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EPA Extends Compliance Dates for PBT PIP (3:1)

Proposed Rule Concerning Additional Extensions Forthcoming

Companies across a wide range of economic sectors have been waiting for a decision from the U.S. Environmental Protection Agency (EPA) on whether to extend the prohibition and other compliance dates for certain substances EPA has deemed to be persistent, bioaccumulative, and toxic (PBT) and that are or may be present in a wide range of commercial and consumer goods, including electronics such as cellphones and laptop computers, electrical components and devices, and equipment widely used in the U.S. economy, including transportation, semiconductor production, and life sciences. On September 3, 2021, EPA announced an interim final rule extending key compliance dates for phenol, isopropylated phosphate (3:1) (PIP (3:1)) and signaling an imminent proposed rule concerning additional compliance date adjustments and further PBT rulemaking.

BACKGROUND

On January 6, 2021, the U.S. Environmental Protection Agency (EPA) finalized regulations under the Toxic Substances Control Act (TSCA) concerning five chemical substances EPA deemed to be PBT. 86 Fed. Reg. 879 (Jan. 6, 2021). The PBT rules prohibit or substantially restrict manufacturing (including importing), processing, and distribution in commerce of products or articles that contain one or more PBT substances.

Many companies and industries were not aware of the wide-spread impact of the PBT rules until after January 6, 2021, creating the potential for significant supply chain disruption on March 8, 2021 – the date on which many prohibitions would apply. The PIP (3:1) rule was particularly problematic because the U.S. is essentially the first country to restrict PIP (3:1) in articles, and industries could not react and reach compliance by the deadline. In recognition of these unintended consequences, EPA issued a No Action Assurance that extended the March 8, 2021, PIP (3:1)



prohibition to the earlier of September 4, 2021, or the date on which EPA issued a final rule addressing the concerns about the PIP (3:1) prohibition. EPA also opened a new comment period on all five PBT rules. 86 Fed. Reg. 14,398 (Mar. 16, 2021), inviting stakeholders to comment on any of the requirements, but particularly alerting companies seeking a modification of the PIP (3:1) prohibition to provide specific evidence concerning (a) the presence of PIP (3:1) in products and articles they manufacture, import, process, or distribute, (b) the time needed to identify and eliminate PIP (3:1) from their supply chains, and (c) their due diligence conducted to support their requested prohibition deadline extension.

A wide range of commenters took advantage of EPA's request for additional comment. Not surprisingly, companies and trade associations described the challenges that retaining the current prohibition date would create and outlined required steps and timetables for reaching compliance. Requested extensions ranged from three to fifteen years.

EPA'S INTERIM FINAL RULE AND FURTHER PLANS

The interim final rule announced on September 3, 2021, extends the March 8, 2021, compliance date for processing and distribution in commerce of certain PIP (3:1)-containing articles, and the PIP (3:1) used to make those articles from March 8, 2021, to March 8, 2022. The extension also applies to recordkeeping obligations for those PIP (3:1)-containing articles. EPA notes that the "limited extension to certain PIP (3:1) revised compliance dates is appropriate and necessary to address comments that the original compliance dates were not practicable and did not provide adequate transition time because they would have caused extensive harm to the economy and public due to unavailability of critical goods and equipment." The extension does not apply to PIP (3:1)-containing goods that are not articles.

EPA also announced its intention to conduct two additional rulemakings:

- An imminent notice of proposed rulemaking (NPRM) concerning any needs for additional PIP (3:1) extensions beyond March 8, 2022. EPA explained that it "does not yet have sufficient information on which to base a decision on the length of time that will ultimately be needed for the affected industry sectors to comply with the prohibitions in the January 2021 final rule." EPA further noted that most commenters did not provide sufficient specifics in their submissions, and EPA expects to articulate in the proposed rule the information it will require for any stakeholder to substantiate an extension request.
- A 2023 rulemaking that will reevaluate the rules for all five PBTs and specify the information and documentation required to support any additional extensions, including:
 - Specific uses in articles;
 - Documentation of efforts to identify, test, and qualify substitutes;
 - Documentation of certifications; and
 - Time estimates to address the items above.

WHAT SHOULD STAKEHOLDERS DO NOW?

Many stakeholders could not provide more specificity in their May 2021 comments because their supply chain inquiries were still ongoing. EPA's announcement signaled its expectation that the six-month No Action Assurance, plus the 60-day comment period that will apply to the imminent NPRM provide sufficient time to complete those inquiries. Affected companies should take steps to continue and, if necessary, accelerate their supply chain diligence to meet EPA's expectation. Companies should also compile the results of their diligence efforts, including documentation of the availability (or lack thereof) of substitutes for PIP (3:1).



King & Spalding's national Environmental, Health & Safety practice includes attorneys experienced with TSCA and its requirements, particularly as TSCA impacts importers, distributors, and articles, and we are assisting clients in commenting on the PBT rules and evaluating methods to ensure compliance with the PBT rules. If you have questions about the PBT rules and their potential impacts on your company and industry, please contact our team.

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