consumer reports to third parties, of providing or collecting payment for or marketing products and services, or for employment purposes; and (2) which uses any means or facility of interstate commerce for such purposes. The bill also states that no requirement or prohibition may be imposed under the laws of any State with respect to the responsibilities of any person (1) to protect the security or confidentiality of information on consumers maintained by or on behalf of the person; (2) to safeguard such information from potential misuse; (3) to investigate or provide notices of any unauthorized access to information concerning the consumer, or the potential misuse of such information, for fraudulent purposes; or (4) to mitigate any loss or harm resulting from such unauthorized access or misuse.

**Status:** H.R. 3997 passed out of the House Committee on Financial Services on March 16, 2006. S. 2169 was referred to the Senate Committee on Banking, Housing and Urban Affairs.

- **Tort Reform – H.R. 3509, the “Workplace Goods Job Growth and Competitiveness Act of 2005**

This bill was introduced by Rep. Steve Chabot (R-OH). It contains an express preemption of state statutes of limitations for durable goods by providing that no civil action may be filed against the manufacturer or seller of a durable good for damage to property arising out of an accident involving that durable good if the accident occurred more than 12 years after the durable good was delivered to its first purchaser or lessee; and no civil action may be filed against the manufacturer or seller of a durable good for damages for death or personal injury arising out of an accident involving that durable good if the accident occurred more than 12 years after the durable good was delivered to its first purchaser or lessee, and if certain conditions are met.

**Status:** Hearings were held in the House Subcommittee on Commercial and Administrative Law on March 14, 2006.

## Recently Proposed Regulations by Federal Agencies

- **State product liability preemption – CPSC Mattress Flammability Rule**

The Consumer Product Safety Commission established new standards for mattress flammability and in so doing explicitly stated that conflicting state laws and common law practice was preempted by the new federal standard. The preemption language was added to the rule's preamble after the notice and comment period closed, providing no opportunity for review or evaluation by NCSL or the public.

**Status:** The rule was finalized on March 15, 2006, but is not effective until July 1, 2007.

- **State environmental standards preemption – Corporate Average Fuel Economy Standards (CAFÉ)**

States should not be able to impose greenhouse gas emission limits on new vehicles. That is one of the less publicized conclusions included in a final rule announced March 30, 2006 by the U.S. Department of Transportation regarding “reformed” corporate average fuel economy standards (CAFÉ). The “reformed” CAFÉ standards apply to sport utility vehicles, pickup trucks and minivans and go into effect in 2011. The final rule claims that the Clean Air Act preempts California's and other states' mandates to cut carbon dioxide pollution.

**Status:** The rule was finalized on March 30, 2006, but is not effective until 2011.

**Regulatory preemptions by federal agencies indicate a troubling new trend in which unelected federal bureaucrats are attempting to preempt state statutory and common law without proper Congressional authority and oversight.**

## Preemption Watch List: 109<sup>th</sup> Congress

Issue	Bill Number	Sponsor	Explanation	Bill Status
Campaign Finance – Section 527 Organizations	S. 271, S. 1053, HR 513, HR 1316	Sen. John McCain (R-AZ), Sen. Russ Feingold (D-WI), Rep. Chris Shays, (R-CT), Rep. Mike Pence (R-IN)	Defines what constitutes a Section 527 organization and requires these organizations to file with the Federal Election Commission. <b>The Senate bill was amended in committee and now contains language that removes state candidates and officeholders from the restrictive provisions of the bill.</b>	S. 271 replaced by S. 1053, and placed on Senate Floor Calendar, May 17, 2005. HR 1316 voted out of Committee, June 22, 2005. HR 513 voted out of Committee, July 22, 2005 and received supplemental report, Sept. 22, 2005.
Civil Justice – Charitable Nonprofits	S. 1125	Sen. Rick Santorum (R-PA)	Preempts state tort law by shielding businesses that provide equipment or facilities for use by charitable nonprofit organizations from state civil liability. Also shields physicians and other licensed health care providers from civil liability under state laws if they are providing charitable services. A number of states have enacted provisions of this type within the broader context of medical liability reform.	Referred to Senate Judiciary Committee, May 25, 2005.
Civil Justice – Frivolous Lawsuits	HR 420	Rep. Lamar Smith (R-TX)	Preempts state civil procedure laws by requiring states to be subject to Rule 11 of the Federal Rules of Civil Procedure in purely state legal proceedings. Requires state judges to apply the sanctions provisions of Rule 11 when a determination was made that a state civil lawsuit was frivolous and affected interstate commerce.	Passed House with vote of 228-184, Oct. 27, 2005. Referred to Senate Judiciary Committee.
Criminal Justice – Athlete Drug Tests	HR 3084	Rep. Cliff Stearns (R-FL)	Preempts numerous state privacy laws by requiring public disclosure of the name of any athlete having a positive drug test that results in suspension.	Voted out of Committee, July 28, 2005 and placed on House Calendar.
Criminal Justice – Capital Punishment	HR 379	Rep. Chaka Fattah (D-PA)	Preempts state capital punishment laws by enacting a mandatory minimum 10-year death penalty moratorium in any state which had sentenced a person to death, and that person had been determined by subsequent judicial process to be innocent. Establishes federally-monitored procedures with which a state must comply to reinstate its death penalty.	Referred to House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, March 2, 2005.
Driver's Licenses and Identification	HR 418 – “REAL ID” Act	Rep. James Sensenbrenner (R-WI)	Imposes rigid, prescriptive federal mandates for state-issued driver's licenses. Requires states to verify lawful presence before issuing a driver's license, establishes security standards for state offices where driver's licenses and related documents are produced and stored, regulates personnel training and security clearances, sets federal data storage requirements, and prohibits financial	Passed the House and the Senate attached to Military Appropriations. <b>Became P.L. 109-13, May 11, 2005.</b>

Issue	Bill Number	Sponsor	Explanation	Bill Status
			assistance to a state unless it joins an interstate compact.	
Elections – HAVA	HR 3094	Rep. Steny Hoyer (D-MD)	Amends the Help America Vote Act (HAVA) and establishes uniform standards for the counting of provisional ballots cast at incorrect polling places. HAVA currently permits the states to create their own laws regarding the counting of provisional ballots, but that provision would be preempted. Also establishes security standards for voting systems used in federal elections and requires states to make election laws “public” by publishing them in hard copy and on the internet by January 1 of any election year.	Referred to House Committee on House Administration, June 28, 2005.
Elections – State Election Administration Officials	HR 834, S. 391	Rep. Ted Strickland (R-OH), Sen. Frank Lautenberg (D-NJ)	Imposes restrictions on the political activities of chief state election administration officials for state elections involving federal officers and preempts longstanding state public policy in this area. A chief state election administration official would not be allowed to take an “active part” in the political management of a political campaign with respect to any election for federal office over which such official has supervisory authority.	Referred to House Committee on House Administration and to Senate Rules Committee, Feb. 15-16, 2005.
Eminent Domain Restrictions	H.AMDT 427 to HR 3058, HR 3083, HR 3087, HR 3135, HR 3315, HR 3405, HR 4088, HR 4128, S. 1313, S. 1704, S. 1883	Rep. Scott Garrett (R-NJ), Rep. Denny Rehberg (R-MT), Rep. Phil Gingrey (R-GA), Rep. James Sensenbrenner (R-WI), Rep. Maxine Waters (D-CA), Rep. Henry Bonilla (R-TX), Rep. Frank Pallone (D-NJ), Sen. John Cornyn (R-TX), Sen. Byron Dorgan (D-ND), Sen. Orrin Hatch (R-UT)	All of these bills are in reaction to the <i>Kelo v. New London</i> Supreme Court decision, and seek to preempt and limit the fundamental function of state and local authority in the use of eminent domain power by removing “economic development” from the “public use” definition. Many of the bills would also withhold federal funding from a number of sources, such as community development block grants, from states and communities that would use eminent domain authority to take property from private persons for commercial or economic development.  HR 3058 Amendment 427 prohibited funds appropriated in that bill from being used by states or localities for eminent domain projects. It was attached as a rider to an appropriations bill, which means the statute is in effect for only one year. NCSL will continue to track this issue to ensure it does not reappear in future appropriations bills or other legislation.	HR 3405 voted out of Committee, Oct. 31, 2005. HR 4128 passed House with vote of 376-38, Nov. 3, 2005 and referred to Senate Judiciary Committee.  H.AMDT 427 to HR 3058 adopted 231-189 in House, retained in Conference report. <b>Became P.L. 109-115, Nov. 30, 2005.</b>  All other bills remain in committee.
Energy	HR 6 – “Energy Policy Act (EPAct) of 2005”	Rep. Joe Barton (R-TX), Sen. Pete Domenici (R-NM)	Included a number of provisions which shift authority from the states to the federal government. Two major provisions relate to the siting of electricity transmission lines and liquefied natural gas (LNG) terminals. The Federal Energy Regulatory Commission (FERC) is authorized to preempt states and issue permits for the construction of interstate transmission power lines in DOE-designated “national interest electric transmission corridors” if the state fails to	<b>Became P.L. 109-58, August 8, 2005.</b>

Issue	Bill Number	Sponsor	Explanation	Bill Status
Environment – Clean Air Act, Superfund and Safe Drinking Water Act	HR 1815, S. 1042	Rep. Duncan Hunter (R-CA), Sen. John Warner (R-VA)	RRPI exempts the Department of Defense (DoD) from compliance with select provisions of the federal Clean Air Act, the Comprehensive Environmental Response and Liability Act (Superfund) and the Resource Recovery and Conservation Act (Solid Waste). The exemptions preempt state laws and regulations that complement and supplement the three federal environmental laws. Proposes to move all cases brought under the Clean Air Act, Superfund and the Safe Drinking Water Act from state courts to federal courts.	This was a provision originally inserted into the DoD reauthorization bill. It was removed prior to passage, and not in the final DoD appropriations bill as enacted.
Environment – Industry Liability	S. 1110	Sen. George Allen (R-VA)	Waives all forms of liability for industries involved in producing and selling antifreeze and coolants containing the bittering agent denatonium benzoate (“DB”), even if the use of this agent causes groundwater contamination, personal injury, property damage, or death. This unprecedented liability waiver would apply even if children or pets are injured or killed by the DB additive, jeopardizing the very people and animals the bill purports to protect.	Reported out of Senate Committee on Commerce, Science and Transportation, Nov. 17, 2005.
Environment – Natural Gas Pipelines	HR 1369	Rep. Chris Cannon (R-UT)	Restricts state authority to impose property taxes on natural gas pipelines at a different rate and prevents states or other local taxing authorities from assessing pipeline property at a higher ratio to market value than other commercial and industrial property in the same taxing jurisdiction. Jurisdiction of pipeline tax cases would be shifted from state to federal courts.	Referred to House Committee on Judiciary, Subcommittee on Commercial & Administrative Law, hearings held in October 2005.
Health – Insurance Providers	HR 2355, S. 1015	Rep. John Shadegg (R-AZ), Sen. Jim DeMint (R-SC)	Promulgated on the premise that the application of numerous and significant variations in state law impedes commerce in individual health coverage by impacting the ability of insurers to offer affordable individual health insurance coverage. Amends Public Health Service Act to provide that the laws of a health insurer’s primary state of licensure apply to individual health insurance coverage offered by that issuer both in the primary state and in any secondary state. Establishes base federal standards for states to meet for an insurer to designate them as primary states, including risk-based capital formulas to determine insurers’ fiscal solvency and the enactment of legislation or regulations to establish independent review process.	HR 2355 voted out of Committee, July 20, 2005. S. 1015 referred to Senate Committee on Health, Education, Labor, and Pensions, May 12, 2005.

Issue	Bill Number	Sponsor	Explanation	Bill Status
Health – Methamphetamine	S. 103	Sen. Jim Talent (R-MO)	Preempts state laws regulating the sale of pseudoephedrine, the main ingredient of methamphetamine, by requiring that all substances containing pseudoephedrine be sold behind the pharmacy counter. Purchasers must produce a photo ID showing date of birth and sign a written log or receipt, and no person shall acquire more than 7.5 grams of pseudoephedrine within any 30-day period. 40 states currently have laws regulating the sale of pseudoephedrine; however, fewer than 10 states regulate in the manner prescribed by the federal bill. It is unclear in the language if this entirely preempts state laws or provides a minimum standard that states can be stricter on.	This bill was attached to HR 3199, the PATRIOT Act Reauthorization conference report, Dec. 2005. Became P.L. 109-177, March 9, 2006.
Health – Patient Safety	S. 544	Sen. James Jeffords (I-VT)	Preempts state freedom of information laws (FOIAs) or any other state laws that govern civil or administrative procedures requiring the disclosure of information provided by a health care provider to a certified patient safety organization.	Became P.L. 109-41, July 29, 2005.
Health – Small Business Association Health Plans	HR 525, S. 406	Rep. Sam Johnson (R-TX), Sen. Olympia Snowe (R-ME)	Seeks to “streamline” regulations for small businesses that pool their money together to buy health insurance through groups called association health plans (AHPs). Preempts state laws providing critical protections to consumers and fails to replace them with adequate federal protections.	HR 525 passed House with vote of 263-165, July 26, 2005. Referred to Senate Committee on Health, Education, Labor, and Pensions. S. 406 referred to Senate Committee on Health, Education, Labor, and Pensions, Feb. 16, 2005.
Housing Finance	HR 1461	Rep. Richard Baker (R-LA)	Establishes a single regulator, the Federal Housing Finance Agency (FHFA), for government-sponsored enterprises (GSEs) involved in the home mortgage market. GSEs are privately owned, congressionally chartered financial institutions created to enhance the availability of credit in the economy, such as Fannie Mae, Freddie Mac, and Federal Home Loan Banks. Preempts state laws by allowing FHFA to act outside state law in some circumstances, and preempts state statutes of limitation and contract law. Preemptions would primarily occur in the event that FHFA serves as the receiver or conservator of a regulated entity.	Passed House with vote of 331-90, Oct. 26, 2005. Referred to Senate Committee on Banking, Housing and Urban Affairs.
Immigration Enforcement	H.AMDT 163 to HR 1817	Rep. Charlie Norwood (R-GA)	Makes states responsible for enforcing federal civil immigration laws by “clarifying” that such authority rests with the states. Attached to the FY2006 authorization for the Department of Homeland Security.	H.AMDT 163 adopted 242-182, bill passed House with vote of 424-4, May 18, 2005. Referred to Senate Committee on Homeland Security and Governmental Affairs.

Issue	Bill Number	Sponsor	Explanation	Bill Status
Immigration Reform	HR 4437, HR 4313, S. 1033, S. 1438	Rep. James Sensenbrenner (R-WI), Rep. Duncan Hunter (CA), Sen. John McCain (R-AZ), Sen. John Cornyn (R-TX),	<p>HR 4437 focuses exclusively on border and interior law enforcement, and states would be forced to take on the costs of enforcing federal immigration law through the affirming of federal authorization of state enforcement of federal civil immigration laws. Withholds federal money from any state or local government that enacts any policy prohibiting law enforcement personnel from inquiring into any individual's immigration status. Contains no funding for the State Criminal Alien Assistance Program (SCAAP).</p> <p>HR 4313 incorporates "inherent authority" provisions to force state and local law enforcement to monitor federal immigration law, and mandates the use of REAL ID standards in worker identification and a host of other stringent restrictions on immigrants.</p> <p>S. 1033 requires the Department of Homeland Security to create a strategy for border security by involving federal, state, local and tribal authorities, includes guest worker program and some funding for SCAAP.</p> <p>S. 1438 incorporates "inherent authority" provisions to force state and local law enforcement to monitor federal immigration law, requires detailed information relating to unauthorized immigrants in custody to be passed from state and local law enforcement to the Department of Homeland Security. Does include a variation of a guest worker program and some SCAAP funding.</p>	<p>HR 4437 passed House with vote of 239-182, Dec. 16, 2005. Referred to Senate Judiciary Committee. HR 4313 referred to 4 separate committees, Nov. 14, 2005. Both Senate bills referred to Senate Judiciary Committee – provisions under consideration for comprehensive immigration proposal from the committee.</p>
Information and Data Security – Notification Requirements	HR 1069, S. 115, S. 751, S. 768, S. 1326, S. 1332, S. 1408	Rep. Melissa Bean (D-IL), Sen. Dianne Feinstein (D-CA), Sen. Charles Schumer (D-NY), Sen. Jeff Sessions (R-AL), Sen. Arlen Specter (R-PA), Sen. Gordon Smith (R-OR)	<p>These bills address how and when the federal government, businesses, and in some cases states must notify individuals when there has been a data security breach which has resulted in, or in which there is a significant risk of harm to individuals. All of these bills define what personal information is "protected," e.g. social security numbers, drivers license numbers, bank account or other account information, etc. All of these bills either expressly preempt state notification laws entirely or preempt state laws to the extent that they are inconsistent with federal law.</p>	<p>S. 1326 reported out of Senate Judiciary Committee, Oct. 20, 2005. S. 1408 reported out of Senate Commerce Committee, Dec. 8, 2005. All other bills remain in committee.</p>
Insurance Regulation	"SMART Act," Not yet introduced.	N/A	<p>Establishes federal requirements and minimum standards for insurance regulatory reform. States would have to adopt federal provisions or face preemptions and sanctions. They would be required to enact model laws developed by the National Association of Insurance Commissioners (NAIC), or essentially accept the model laws if state action was deemed inconsistent with them by a federal insurance panel. Deregulates property-casualty rates for most insurance lines, primarily automobile, homeowner's and worker's compensation</p>	<p>Not yet introduced, draft bill circulated in late 2004 with continued discussions in 2005 – 2006.</p>

Issue	Bill Number	Sponsor	Explanation	Bill Status
Sex Offenders	HR 4621	Rep. Mark Kennedy, (R-MN)	Requires every state to enact a law that would disallow any parole option ever for an individual convicted of a criminal offense against a minor or who is a sexually violent predator. States would have 3 years to comply or lose Local Law Enforcement Block Grants.	Referred to House Judiciary Committee, Dec. 17, 2005.
Sex Offender Registration	HR 3132, HR 4472	Rep. James Sensenbrenner (R-WI)	The bills are virtually identical in their requirements on states to create statewide sex offender registry databases according to federal standards to be established by the Attorney General. They require a plethora of information to be collected and monitored by the state, including DNA samples, and reported to the Attorney General. Any state that does not comply within the designated time period will have its registry program taken over by the Department of Justice and will lose 10 % of the Byrne Grant and/or LLEBG funding for the applicable fiscal year.  The Senate version of the legislation, S. 1086, is kinder to states. It makes a number of the preemptive provisions optional to the states and applicable only if they participate in a federal grant program.	H.R. 3132 passed House with vote of 371-52, Sept. 14, 2005 and referred to Senate Committee on Judiciary. H.R. 4472 received no committee hearing and was passed by voice vote on the House floor, March 8, 2006 and placed directly on Senate calendar.
Technology – Spyware	HR 29, HR 744, S. 687, S. 1004	Rep. Mary Bono (R-CA), Rep. Bob Goodlatte (R-VA), Sen. Conrad Burns (R-MT), Sen. George Allen (R-VA)	HR 29 contains an intergovernmental mandate identified under UMRA preempting state law in areas ranging from the regulating and implementation of penalties against outside users from using protected computers in a deceptive manner to the use of authorized information collection programs, and the use of web-accessed computer software displaying online advertising.  S. 687 prohibits states from enacting statutes limiting or restricting the use of software that collects information about the user of a computer, the user's use of the computer, the user's browsing behavior, or cause advertisements to be delivered to the user. SPY BLOCK also supersedes state law regarding notification of software installation.  HR 744 contains an intergovernmental mandate identified under UMRA prohibiting a state from creating civil penalties that specifically reference federal statute regarding computer fraud.  S. 1004 preempts state law relating to installation of software through deceptive acts in favor of FTC authority.	HR 29 passed House with vote of 393-4, May 23, 2005. Referred to Senate Commerce Committee. HR 744 passed House with vote of 395-1, May 23, 2005. Referred to Senate Judiciary Committee. S. 687 reported out of Senate Commerce Committee, Nov. 17, 2005. S. 1004 remains in Senate Commerce Committee.
Telecommunications	S. 1294, S. 1350	Sen. Frank Lautenberg (D-NJ), Sen. Arlen	S. 1294 preempts state laws that regulate a public provider of broadband services, and prohibits a public provider of broadband services from refusing advanced telecommunications capability or any service utilizing such capability	Both bills referred to Senate Commerce Committee, June 2005.

Issue	Bill Number	Sponsor	Explanation	Bill Status
		Specter (R-PA)	within its capacity to any person or any private or public entity.  S. 1350 seeks to protect the privacy of mobile phone users by prohibiting the inclusion and dissemination of wireless telephone number information to wireless directory assistance service databases, provided the consumer opts out of such inclusion. Preempts state laws that impose requirements on providers of commercial mobile services, or any direct or indirect affiliate or agent of such providers that are inconsistent with federal requirements.	
Tort Reform – Gun Manufacturer Liability	S. 397, HR 800	Sen. Larry Craig (R-ID), Rep. Cliff Stearns (R-FL)	Preempts state tort law by banning civil lawsuits against gun manufacturers when guns are not used for legitimate self-defense, recreation, or sporting purposes. Prohibits qualified civil liability actions in state courts against firearm or ammunition manufacturers, distributors, dealers, or importers when their products are unlawfully or criminally used.	HR 800 voted out of House Judiciary Committee, June 14, 2005. S. 397 became P.L. 109-92, Oct. 26, 2005.
Tort Reform – Medical Malpractice	HR 5, HR 534, HR 2657, HR 3154, HR 3378, S. 354	Rep. Phil Gingrey (R-GA), Rep. Chris Cox (R-CA), Rep. Brian Baird (D-WA), Rep. Barbara Cubin (R-WY), Sen. John Ensign (R-NV)	All proposed bills preempt state laws regulating medical malpractice civil lawsuits within state courts, specifically in the areas of noneconomic and punitive damages caps, attorneys fees, statutes of limitations, joint and several liability, collateral source rules, and periodic payments. HR 5 also exempts drug or medical device manufacturers and distributors from civil liability if a specific product has received Food and Drug Administration clearance.	HR 5 passed House with vote of 230-194, July 28, 2005. Referred to Senate Judiciary Committee. All other bills remain in committee on joint referral to the Judiciary Committee and Health Subcommittee.
Tort Reform – “Obesity” Liability	HR 554	Rep. Ric Keller (R-FL)	Preempts state tort law by banning qualified civil lawsuits in state courts against food manufacturers, marketers, distributors, advertisers, sellers and trade associations for injury claims relating to weight gain or health conditions. Also eliminates any lawsuits already filed from proceeding.	Passed House with vote of 306-120, Oct. 19, 2005. Placed on Senate calendar without referral to committee.
Tort Reform – Vaccine Manufacturer Liability	H.R. 2863, defense appropriations rider	Sen. Bill Frist (R-TN)	This provision was added as a rider to the Conference Committee report of H.R. 2863, the FY2006 Defense Appropriations bill. It prohibits <i>any</i> lawsuit, under federal law or any applicable state law, from being filed against a vaccine manufacturer, distributor or administrator for any claim arising or resulting from the use of the vaccine or drug in question. Any petitioner making a claim of willful misconduct by a drug manufacturer may only file a complaint with the Secretary of Health and Human Services, thus being further barred from the state and/or federal court system. Courts are restricted to review of the Secretary’s action and may not ever consider the nature of the willful misconduct complaint.	Conference Report accepted by House with vote of 308-106, Dec. 19, 2005. Accepted by Senate with vote of 93-0, Dec. 21, 2005. <b>Became P.L. 109-148, Dec. 30, 2005.</b>

Issue	Bill Number	Sponsor	Explanation	Bill Status
Utilities and Energy	HR 3893	Rep. Joe Barton (R-TX)	Overrides state and local government zoning authority and eliminates citizen decision-making authority in the sites and permits for oil refineries and other utilities. This responsibility would be transferred to the Secretary of Energy, the President of the United States, and the federal District Court of Appeals in Washington DC. It would also discourage state and local governments from advocating on the behalf of their residents by establishing a “loser-pays” standard. Specifically, the bill would force states and localities to pay the attorney’s fees of the industry if a city loses, <i>but</i> if the state or local government wins the case, the industry is not required to pay the expense of the litigation.	Passed House with vote of 212-210, Oct. 7, 2005 and referred to Senate Committee on Energy & Natural Resources.

Issue	Federal Agency	Explanation	Status
State Product Liability – Prescription Drug Labeling	Food and Drug Administration (FDA)	<p>Preempts all state product liability law relating to prescription drug labeling, thereby usurping state legislative and court authority, and undermining state policy and judicial decisions. Written into the rule’s preamble, the preemption provision is contrary to consumer protection goals of the rest of the rule and harms the consumers that the rule is supposed to protect.</p> <p>The FDA also violated Executive Order 13132 – which requires federal agencies to consult with state and local organizations if a rule would have any effect on state or local law – by not consulting with NCSL or any other state or local organization, and by refusing to allow NCSL to comment on the Notice of Final Rulemaking.</p>	<p><b>Finalized on January 18, 2006, scheduled to go into effect on June 30, 2006.</b></p> <p>NCSL continues to fight against implementation, and is working with members of Congress to stop the rule.</p>
State Tort Law and Product Liability – Vehicle Rollover Traffic Accidents	National Highway Traffic Safety Administration (NHTSA)	<p>Preempts state common and product liability laws which hold automobile manufacturers to stricter standards than federal law.</p> <p>The preemption is included in a proposed regulation (Vol.70 Federal Register, No.162, page 49223) seeking to strengthen federal roof crush standards to reduce fatalities and injuries resulting from vehicle rollovers. The rule contains a civil justice section expressly preempting state product liability and wrongful death laws. Ironically, in its federalism impact statement, NHTSA erroneously concludes that “no consultation with states was necessary because there is no significant federalism impact,” a violation of Executive Order 13132 on Federalism. The preemption is also unauthorized by Congress in the legislation asking NHTSA to create stricter roof crush standards.</p>	<p>Pending. NCSL has called for a congressional investigation by the Senate Judiciary and Commerce Committees of the federalism executive order violation and the lack of legislative intent to preempt in the proposed NHTSA rule.</p>