Regulation: Formaldehyde Emission Standards for Composite Wood Products (40 CFR Part 770, Published December 12, 2016) (81 FR 89674)

Agencies involved: Environmental Protection Agency, Customs and Border Protection

We at the American Home Furnishings Alliance, the Kitchen Cabinet Manufacturers Association, the International Wood Products Associations, the Recreational Vehicle Industry Association, the National Retail Federation, and the Retail Industry Leaders Association urge the Trump Administration to substantially improve or eliminate the EPA's Formaldehyde Emissions Standards for Composite Wood Products regulation. This new regulation will severely disrupt the supply chain for U.S. businesses manufacturing and selling products that include composite wood products such as furniture, cabinetry, wood flooring, recreational vehicles and many others consumer goods. The challenges associated with complying with this misguided regulation will lead to higher prices for U.S. consumers and the loss of good paying American jobs.

Our Associations are particularly concerned about the following provisions:

Effective Date and Compliance Timeline: The regulation as finalized on December 12, 2016, was originally set to become effective on February 10, 2017, and there are subsequent compliance milestones explicitly stated in the regulation. This effective date was delayed by 60 days in accordance with White House Chief of Staff Reince Priebus' January 20th Memorandum for the Heads of Executive Departments and Agencies concerning Regulatory Freeze Pending Review. On March 20th, EPA delayed the effective date until May 22, 2017. This shortens the timeline for Third-Party Certifier (TPC) recognition substantially and puts tremendous pressure on EPA to process these applications quickly. We are deeply concerned that if the final rule goes into effect in its current form with this delay in the effective date - without also amending all the internal implementation dates - it will have an adverse effect on regulated industries.

If this rule goes into effect as currently proposed on May 22, 2017, EPA will have reduced the time available for TPCs, panel manufacturers, fabricators, importers, distributors and retailers to obtain compliance by the mandated date of December 12, 2017, creating a substantially increased regulatory burden. Under this rule, EPA must first recognize Product and Laboratory Accreditation Bodies, only then can a TPC apply for and be recognized by EPA. Panel manufacturers must have an EPA-recognized TPC certify its production processes and only when that task is complete can it be approved to manufacture EPA / TSCA compliant wood composite panels. Covered products must be compliant and labeled by December 12, 2017 to be sold in the U.S. In turn, fabricators, importers, distributors and retailers must wait until these steps are complete to be able to supply compliant products to the marketplace. All of this action cannot begin until the rule is in effect. We strongly urge EPA to amend the internal implementation dates so that all of the rule's mandatory dates for compliance reflect *at a minimum* the lead times in the original final rule.

Also under the regulation, beginning December 12, 2017, one year after the regulation's original effective date, all covered wood products must be labeled as TSCA compliant. While we initially communicated our concerns about this tight one-year timeframe to EPA staff, the two delays have eliminated four months before the process can begin. We are concerned that the shrinking timeframe combined with limited staffing at EPA to process applications, finite TPC capacity, and the large number of composite wood product producers that must be visited will make it nearly impossible for U.S. businesses to bring their supply chains into compliance.

While at a minimum EPA should restore the lead times included in the original final rule, we believe a further 12 month extension is warranted. The most recent delay prohibiting Accrediting Bodies (ABs) and TPCs from submitting applications to the agency for review and approval limits fabricators, importers, and distributors from sourcing compliant platforms used to produce laminated products. These laminated products are used as component parts of finished goods, i.e. furniture, wood flooring, cabinetry, and countless other consumer goods. The most recent delay in the effective date, combined with the 3-months anticipated for the agency to issue a direct final rule, severely limits the ability of the supply chain to source compliant composite wood products and truncates the compliance by possibly 6-months. The most workable solution would be for EPA to tie the rule's compliance timeline to the final effective date published in the Federal Register following EPA's latest review of the regulation and grant a 12-month extension to allow the various compliance milestones to be met and ensure the adequate supply of certified composite wood products throughout the supply chain.

Non-Complying Lots: This provision, 40 C.F.R. § 770.20(f), applies to a fabricator who receives notification from a panel producer that panels it received were part of a lot that failed an emissions test. The provision arguably requires the fabricator to notify its customers to which it may have shipped finished products containing component parts made from those panels. The fabricator's notification must inform its customers that those finished products must be isolated; cannot be further distributed; and must either be recalled or treated and retested. This non-complying lots provision appears to be designed with panels and a short supply chain in mind. But it makes no sense when applied to finished goods that may or may not contain component parts from those panels, for several reasons.

First, by the time the fabricator receives the panel producer's notification, the panels almost certainly no longer exist as panels. Instead, the fabricator will almost certainly have cut up the affected panels it received into component parts, incorporated those component parts into finished goods, and shipped those finished goods. Second, the affected panels are untraceable once they are incorporated into finished goods. A fabricator does not track which panels go into which finished goods. Thus, it is infeasible to trace which customers received finished goods made from the affected panels. Third, in the fabrication process the panels are covered with veneers or other coatings. This means that it is no longer feasible to test the panels accurately for compliance with the emissions limits. Fourth, the fabricator's notification is very likely to be completely unnecessary, because by the time the customer receives its notification, the affected panels will probably have aged to the point that they now meet the emissions limits.

This dilemma for fabricators was not addressed in the proposed rule, which did not propose to require fabricators to notify their customers. Instead, it proposed to require panel producers to store panels until test results confirmed compliance. The final rule dropped that requirement, however, and instead required fabricator notifications. This means that the implications of a fabricator notification requirement were not subjected to notice and comment or even extensive consideration by EPA.

Early Compliance with Labeling Requirement: We respectfully request that EPA allow for the voluntary truthful labeling of compliant products prior to December 12, 2017. While at first glance it may appear that the final rule will require a rather simple change over to new *TSCA Title VI Compliant* labels, in fact the precipitate change in labeling – prohibited on December 11, 2017 and required on December 12, 2017 – would cause untold confusion in the marketplace and unnecessary burdens for panel producers, fabricators, distributors and retailers who seek to roll-out new TSCA-compliant SKUs and manage their inventories to address potential seasonal disruptions, while voluntarily and legitimately complying with the new regulation *prior to* the effective date.

There is no statutory requirement for the regulation's early labeling prohibition. The statute directs EPA to promulgate regulations regarding labeling, but addresses timing of the labeling in the following language:

> *(B) IMPLEMENTING REGULATIONS – the regulations promulgated under this subsection shall – (II) not require any labeling or testing of composite wood products or finished goods containing regulated composite wood products manufactured before the designated date of manufacturer.*

The statutory language is very logical. Regulated entities should not be required to label before the underlying regulations take effect. However, the statutory prohibition on the EPA not requiring such labeling has morphed into a regulatory prohibition on manufacturers from labeling. This was not contemplated by the Congress and is not supported by a close reading of the Statute.

Import Certification: This regulation marks the first time EPA has applied the import certification requirements of TSCA to "articles."[i] Until now articles containing regulated chemicals have generally been exempt from TSCA. This unprecedented shift results in costly double regulation for composite wood product imports, which are already subject to the formaldehyde emission standards and the associated, labeling, testing, Third Party Certification, chain-of-custody, recordkeeping, and reporting requirements. This additional burden is unnecessary and provides no added public safety benefit.

When this regulation was being developed, EPA's weak justification was that import certifications are a potential "reminder" to importers. With every single imported shipment already required to meet labeling and documentation requirements, there is *no* justification for the conclusion that importers need such a reminder.

EPA also refers to import certification as a "compliance monitoring tool" -- this negates the fact that typically this tool is only used for bulk chemicals and mixtures of toxic chemicals that are *not* independently subject to other compliance monitoring. In contrast, composite wood products are engaged in significant compliance monitoring, Third Party Certification, labeling and reporting. In addition, EPA has never before applied import certification requirements to articles and should not have made such a major change to this well-established policy without a dedicated review.

Under this regulation, importers (or their authorized agents) must certify either that each shipment is subject to TSCA and complies with all applicable rules and orders thereunder (positive certification), or that the chemical shipment is not subject to TSCA (negative certification). This statement must be on or attached to a commercial invoice or entry document belonging to the imported shipment. This requires costly coordination with importing agents and brokers, revision of international forms and documents, the submission of additional paperwork, adjustments to internal processes, and training – all on top of the already substantial requirements of the broader Formaldehyde Emission Standards for Composite Wood Products regulation. In addition, CBP is now required to review a flood of new import certifications. For those products exempted under the rule it is not clear if they would also be forced to do a negative certification. That additional requirement could snare scores of companies otherwise exempted from the rule. Such a result will only lead to more confusion, unnecessary paperwork, and costly analysis for each entry.

Laminated Products Exemption: EPA disregarded their legislative mandate to evaluate laminated products by ignoring available and published data suggesting that finished furniture dramatically reduces the emission profile of laminated products used as component parts of finished goods. In the final rule, EPA gave no credit or recognition to the value added process of finished furniture. It should be noted that EPA has discretion to exempt laminated products based on published, available, and relevant information asserting such an exemption is justified. Industry stakeholders submitted to the docket data that suggest an exemption is warranted and should be included in the final rule.

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[i] TSCA defines "article" as "a manufactured item (1) which is formed to a specific shape or design during manufacture, (2) which has end-use function(s) depending 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 that have no commercial purpose separate from that of an article, and that results from a chemical reaction that occurs upon end use of other chemical substances, mixtures, or articles." "Articles" that contain chemical substances which are not intended to be removed and have no separate commercial purpose have until now been generally exempt from TSCA.