



May 17, 2021

Via regulations.gov (EPA-HQ-OPPT-2021-0202)

ATTN: Cindy Wheeler, Existing Chemicals Management Division
Office of Pollution Prevention and Toxics
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460-0001

Re: Proposed Rule – Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Request for Comments; (Mar. 16, 2021); Docket ID: EPA-HQ-OPPT-2021-0202

Dear Ms. Wheeler:

The Retail Industry Leaders Association (RILA) want to take this opportunity to express its appreciation of the U.S. Environmental Protection Agency's (EPA's or Agency's) recent moratorium on enforcing the Final TSCA Section 6(h) rule for Phenol, Isopropylated Phosphate (3:1) (PIP (3:1), hereafter the Final PIP Rule), with respect to manufactured articles. Our members also appreciate the opportunity to submit additional comments on the issue of a new compliance date for the prohibition on the distribution of PIP (3:1)-containing articles.

By way of background, RILA's members include the largest and most innovative retailers. The retail industry employs over 42 million Americans and accounts for \$1.5 trillion in annual sales. RILA and its member companies strongly support the mission and goals of the EPA to protect human health and the environment, including preventing exposure risk from chemical substances that may be present in consumer goods and products. RILA members have robust compliance programs in place and work closely with trusted suppliers to ensure that all products that they sell meet or exceed all applicable U.S. safety standards and legal requirements.

RILA fully supports EPA's efforts to eliminate environmental risks and minimize exposure to PIP (3:1) to the extent practicable, including PIP (3:1) that may be contained in manufactured articles, for the general public and susceptible subpopulations. RILA strongly urges the Agency to develop a realistic compliance date that takes into consideration the following key supply chain realities:

- The significant amount of time needed for product manufacturers and component part suppliers to investigate complex, multi-tiered global supply chains for the millions of consumer products sold in the U.S. marketplace each year to pinpoint the products and



product components that contain PIP (3:1).

- The critical, but lengthy and time-consuming, process for product manufacturers and their component part suppliers to find and test alternative chemicals for use in component parts and final consumer products to ensure that a replacement chemical meets product specifications and performance, safety and environmental requirements;
- The timeframe required for product and component part manufacturers to secure reliable sources of a replacement chemical, rollout its use in the manufacturing processes and build up adequate inventory of PIP (3:1)-free products to sell to U.S. retailers;
- The typical purchasing calendar for retailers to order new PIP (3:1)-free products from suppliers and the timeline for manufacturers to ship these new products to retailers, and
- The need for an adequate sell-through period to allow retailers time to segregate old product containing PIP (3:1) from new PIP (3:1)-free products and sell through old inventory thereby avoiding the disposal of a large number of PIP (3:1) products, which would create environmental risks and result in significant costs and lost sales and profits for retailers and manufacturers.

In addition, the Agency should develop a clear policy and guidance that allows importing retailers to rely on demonstrated good faith compliance efforts, including supplier education programs and suppliers' certificates of compliance as evidence of compliance with the Final PIP Rule. Further, as the EPA moves forward with future regulation of chemicals in products under TSCA, RILA and its members recommend that the Agency develop a process for collecting data on the global chemical manufacturing of the specific chemical at issue and its use in products. To ensure the effective implementation of future regulations and a smooth market transition away from the targeted chemical, it is critical that the Agency establish a framework for outreach and engagement with all interested stakeholders, including retailers and consumer product manufacturers.

Each of these issues is discussed in more detail below.

I. EPA Should Take into Consideration Supply Chain Realities when Determining a Final Compliance Date to Prohibit PIP (3:1) in Articles

Historically, the application of TSCA restrictions to "articles" or consumer products has been limited. In the instant case, where the EPA has included "articles" in the scope of new PIP (3:1) restrictions, and in future application of TSCA requirements to consumer products, it is important for the Agency to understand today's complex, global and multi-tiered supply chains. To aid the Agency in its decision-making process, we have included a general discussion of retail supply chains and key supply chain concerns below.

A. Millions of Consumer Goods Are Sold Each Year Making Detecting Products Containing PIP (3:1) Challenging and Time Consuming

Each year millions of consumer products are sold to U.S. consumers ranging from food, clothing, accessories, toys, home décor, appliances, electronics, pet, auto, hobby, tools

and supplies for home repair, garden supplies, exercise and outdoor activity equipment, health and beauty products and more. Consumers depend on these products to feed and clothe their families; cook their food, wash the family laundry, communicate with family and friends, support remote learning and working from home, provide family entertainment; decorate their homes and gardens, and maintain healthy lifestyles.

The versatility and utility of PIP (3:1) has resulted in its extensive use in consumer products and their components parts. As the EPA noted in the Final PIP Rule, PIP (3:1) is used as, among other things, a plasticizer, flame retardant and anti-wear or anti-compressibility additive. In addition to the products the EPA has listed in the Final PIP Rule, our members understand that PIP (3:1) may be present in a wide range of consumer products and component parts including electronics, appliances, computers and peripherals, musical instruments, power tools, footwear, home office equipment, lighting and home furnishings, replacement auto parts, among many others. While retailers have started to have conversations with their private brand and national brand suppliers regarding the possible presence of PIP (3:1) in the products they sell, the process for trying to determine if PIP (3:1) may be contained in a component part, wiring or coating within millions of finished goods is daunting to say the least.

Up until now, the use of PIP (3:1) has not been regulated or banned in the U.S. or internationally, and as a result retailers and consumer product manufacturers have not had to track its presence in products they sell. It would be unfeasible for retailers to test each of the millions of finished products, component parts, wiring and coatings within their inventory based on the *mere possibility* of the presence of PIP (3:1). Such an effort would be akin to looking for a needle in a haystack.

Instead, a more reasonable and cost-effective approach would be to allow retailers, in partnership with their suppliers, sufficient time to conduct a thorough investigation of their supply chains. Preliminary discussions with manufacturers suggest that one year may be adequate to identify PIP (3:1)-containing components; however, we understand some manufacturers believe a longer period may be needed.

B. Any New Compliance Date Must Take into Consideration the Time-Consuming Process Necessary for Manufacturers to Identify and Test Replacement Chemicals for Use in Products to Ensure their Safety and Effectiveness

Once supply chains are investigated and products and component with PIP (3:1) are identified, manufacturers and their component part suppliers must begin the crucial process of identifying and testing alternative chemicals for use in component parts and final consumer products. Depending on the use and functionality of PIP (3:1) in a product or component (e.g., whether it is being used as a plasticizer, flame retardant etc.), extensive efforts may be required to identify potential effective alternative replacement chemicals. Sample component parts and final products incorporating the various

alternative replacement chemicals must be created and tested to ensure that any final consumer product and its component parts meet all product specifications and performance, safety and environmental requirements and customer expectations.

This process will not be quick or easy. When establishing a new compliance date for articles containing PIP (3:1), it is critical that the Agency build in enough time to allow manufacturers adequate time to complete this process. Failure to do so will result in products being pulled off the market with no new products available, which could have potentially devastating impact on consumers who rely on these products in their daily lives. Or alternatively, manufacturers could feel pressured to supply new inventory and rush through the important analysis and testing process resulting in products that may not meet product specifications and performance, safety and environmental requirements. Clearly, neither of these options was the intended results of the Final PIP Rule.

C. Manufacturers and Retailers will Need Time to Sell Through On-Hand Products Containing PIP (3:1) and Build Up Adequate Inventory of PIP (3:1)-free Product to Sell to U.S. Consumers

Once product and component part manufacturers have identified effective and safe alternative chemicals, they will need to contract with quality chemical suppliers that are able to meet their quantity and timing requirements. Manufacturers can then start to incorporate the new chemical into the product manufacturing process. This could take some time as the new replacement chemical may have different properties and handling requirements requiring a change in manufacturing processes and procedures. After manufacturing protocols and processes are updated and finalized, the production line can run, and the manufacturer can start to build up inventory of PIP (3:1)-free components and final consumer products for sale to U.S. retailers.

Depending on the product category, retailers place product orders anywhere from four to 12 months prior to shipment from the manufacturer's facility. After production, finished goods are transported by ocean, truck, rail or air for delivery to a company's U.S. warehouse. Transportation times can range from hours (air), day(s) (truck/rail) to three to four weeks (ocean).¹ Upon arrival at the warehouse, retailers will verify that the shipment complies with the purchase order terms, products are then scanned into inventory and sorted and allocated for distribution to stores or ecommerce fulfillment centers. Products are then loaded onto containers to be taken by truck and/or rail to their ultimate destination and are available for sale to U.S. customers.

¹ It should be noted that the above is a "best case" scenario for shipping timelines. However, these can easily be disrupted by natural or manmade disasters (e.g., hurricanes, floods, blockage of the Suez Canal) or other factors like port labor strikes or slowdowns or lack of needed shipping containers or transportation provider shipping capacity. These disruptions can delay a shipment by days, weeks, or months.

As retailers and manufacturers navigate the challenging process of transitioning from products containing PIP (3:1) to new PIP (3:1)-free products, retailers will need to segregate old products from new PIP (3:1)-free products. They will do this by creating new stock keeping units ("SKUs") which are the scannable bar codes on product packaging and labels. Retailers use SKUs in their inventory and Point of Sale (POS) systems and on their ecommerce websites to track inventory and sales. The process for creating new SKUs for a large number of new products is time consuming and requires advance coordination with product manufacturers to ensure that new the SKUs are placed on the new product labels or packaging. By using separate SKUs for new PIP (3:1)-free products, retailers will be able to avoid co-mingling old and new products and track and sell through old inventory prior to a hard stop sale date. This will ensure that retailers do not have to dispose of a significant number of PIP (3:1) products, which would have an adverse environmental impact and result in substantial costs and lost sales and profits for retailers.

In the past, regulatory agencies, including the EPA, have recognized the need to provide retailers enough time to sell through old products. For example, when the EPA adopted a new standard for formaldehyde and added product labeling requirements, retailers were given one year to transition from old to new products. Similarly, when the Consumer Product Safety Improvement Act² imposed new progressively lower lead level standards for children's products, retailers were given time and created new SKUs to segregate and sell through old inventory thereby ensuring that only products meeting the new lower lead level standards were on store shelves by the hard stop sale date.

It must be noted that in each of the above examples, the timing of the effective date and sell-through period was relatively short. However, in both instances, there were existing standards in place³ so that the compliance hurdles for the new stricter standard and time required for implementation were not as great as in this instance where there is no current PIP (3:1) standard or ban.

The entire process from initial development, manufacturing, and shipment of replacement PIP (3:1)-free product, and the transition from old to new products will be lengthy. Several suppliers have told RILA members that the time needed for the development to shipment of PIP (3:1)-free products could take up to 5 years or more. In addition, retailers will need a sell-through period of a year or more to work through old inventory and product returns before a final stop sale date.

² Consumer Product Safety Improvement Act of 2008, Pub. Law 110-314 as modified by Pub. Law 112-28, codified in 15 U.S.C 47.

³ For example, prior to EPA's adoption of its formaldehyde rule, California had previously established a formaldehyde limit and labeling requirements. Similarly, to the enactment of progressively lower limits under the Consumer Product Safety Improvement Act, there was a prior higher lead level standard for children's products.

II. Substantiation of Compliance

RILA members strongly urge the EPA to allow importers and retail sellers of a covered "article" under a TSCA rule to demonstrate compliance through a supplier certification program. As noted above, global supply chains are complex and multitiered. The vast majority of retailers and importers do not manufacture the products they sell, and instead, purchase finished customer products from U.S. and foreign product manufacturers. It would be impractical and cost prohibitive for retailers to test every component part, wiring, coating in the millions of products sold in the U.S. each year. Retailers must rely on their product suppliers provide information regarding the chemical composition of the products and its component parts. Product manufacturers are best position to do this as they have contractual relationships with component suppliers as well as control over the manufacturing process. Retailers recommend that companies be able to rely upon their demonstrated good faith compliance efforts including supplier education and compliance programs and suppliers' certifications of compliance. Such a process is consistent with how other regulatory requirements for imported products are implemented.

III. Recommendations for Steps the Agency Should Take in Connection with Future Regulation of Chemicals in Consumer Products

The EPA has a long history of engaging with chemical manufacturers and importers of chemical products on TSCA-related matters. However, with its recent expansion of TSCA restrictions to include chemicals in "articles" and to cover typical consumer products under new TSCA rules, consumer product manufacturers and retailers are now also key stakeholders. To ensure a smooth implementation of any future TSCA chemical regulation covering "articles", it is critically important that that Agency expand its outreach to include new sources of data and stakeholders. The Agency's current data collection methods through Chemical Data Reporting and Pre-Manufacturing Notices are predominantly focused on chemicals and chemical suppliers. To get a full understanding of the potential impact of a proposed TSCA rule that will cover articles, the Agency's review will need to include data collection regarding the global manufacture, supply and use of specific chemicals, including its use in consumer products. Additional outreach targets should include consumer product manufacturers and retailers.

EPA has various avenues to conduct this outreach. First, it can collaborate with environmental agencies in other countries to get information on international manufacturing of specific chemicals and global chemical supply chains. It can also develop a formal stakeholder engagement process under the Federal Advisory Committee Act⁴ to engage with chemical producers, consumer product manufacturers, retailers, environmental advocates, and other stakeholders. Lastly, it can use more informal means of outreach, including public workshops

⁴ 5 U.S.C. App.

or informal listening sessions where Agency staff hear from various stakeholders with information on the use of a specific chemical in consumer products and number of products impacted, global supply chain challenges and the timeframe for developing, manufacturing, shipping, and distributing products containing effective and safe alternative chemicals. RILA and its members would welcome the opportunity to engage with Agency staff on these issues.

Closing

RILA appreciates the opportunity to submit additional comments on the issue of a new compliance date for the prohibition on the distribution of PIP (3:1)-containing articles. RILA and its members look forward to further engagement with the Agency during its rulemaking process, and its many efforts that serve to protect consumers from exposure to toxic chemicals and unsafe products.

If you have any questions or need any additional information, please contact me at kathleen.mcguigan@rila.org / (202) 869-0106 or Susan Kirsch, Senior Director Regulatory Affairs and Compliance susan.kirsch@rila.org / (202) 866-7477.

Sincerely,

A handwritten signature in cursive script that reads "Kathleen McGuigan". The signature is written in black ink and is positioned above the printed name and title.

Kathleen McGuigan
EVP & Deputy General Counsel