



September 27, 2021

U.S Environmental Protection Agency
Attention: Docket ID No. EPA-HQ-OPPT-2020-0549
Dr. Michal Freedhoff
Principal Deputy Assistant Administrator
Office of Pollution Prevention and Toxics
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
Via Electronic Submission: <http://regulations.gov>

Re: TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances. Docket ID No. EPA-HQ-OPPT-2020-0549, 86 Fed. Reg. 33,926 (June 28, 2021)

The National Association of Chemical Distributors (NACD) submits the following comments in response to the proposed rule published by the U.S. Environmental Protection Agency (EPA) in the June 28, 2021, *Federal Register* issue regarding **Docket ID No. EPA-HQ-OPPT-2020-0549, TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances**.

About NACD

The National Association of Chemical Distributors (NACD), established in 1971, is an international association of chemical distributors and their supply-chain partners. Member companies process, formulate, blend, re-package, warehouse, market, and transport chemical products for over 750,000 customers across the U.S. The industry that NACD represents is a major economic engine that generates \$7.5 billion in tax revenue. NACD's members represent more than 85% of the chemical distribution capacity in the nation and 90% of the industry's gross revenue. They range from small family-owned businesses to large national and international organizations. NACD members meet the highest standards in safety and performance through mandatory participation in NACD Responsible Distribution®, the association's third-party-verified environmental, health, safety, and security program. Through this verification, NACD members demonstrate their commitment to continuous improvement in every phase of chemical storage, handling, transportation, and disposal operations.

Challenges of Retrospective Reporting

NACD supports EPA's regulatory decision-making that is informed by efficient and targeted data collection. As EPA develops a final rule for Toxic Substances Control Act (TSCA) Section 8(a)(7), EPA must consider that the proposed reporting rule would require information about past manufacturing and importing activities from many entities that would not have had a reason to ask for or inquire broadly about per- and polyfluoroalkyl substances (PFAS) content in imported products (including substances, mixtures, and articles). This level of reporting in combination with the ten-year retrospective reporting timeframe may impose undue burden on covered entities.

Exemptions for Certain Persons

Under previous reporting rules, EPA has accommodated and granted reporting exemptions for certain persons within TSCA's statutory parameters. For example, TSCA Section 8(a)(7), under which the PFAS rule was proposed, allows EPA to include exemptions to the reporting requirements (e.g., persons that import chemicals substances as part of articles or manufacture or import substances as byproducts or impurities). EPA has included exemptions in regulations issued under TSCA Section 8(a)(1), despite the statutory language stating that "each person" (other than small manufacturer or processor) is required to report. Similar language is present in TSCA Section 8(a)(7), i.e., it requires that "each person who has manufactured" a PFAS chemical to report. Additionally, TSCA Section 8(a)(5), especially in reference to TSCA Section 8(a)(5)(C) but not necessarily limited to 8(a)(5)(C), applies to all TSCA Section 8(a) rules, including the proposed PFAS Section 8(a)(7) rule. That provision states:

- (5) Administration.—In carrying out this section, the Administrator shall, to the extent feasible—
- (A) not require reporting which is unnecessary or duplicative;
 - (B) minimize the cost of compliance with this section and the rules issued thereunder on small manufacturers and processors; and
 - (C) apply any reporting obligations to those persons likely to have information relevant to the effective implementation of this subchapter.

The information required under the proposed rule is less likely to be known or reasonably ascertainable by persons that manufacture or import PFAS substances as impurities, byproducts, in low volume/concentrate or as part of articles, than by persons that domestically manufacture PFAS or import the substances in bulk. Furthermore, because the required information may not be known or reasonably ascertainable, mere coverage under the rule imposes a significant burden on these persons to become familiar with and determine any reporting obligations under the rule. EPA should consider reasonable exemptions for certain persons such as those who manufacture (or import) PFAS as byproducts, impurities, in low volumes/concentrates or as part of articles.

Additionally, EPA should consider the impact that this rule will have on small businesses and incorporate a reporting exemption for organizations whose revenue falls below a certain threshold and/or for organizations with a limited number of employees. Small businesses would be especially impacted by the broad reporting requirements, and the rule could force smaller organizations out of business.

EPA has outlined these same exemptions – de minimis, small business, byproduct, impurity, import articles, etc. – under other TSCA rules and should extend this rationale to this proposed rule.

Clear and Defined Reporting Parameters

For articles and other products that may or may not contain a PFAS substance, it is not clear what level of effort an importer is required to undertake to determine whether any of these products contain a particular PFAS substance. NACD poses the following questions to EPA:

- Are importers of all products and articles required to ask all their suppliers to meet the known or reasonably ascertainable reporting standard?
- How will EPA define "known or reasonable ascertainable"?

- Are these importers required to ask their suppliers for other information to inform reporting, e.g., percentage of the chemical in the product, function of the PFAS chemical?
- If the supplier does not provide information but the product or article turns out to contain a PFAS, how is the importer held liable?

EPA should consider that in the unlikely event a supplier confirms the presence of a particular PFAS, there is a good chance that other information, such as the percent of the chemical in the products and articles, would not be disclosed which would limit the value of the available information. By establishing such broad reporting rules, the proposal adds unnecessary obligations on industry participants as well as on EPA, which must collect and examine the data. To avoid overburdening itself and reporting entities, the agency should clearly explain its reporting parameters with possible example scenarios to include what constitutes due diligence, examples of imported products and articles, and information that would be considered to be known or reasonably ascertainable by a manufacturer or importer under the rule.

In this regard, reference to Chemical Data Reporting (CDR) guidance is wholly inadequate given the array of exemptions under that rule that are not included in the PFAS proposed rule.¹ If EPA expects an importer to send an inquiry to each foreign supplier of a product or article, EPA needs to recognize this could impose a tremendous burden that would typically be beyond what is required under CDR and far outside of what EPA contemplates in the PFAS rule.²

Additionally, given the vast amount of possible PFAS substances that could be subject to this rule, NACD requests that EPA identify the specific substances that are subject to reporting. This would reduce the overall burden on both the agency and reporting entities. The process of defining the reportable substances, using sound science, would allow EPA to narrow in on the PFAS that are of priority and facilitate compliance in the reporting community. Further, NACD suggests that EPA use a phased coverage approach, as discussed below, in the event the agency determines more PFAS should be covered or it requires additional data.

Phased Coverage of PFAS Chemicals

NACD further stresses that EPA should consider its ability to review and use data that may be of limited quality. In this instance of proposed reporting, quantity of data may not coincide with quality

¹ Chemical Data Reporting (CDR) exemptions that are not included in the proposed per- and polyfluoroalkyl substances (PFAS) reporting rule are described below. There are other exemptions, such as an exemption for naturally occurring substances, that are omitted because they do not or are not likely to apply to PFAS.

1. *De minimis* level (<2,500* or <25,000 lbs/site depending on the substance) (40 C.F.R. § 711.8).
2. Impurity (40 C.F.R. § 711.10(c), *citing* 40 C.F.R. § 720.30(h))
3. Byproduct (40 C.F.R. § 711.10(c), *citing* 40 C.F.R. § 720.30(g) (certain commercial byproducts) and (h) (byproducts with no commercial purposes), and 40 C.F.R. § 711.10(d) (certain specified byproducts, e.g., that are recycled on-site)).
4. Import as part of articles (40 C.F.R. § 711.10(b)).
5. Polymer (40 C.F.R. § 711.6(a)(1)).*
6. Non-isolated intermediate (40 C.F.R. § 711.10(c), *citing* 40 C.F.R. § 720.30(h)(8)).
7. Substances that are formed upon end use of another substance, mixture, or article (40 C.F.R. § 711.10(c), *citing* § 720.30(h)(5) and (6)).
8. Substances that are formed under certain conditions (40 C.F.R. § 711.10(c), *citing* 40 C.F.R. § 720.30(h)(3), (4) (such as weathering and aging, respectively), and (7)).
9. Small government or small manufacturer (40 C.F.R. § 711.9).*

* Some exemptions are not available if the chemical substance is subject of specific Toxic Substances Control Act (TSCA) actions, such as a Consent Order or Significant New Use Rule (SNUR).

² EPA estimates “Importers of articles that contain PFAS may incur costs for rule familiarization (\$69.79 per firm); identifying the type of imported articles that potentially use PFAS (\$1,641-\$1,932 per firm); identifying suppliers involved (\$1,185 per firm); collecting data from suppliers (\$0-644 per article); and recordkeeping (\$12 per firm). 86 Fed. Reg. 33926, 33935 (June 28, 2021).

of data. EPA should focus on what kinds of data and parameters under this reporting rule would best inform the agency in an efficient and effective manner. Voluminous amounts of data have the potential to overburden EPA and reduce the efficacy of this rule.

If EPA needs additional data in the future, the agency should consider additional rounds of data reporting, like the recently issued tiered data reporting proposal. For example, EPA might require separate rounds of reporting at various quantity thresholds, such as a round for manufacture or imports above 10 tons per substance, another later round for quantities above 1 ton per substance, and consider whether reporting at additional, lower tonnage bands is warranted given the costs and benefits of requiring such reporting. This could facilitate more effective and efficient reporting as required under the Paperwork Reduction Act³.

Additionally, EPA should consider taking a phased approach for particular PFAS chemical reporting. Although the statute requires a final rule be issued by 2023, it does not address when reporting must occur. EPA could target the initial reporting to PFAS chemicals believed to present the greatest hazard (e.g., C8 and C6 PFAS chemicals). This could allow EPA to tailor subsequent reporting further based on lessons learned from the earlier round(s) and allows EPA to manage the data more effectively.

Conclusion

NACD appreciates the opportunity to provide EPA its comments on the proposed TSCA Section 8(a)7 Reporting and Recordkeeping Requirements rule. As EPA finalizes this reporting rule, NACD urges the agency to consider the impact of the breadth of the reporting rule and weigh the benefits of reasonable exemptions for certain persons that manufacture (or import) PFAS in low concentrations/volumes, as impurities, as byproducts or as articles and for small businesses. Additionally, NACD emphasizes the need for clear and practical regulatory guidelines. The more explicit, practical, and well-defined the data reporting parameters are, especially a defined list of reportable substances, the more efficiently entities subject to this rule can report to EPA.

If you have questions or require additional information, please do not hesitate to contact me.

Sincerely,



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³ 44 U.S.C. 3501 et seq