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Restricting persistent, bioaccumulative, and toxic substances: EPA grants a 180-day reprieve on parts of the new Toxic Substances Control Act rules

By Alison Torbitt and Dana Stanton

The U.S. Environmental Protection Agency (EPA) recently finalized five new rules under the Toxic Substances Control Act (TSCA) restricting the manufacture and distribution of five chemicals that the EPA determined are persistent, bioaccumulative, and toxic (PBTs), including phenol, isopropylated phosphate (3:1) (PIP (3:1)), a widely-used flame retardant additive in various lubricating oils, grease, adhesives, sealants, paints, coatings, and plastic components. Processing and distributing PIP (3:1) and PIP (3:1)-containing products is now prohibited, with certain exemptions, such as PIP (3:1)-containing lubricants and greases.

Amid industry outcry on the original, tight timeline that caused havoc in the supply line across the country, the EPA rolled out a “No Action Assurance” policy, available [here](#), indicating that the EPA will temporarily not enforce violations of certain aspects of the new rules, specifically exercising its enforcement discretion for the ban on processing and distributing PIP (3:1) for use in articles and PIP (3:1)-containing articles. An “article” is defined as a manufactured item:

1. Which is formed to a specific shape or design during manufacture,
2. Which has end use functions dependent in whole or in part upon its shape or design during end use, and
3. Which has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article, and that result from a chemical reaction that occurs upon end use of other chemical substances, mixtures, or articles, except that fluids and particles are not considered articles regardless of shape or design.

Notably, fluids do not meet the definition of articles, and therefore are not covered by the reprieve granted by the No Action Assurance Policy.

The No Action Assurance policy is scheduled to remain in effect until September 4, 2021.

The EPA stated that it is taking this action to reduce the hardships and supply chain disruptions caused by the ban, acknowledging that “a wide range of key consumer and commercial goods could be affected by the prohibitions to varying degrees, and [the] EPA is being alerted of additional articles every day as stakeholders investigate the presence of PIP (3:1) in their supply chains.” The reprieve is aimed to give regulated entities more time to identify PIP (3:1) in articles and to find and test suitable replacements and alternatives. The EPA also indicated that it may consider officially extending the March 9, 2021, compliance deadline, so any public comments should still comment on this now past-date.

Beyond the compliance deadline for PIP (3:1), EPA also re-opened the public comment period regarding any and all aspects of all five of the new TSCA rules. In the EPA’s announcement, available [here](#), the EPA indicated that it is especially interested in comments regarding implementation issues associated with the final rules, whether to consider additional or alternative measures or approaches, and whether to push back the compliance deadline. The EPA will be accepting public comments until May 17, 2021.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Alison Torbitt, 415-984-5008, atorbitt@nixonpeabody.com
 - Dana Stanton, 518-427-2735, dstanton@nixonpeabody.com
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