



May 12, 2017

By Submission to the Rulemaking Portal

Document Control Office (7407M)
Office of Pollution Prevention and Toxics (OPPT)
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460-0001
Attention: Docket No. EPA-HQ-OA-2017-0190

Re: Evaluation of Existing Regulations: Formaldehyde in Composite Wood Products Rule, 40 C.F.R. § 770.30(d)

Dear Sir or Madam:

Thank you for this opportunity to provide comments with respect to EPA's consideration of regulations that may be appropriate for repeal, replacement, or modification in accordance with Executive Order 13777, "Enforcing the Regulatory Reform Agenda" (Docket ID No. EPA-HQ-OA-2017-0190). These comments address a provision of the Formaldehyde Emissions Standards for Composite Wood Products, 40 C.F.R. Part 770, adopted under Title VI of the Toxic Substances Control Act (TSCA). These standards were published at 81 Fed. Reg. 89674 (Dec. 12, 2016). They are scheduled to take effect on May 22, 2017, following the expiration of the current regulatory freeze. One issue of particular concern is that relating to import certification, 40 C.F.R. § 770.30(d).

We at the American Home Furnishings Alliance, the Kitchen Cabinet Manufacturers Association, the International Wood Products Association, the Recreational Vehicle Industry Association, and the Retail Industry Leaders Association urge EPA to eliminate the import certification provision of the formaldehyde rule, 40 C.F.R. § 770.30(d). This unnecessary new provision 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. If this provision is allowed to go into effect in its current form, it will lead to higher prices for U.S. consumers and the loss of potentially thousands of good paying American jobs in the industries we represent.

A. Import Certification Is Not “Necessary” For Compliance and Adds Little Value Beyond the Other Requirements in the Proposed Rule

Especially in light of the burdens described below, EPA should not impose requirements that are not necessary for compliance. TSCA section 13 import certification is clearly not necessary for compliance with EPA’s formaldehyde rule.

TSCA Title VI provides that EPA, “in coordination with the Commissioner of Customs and Border Protection [CBP] and other appropriate Federal departments and agencies, shall revise regulations promulgated pursuant to section 13 as [EPA] determines to be *necessary to ensure compliance* with this section [i.e., with TSCA Title VI].” (Emphasis added).

EPA should give due weight to Congress’s use of the term “necessary,” as courts reviewing EPA rules and decisions have consistently given due attention to the use of the term “necessary” in such regulation-enabling statutory language. See, e.g., *Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 930 (5th Cir. 2012) (holding that because a requirement imposed by EPA was neither necessary to assure compliance under the statute nor warranted by any other applicable provision, “we must conclude that the EPA’s insistence upon it here was unjustified”). Thus, any requirements that are not *necessary* to ensure compliance with the emission standards and related provisions of TSCA Title VI should not be imposed.

The testing, third-party certification, quality control, chain-of-custody, recordkeeping, and reporting requirements already imposed on importers of composite wood products and articles containing composite wood products are quite sufficient to ensure compliance with the formaldehyde emission limits, and to maintain fairness between domestic and imported products. The formaldehyde rule requires importers to assure that foreign suppliers—like domestic manufacturers—document compliance with the emission limits, including with test results, and much of this documentation could be provided to EPA upon request. The addition of import certification on top of all of these other requirements adds no new substantive check on the compliance processes and would be simply duplicative of information otherwise reasonably accessible to EPA.

EPA did not offer a justification for the import certification in the preamble to the final rule. In the proposed rule, it asserted that import certification was necessary as a potential “reminder” to importers. Importers do not need this reminder; with every single imported shipment required to meet labeling and documentation requirements, there is no justification for the conclusion that importers would need or benefit from such a reminder. The preamble to the proposed rule also referred to import certification as a “compliance monitoring tool.” While such a tool is indeed useful for importers of bulk chemicals and mixtures that are not independently subject to other compliance monitoring, it is unnecessary for importers of composite wood products who, along with third-party certifiers of composite wood products, will already be engaged in significant compliance monitoring and reporting for all of their imports of those products. EPA has not, in the preamble to the rule, the Information Collection Request (ICR), or elsewhere, justified that import certification is necessary here to ensure compliance.

B. EPA Has Never Before Applied Import Certification Requirements to Articles and Should Not Make Such a Major Change to Well Established Policy Without More Analysis

EPA has long recognized the impracticality of imposing TSCA import certifications on importers of articles, and it should continue that policy. Even in other rules and proposals targeting chemicals in articles under TSCA, EPA has not deemed it “necessary” to impose import certification requirements.

The CBP import certification regulations exempt “articles” from import certification requirements unless EPA has adopted a rule requiring import certification for particular kinds of articles. See 19 C.F.R. § 12.119(c). EPA has never before required import certification for articles. The formaldehyde rule is far out of the mainstream of EPA actions in its requirement for import certification for articles.

EPA has several times considered whether to apply significant new use rules (SNURs) to SNUR chemicals in articles. It has a generic exemption for SNUR chemicals in articles, 40 C.F.R. § 721.45(f). In some cases, however, it has chosen to apply, or proposed to apply, the SNUR to SNUR chemicals in articles. In each of those cases, however, EPA has uniformly not added an import certification requirement, in contrast to the formaldehyde rule. For example, in its 2012 proposed test rule and significant new use rule (SNUR) for certain polybrominated diphenyl ethers (PBDEs), EPA proposed to eliminate the articles exemption for submission of significant new use notices (SNUNs) by importers of articles containing the PBDEs, but did not propose to eliminate the articles exemption with regard to TSCA import certification. EPA stated that it “d[id] not believe that making importers of PBDEs contained in articles subject to TSCA section 13 import certification requirements would significantly increase the effectiveness of this proposed rule” and that it was “concerned that the potential burdens associated with administration and compliance with import certification requirements could be significant.” 77 Fed. Reg. 19862, 19879 (Apr. 2, 2012).

Similar reasoning should apply here: the requirements would do little to increase the effectiveness of the proposed rule, and the potential burdens associated with administration and compliance will be significant. *See also, e.g.*, EPA, Final Significant New Use Rule for Hexabromocyclododecane and 1,2,5,6,9,10-Hexabromocyclododecane (HBCD), 80 Fed. Reg. 57293 (Sept. 23, 2015 (“At this time EPA is not requiring import certification for these chemical substances as part of articles.”); EPA, Proposed Significant New Use Rules: Perfluoroalkyl Sulfonates and Long-Chain Perfluoroalkyl Carboxylate Chemical Substances, 80 Fed. Reg. 2885 (Jan. 21, 2015) (“At this time EPA is not proposing to require import certification for these chemical substances as part of articles”); EPA, Benzidine-Based Chemical Substances; Di-n -pentyl phthalate (DnPP); and Alkanes, C[12-13], Chloro; Final Significant New Use Rules, 79 Fed. Reg. 77891 (Jan. 29, 2014) (“In this case, EPA did not propose to require section 13 import certification or section 12 export notification for the subject chemical substances when part of articles. This is consistent with EPA's past practice of making the exemption at 40 CFR 721.45(f) inapplicable without also requiring import certification or export notification for these chemical substances as part of articles (40 CFR 721.2800; 40 CFR 721.10068).”). These precedents support the conclusion that import certification for articles is not necessary to ensure compliance with TSCA rules, even when those TSCA rules do otherwise target articles.

C. Applying the Import Certification Provisions to Vast Numbers of Companies Never Before Subject to TSCA Would Impose Onerous Burdens

EPA has mischaracterized the burden of import certification in this case. Its ICR for the proposed import certification requirement for composite wood articles states:

In practice, import certification is fulfilled by checking a box on an invoice or entry document. It is assumed that this does not generally impose a significant additional burden or cost on the importer. Any potential burden associated with a submitter's familiarization with this requirement is assumed to be included in the more general rule familiarization burden

EPA ICR No. 2446.01 at 12.

We disagree with EPA – the burden associated with import certification is neither negligible nor insignificant.

Under the TSCA import certification regulations, 19 C.F.R. §§ 12.118 – 12.127, 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). Noncompliance can lead to detention of shipments as well as to penalties or other enforcement. Currently, these provisions apply generally to chemical substance imported in bulk or as part of a mixture, but apply to articles containing a chemical substance or mixture only if so required by EPA by a specific rule under TSCA. 19 C.F.R. § 12.119.

Each company would potentially have to coordinate closely with importing agents and brokers, revise forms and internal documents and submit more paperwork, adjust additional internal processes, and train personnel on how to assure that the positive or negative certifications are justified for each shipment, burdens above and beyond the rest of the already significant requirements of the proposed rule. Especially in the aggregate, given the enormous number of companies involved, the burden would be quite substantial. Moreover, in the aggregate, the burden on CBP to review a flood of new import certifications would be significant as well.

The EPA import certification provision in the formaldehyde rule is also ambiguous. The rule excludes certain kinds of composite wood products from its scope. Does that mean that importers of excluded composite wood products must submit import certifications containing a negative statement (indicating that the products are not subject to TSCA)? The lack of clarity would impose, at the least, an additional analytical burden on companies that would be subject to the requirement, including companies not subject to other requirements of the rule.

In sum, EPA is required to show that its provision extending TSCA import certification requirements to articles is necessary and non-duplicative, and it has not done so. In light of the unjustified and onerous burden such a requirement would impose on a multitude of companies, as well as on EPA and CBP, and the availability of equivalent compliance assurance and reportable information under other provisions of the proposal, EPA should eliminate the import certification requirement included in the final rule.

Sincerely,

American Home Furnishings Alliance
Kitchen Cabinet Manufacturers Association
International Wood Products Association
Recreational Vehicles Industry Association
Retail Industry Leaders Association