

EPA and PFAS in consumer products

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Overview

Overview

- The federal government, led by US Environmental Protection Agency, has been slow to regulate PFAS relative to the states
- Presumably due to constraints on regulatory authority, as Congress has not passed meaningful legislation regarding PFAS in consumer products
- US EPA's primary tool for regulating PFAS in consumer products is the Toxic Substances Control Act (TSCA)
 - Focused on identifying and evaluating human health and environmental impacts of chemicals substances
 - Permits EPA to ban or otherwise restrict chemical substances from US market
 - Applies to chemical substances, mixtures, and articles manufactured in, or imported into, the US

The Toxic Substances Control Act (TSCA)

TSCA basics

- 15 U.S.C. § 2601 et seq.
- Enacted in 1976, but amended in 2016 to address perceived shortcomings in the law
- Regulation of chemicals manufactured in, or imported into, the US
 - Grants EPA authority to regulate entire life cycle of chemical substances
 - Generally not used as a tool to provide comprehensive bans of chemicals
 - Evaluation of human health and environmental impacts of chemicals
 - Authorizes EPA to restrict or ban a chemical from the US market
 - Provides enforcement authority for noncompliance

Chemicals, mixtures, and articles

- Applies to chemical substances, mixtures, and articles
- Typically, EPA has used TSCA to regulate chemicals and mixtures, but not **articles** manufactured with those chemicals or mixtures

Article:

- Any manufactured item that:
 - is formed to a specific shape or design during manufacture,
 - has end use function(s) dependent in whole or in part upon its shape or design during end use, and
 - has either no change of chemical composition during its end use
 - is not a fluid

Key provisions

Section 4: testing of chemicals

- Provides EPA with authority to order manufacturers and importers of chemicals and mixtures to test them for human health and environmental impacts

Section 5: new chemical substances

- Authorizes EPA to regulate new chemical substances prior to manufacture within the US or import into the US
- Requires notification prior to manufacture or import to permit EPA to assess whether a chemical substance poses an unreasonable risk to human health or the environment
 - New chemical substances are those for which EPA does not already have human health and environmental risk data (as set forth in the TSCA Inventory of Chemical Substances)
 - Authorizes EPA to issue “Significant New Use Rules,” or SNURs, for known chemical substances being used in a new way

Section 6: regulation of hazardous chemicals

- Authorizes EPA to directly restrict or regulate individual chemicals or mixtures
 - Bans, phase outs, restrictions on use (e.g., limited commercial/industrial use, no consumer use)

Key provisions—cont'd

Section 8: reporting and recordkeeping

- Requires EPA to maintain the TSCA Inventory
- Authorizes EPA to require reporting and recordkeeping in connection with the manufacturing and import of chemicals

Section 13: import certification

- Requires importers to certify compliance with TSCA or to declare that TSCA does not apply to the imported goods

Section 13: enforcement

- Failure to comply with any requirement under the Act;
- Failure to maintain records or submit required notification or reports
 - Civil penalties (up to ~\$47,000 per violation)
 - Denial of entry, import seizure

EPA's PFAS Action Plan

EPA PFAS Action Plan (2019)

“Short-term and long-term actions ... to understand and address PFAS”

Development of analytical methods and tools

Review of new PFAS substances

Augmentation of existing rules and regulations regarding PFAS use (SNURs)

Focused enforcement

Long-term multi-step research initiatives and regulatory actions

EPA actions—consumer products

Long Chain PFAS Significant New Use Rule (SNUR)

Proposed PFAS Reporting Rule

Framework for TSCA New Chemical Review

Proposed Inactive PFAS Significant New Use Rule

Long Chain PFAS Significant New Use Rule (SNUR)

- Requires a manufacturer, importer, or processor of a chemical substance or article within scope to provide notification to EPA at least 90 calendar days prior to manufacturer, import, or processing
- Effective September 2020
- Notification, which is onerous, includes information on use and quantity, as well as any known health or environmental impact data.
- EPA can then choose to regulate or restrict the intended use of the chemical substance.
- Requires notification for the use of:
 - PFA sulfonates (~300)
 - Certain long-chain PFAS (three groups)
 - Historically phased-out long-chain PFAS
 - Perfluorooctanoic acid (PFOA) and its salts
 - Leaves a subset of long-chain PFAS currently unregulated, except that their use in carpets and rugs is prohibited

Long Chain PFAS SNUR—cont'd

- Specifically applies to textiles, including furniture, treated with a PFAS surface coatings
 - No article exemption
 - Imported textiles with a PFAS surface coating may be subject to notification requirements
- Significant confusion with regard to compliance, as change in presidential administrations led to re-prioritization of the rule
- Have not seen publicly available information indicating enforcement

Proposed PFAS reporting rule

To support EPA's continued obligation under TSCA to gather information on chemical usage, the proposed rule would require:

- manufacturers (including importers)
- of any **article containing a PFAS substance**
- Manufactured (including import) after January 1, 2011
- To report to EPA:
 - Chemical properties of the PFAS substance
 - Processing and use type, sectors, functions, and volume
 - Whether intended for use in products for children
 - Max concentration
 - Information on occupational exposure
 - Existing human health and environmental impact data

Proposed PFAS reporting rule-cont'd

Implementation details

- Reports due six months after effective date
- Submission via EPA's TSCA submission portal
- No exception for small manufacturers (importers)

Specifically identifies importers of articles:

“EPA acknowledges that it is possible that ... an importer of articles containing PFAS, may not have knowledge that they have imported PFAS ... even after they have conducted their due diligence under this reporting standard.... Such an importer should document its activities to support and claims it might need to make related to due diligence.”

Status:

- Public comments received toward end of 2021
- Subsequent round of comments received toward of 2022 focused on costs of rule to small businesses
- Awaiting EPA's next move, but expect some form of reporting requirement

Framework for TSCA new chemical review

Establishes EPA's stated approach to evaluating new PFAS substance or new uses for known PFAS substances

- Published June 2023
- Applies to Premanufacture Notices (PMNs) for new PFAS and Significant New Use Notices (SNUNs) for known PFAS
- States that EPA expects to issue SNURs restricting use of any new PFAS developed
- In the context of consumer products, EPA expects to require a “full suite of testing [to] be completed and submitted to EPA for review prior to manufacture
- EPA anticipates that it would issue SNURs heavily restricting the use of or prohibiting any new PFAS to be used with consumer products
- While less absolute than the state laws banning any intentionally added PFAS, this is consistent with trend to eliminate PFAS substances from use in consumer products

Proposed Inactive PFAS Significant New Use Rule

- Proposed rule aims to formally prevent new use of PFAS substances that have been deemed “Inactive” under TSCA because they have not been manufactured or imported for many years (generally since 2006)
- As proposed, manufacture or import of articles containing these substances are exempted
- However, EPA intends to reconsider this exemption once it has received data under the proposed PFAS reporting rule

Status:

- Public comment period closed in March 2023
- Awaiting EPA’s finalization of the rule

Looking ahead

What's next?

Expect current EPA administration to continue moving TSCA rules forward to include articles

- Some version of PFAS reporting rule is likely to go into effect in the near future
- However, as shown by the turbulence between prior administrations, any change in 2024 could lead to back-tracking or unwinding of current efforts on the roadmap

Assess current processes for use of long-chain PFAS subject to TSCA rules

- While lack of enforcement information suggests EPA has not prioritized this rule, it is in effect, and priorities can change
- Likely prudent to confirm whether any impacted PFAS are being used on articles as surface coatings in advance of state PFAS bans

What's next?

Set up knowledge base to track EPA activities

- With so much action at the state level, it is easy to ignore EPA
- But risk and severity of non-compliance may be greater
- While EPA has been slow to act in a way that meaningfully impacts consumer product manufacturers and importers, this could change

Watch for EPA attention to alternative technologies and chemistries

- While trend and focus are clearly on phase out of PFAS substances from consumer products, EPA may shift focus to look at any alternatives developed as a result



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