

May 17, 2021

Ms. Michal Freedhoff
Acting Assistant Administrator
Office of Pollution Prevention and Toxics
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460-0001

**RE: Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA
Section 6(h) (EPA-HQ-OPPT-2021-0202-0001)**

Dear Acting Assistant Freedhoff,

On behalf of the National Retail Federation, we welcome the opportunity to submit these comments regarding the prohibition on the processing and distribution of persistent, bioaccumulative, and toxic (PBT) substances issued on January 6, 2021 (PBT Rules). We agree with comments previously submitted by many stakeholder groups requesting an extended compliance date to avoid significant supply chain disruptions. For reasons outlined below, we are also concerned about placing strict liability on retailers for sale of PBT substances and strongly believe that the compliance date should be focused on a manufacture date.

The National Retail Federation, the world's largest retail trade association, passionately advocates for the people, brands, policies and ideas that help retail thrive. From its headquarters in Washington, D.C., NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing \$3.9 trillion to annual GDP and supporting one in four U.S. jobs — 52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating, inspiring and communicating the powerful impact retail has on local communities and global economies.

Background

Retailers operate very complex global supply chains working with thousands of vendors to supply a wide range of products, and some online retailers allow third parties to sell products in their stores. Retailers often sell complex goods or other articles that may contain hundreds or more individual components, and each of those components may themselves be articles. It is very difficult for retailers to determine the chemical composition of each of these articles, as they do not come with a Safety Data Sheet (SDS) or other documentation/labels identifying all chemicals used in the article. Moreover, it is also common for a non-article component (*i.e.*, a “product” or PBT substance as defined in the PBT Rules) to be many links upstream in the supply chain. Retailers manage robust vendor and product compliance programs because retailers are typically not the manufacturer of the product; retailers contract with manufacturers

to provide the goods that are ultimately sold to customers. These contracts are executed well before a good is ever provided for sale to a customer. Retailers usually work with their suppliers anywhere from six to nine months, or longer in some instances, before a good is imported, placed on a store shelf, or offered for sale online.

Several industry groups representing retail product suppliers, including the Consumer Technology Association (CTA) and the Information Technology Industry Council (ITI), previously raised concerns with proposed rules and the impact it would have on retailers. Their concerns correctly reflect retailer concerns about the unreasonably swift implementation timeline for distribution in commerce.

We are particularly concerned that EPA is seeking an incredibly short implementation timeframe. For example, for PIP (3:1) there is no international standard, especially with a focus on articles. The lack of an existing international standard means that there are not yet reliable mechanisms for identifying, tracking, and eliminating potential sources of PIP (3:1) in the incredibly complex supply chains retailers must navigate before offering products for sale. Understanding where PBT substances exist within these supply chains will take time. It will also take time to find suitable alternatives for PBT substances, adjust manufacturing processes, and begin shipping and selling the re-engineered products.

Retailers can respond to evolving environmental and human health and safety needs when information is available that allows them to respond. The EPA needs to further review the issue to fully understand the issues within the global supply chain, testing procedures and requirements and need for international harmonization.

Strict Liability Concerns

The PBT regulations impose strict liability on retailers for selling articles containing any of the PBT substances. As applied to retailers, this is an unreasonable standard because it is difficult for retailers—often many steps away from manufacturers in the supply chain—to determine if the products sold in their stores contain PBT substances. Retailers thus face significant challenges identifying and removing any potential source of PBT substances inside of extremely complex supply chains. Retailers are not positioned to understand the granular details of their supply chains given that PBT substances might be introduced at any point in the manufacture of sub-sub-sub-components manufactured multiple layers deep in a supply chain for the finished product that a supplier delivers to a retailer for sale to a customer. A strict liability risk of this magnitude requires an unprecedented degree of supply chain visibility that is not currently possible and certainly not possible on the short timelines the EPA is considering.

Rather than a strict liability standard, the EPA should apply a “known to or reasonably ascertainable” standard, which EPA has used elsewhere in TSCA. *See, e.g.*, 40 C.F.R. § 710.25 (excusing manufacturers from reporting if information about prior production was not known to or reasonably ascertainable by the manufacturer); § 720.40 (requiring data submittal for new chemicals only to the extent such information is known to or reasonably ascertainable by the submitter). Similarly, the Clean Air Act’s defeat device prohibition, enforced by the EPA, makes the sale, offer to sell, or installation of a defeat device illegal only where “the person knows or

should know that such part or component is being offered for sale or installed for such use or put to such use.” 42 U.S.C. § 7522(a)(3)(B). Combined with a sell-off period for retailers to remove any non-compliant products, applying a knowledge-based standard would place compliance requirements on those parties that have access to the appropriate information and can accelerate implementation of the EPA’s goals.

The EPA could also publish and maintain its own list of articles containing PIP (3:1) and other PBT substances. This approach would significantly simplify retailers’ efforts to meet the EPA’s environmental and human health and safety goals.

Sixty Day Timeframe Challenges

Unfortunately, as initially proposed, only providing 60-days to come into compliance with distribution prohibition for PIP (3:1) is not a realistic timeframe that retailers and their vendor partners can meet without causing significant supply chain disruption and economic harm to these businesses, especially as companies continue to recover from the ongoing global pandemic.

In order for retailers to implement their compliance programs for final rules, there needs to be certainty regarding a final rule. While the regulated community has been aware of the draft rules, many have been waiting to communicate out requirements to their supply chain partners until the rule is finalized and all the requirements are known. Retailers and other stakeholders will need time to build out systems and requirements, but this will be incumbent upon final rules being published with additional guidance from the EPA. These internal processes, documents, data systems to collect the required compliance documentation cannot be built and communicated within 60 days of a final rule being published.

We would suggest that a much more reasonable timeframe would consider the entirety of the global supply chain including manufacturing timelines, shipping timelines and typical inventories of product that may need to sell through.

Compliance Date Alternative

We strongly believe that the EPA should shift the compliance date for all PBT substances to a “manufacture date” with an additional sell thru period rather than a distribution in commerce date. We support the proposal from CTA and ITI to establish a “manufactured by” compliance date for PIP (3:1) of no sooner than 48 months from the publication of the revised final rule. As these groups noted, there is worldwide precedent for the four (4) year timeframe under the European REACH regulation impacting articles as well as EPA’s approach for adhesives and sealants under the Final Rule for PIP (3:1). For the same reasons, we propose that the “manufacture date” for all PBT substances be at least 48 months after publication of the revised final rule.

We also request that the EPA provide an additional one year sell thru period after the final manufacture date requirement for all PBT substances. The EPA has certainly provided sell thru provisions in other regulations. This includes the Section 6 Formaldehyde Rule; EPA allowed a phase-in of the restrictions and requirements for this rule. The rule first mirrored an

existing California emission requirement. The rule then allowed just over three years (12/16-3/19) for Third Party Certifiers to update their accreditation requirements to recognize TSCA. Similarly, labeling on products was not required to change from labeling as CARB compliant to EPA and CARB compliant until 3/2019. Finally, the certification of panels as compliant with TSCA or CARB needed to be done by 6/2019 (almost a year after the direct final rule). This precedent provides a useful model the EPA can use for creating a 48-month timeframe and sell thru period for all PBT substances.

During a compliance extension, supply chain participants would have a duty to provide downstream notifications if they are selling articles containing any of the PBT substances. Receiving notifications from upstream suppliers would help address the lack of knowledge on the retail side. Ideally, such downstream notifications could also be done on webpages (e.g., for an online store)

Providing the longer implementation timeline will also allow retailers to avoid the environmental and financial costs, including increased greenhouse gas emissions, of disposing of out of compliance products.

Conclusion

While NRF applauds the EPA's desire to protect human health and the environment and retailers have created robust compliance programs in support of those same goals, the proposed rules prohibiting PBT substances not realistic as written. The prohibition dates should be extended, and retailers should have sell thru periods to dispose of inventory. Retailers and the suppliers upon which they rely need no less than 48-months to comply for the reasons that we have outlined in this letter and that other associations like CTA and ITI, who represent significant parts of the retail supplier base, have also stated.

In addition, given the challenges retailers face identifying all potential sources for PBT substances to enter its supply chains even with our requested extended timelines, the EPA should adopt a knowledge-based standard rather than a strict liability standard for retailers, and should publish a list of products containing PBT substances so that retailers have the information they need to comply.

Sincerely,



David French
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