EPA Flexes Its TSCA Muscles: The Application of SNURs to Articles

By

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The U.S. Environmental Protection Agency's (EPA) recent proposals to apply its significant new use rule (SNUR) authority under the Toxic Substances Control Act (TSCA) to "articles" raises legal and policy issues, and presents challenges to EPA and industry. Here is why.

Proposed SNURs

EPA recently proposed SNURs for five groups of chemicals: certain polybrominated diphenylethers (PBDE), hexabromocyclododecane (HBCD), benzidine-based chemical substances, a type of short-chain chlorinated paraffins (SCCP), and di-n-pentyl phthalate (DnPP). The proposed rules are noteworthy for several reasons, including the fact that EPA has proposed that significant new use include "processing" of covered PBDEs in addition to more customary manufacturing and importing activities. Importantly for present purposes, EPA has proposed to regulate both chemical substances/mixtures and "articles" containing three of the five SNUR substances. This is unusual as the vast majority of SNURs exempt the substance as part of an article.

Under TSCA, an "article" is defined as a manufactured item that is formed to a specific shape or design, has end use functions dependent upon its shape or design during end

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use, and that has no change of chemical composition during its application (or only changes that have no independent commercial purpose). Articles include a range of manufactured items, from simple car bumpers to elaborate electronic devices.

When EPA issues a SNUR, it is designating a use of a chemical as "new" and subjecting that use to premarket EPA review. In designating a use as "new," manufacturers, importers, and/or processors of that chemical substance must submit to EPA a significant new use notice (SNUN) at least 90 days before any manufacture, import, or processing for that use. Reviews can take longer than 90 days, and EPA's TSCA authority can be expressed in the imposition of commercial restrictions or operating conditions, some of which may need to be communicated to downstream customers of the SNUN submitter.

The proposed PBDEs, HBCD, and benzidene-based chemical substances SNURs each would regulate persons who import or process a SNUR substance "as part of an article." The proposed SNUR for HBCD would designate "use in consumer textiles, other than for use in motor vehicles" as a significant new use. The proposed benzidine-based chemicals SNUR would add nine benzidine-based chemical substances to the existing SNUR and would include the import or processing of the substances as part of an article. Under the proposed PBDEs SNUR, EPA would include the importing and processing of articles that contain any of the listed PBDEs within the scope of the SNUR.

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Why You Care

The proposed SNURs raise important legal and practical questions. EPA offers little explanation regarding the scope of the SNURs or how risks from imported articles may pose the type of risk EPA's SNUR authority was intended to address. The proposed SNURs would regulate SNUR chemicals in articles independent of whether any such article actually poses a risk.

EPA also places a significant and misplaced legal burden on commenters to explain existing uses, and to define terms and use applications with sufficient granularity to avoid being considered new. Given the complexity of imported articles, EPA's "one size fits all" approach begs the question whether a more refined subset of articles, well defined products that might actually pose risks to human health or the environment, are a more fitting candidate for SNUR regulation.

Moreover, the consequences of the proposal are likely not well understood. A key reason for this is while chemical manufacturers and importers are well aware of SNURs, their downstream customers and article manufacturers are less familiar with TSCA and may be completely oblivious to the proposed rules and their game-changing commercial implications.

Industry has a responsibility to step up and address these issues and the institutional and legal challenges EPA faces under TSCA to discharge its duty to protect human health and the environment. Critics will charge that the chemical manufacturing community

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cannot credibly continue to do little to rehabilitate TSCA's deficits, and then criticize EPA for using its existing authorities creatively to achieve its chemical management objectives. Industry stakeholders should consider developing thoughtful legal positions and practical solutions to these challenges to assist EPA and ensure that TSCA authority is deployed effectively and rationally.

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