



AmericanCoatings
ASSOCIATIONSM

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Danielle Jones
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Office of Management and Budget
The White House
1600 Pennsylvania Ave. NW
Washington, DC 20500

Submitted via e-rulemaking portal: www.regulations.gov

*Re: RIN 2070-AK95, EPA/OCSP
Docket No. EPA-HQ-OPPT-2021-0202
Regulation of Persistent, Bioaccumulative and Toxic Chemicals under TSCA
Section 6(h)*

Dear Mrs. Jones:

The American Coatings Association (“ACA”)¹ appreciates the opportunity to comment about the proposed regulation of persistent, bioaccumulative and toxic chemicals (hereinafter “PBT chemicals”) as required by the Section 6(h) of *Frank R. Lautenberg Chemical Safety for the 21st Century Act* (“Lautenberg Act”). We are committed to working with EPA to help ensure effective risk mitigation of PBT chemicals under TSCA.

The Association’s membership represents 90% of the paint and coatings industry, including downstream users (or processors) of chemicals, as well as chemical manufacturers. Our membership includes companies that manufacture paints, coatings, sealants and adhesives

¹ ACA is a voluntary, non-profit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services. ACA’s membership represents over 90 percent of the total domestic production of paints and coatings in the country.

whose manufacturing processes or products may be affected by the outcome of EPA's determinations regarding PBT chemicals. In effect, our membership is concerned about EPA's process for assessing PBT chemicals and the proposed risk mitigation measures. ACA is eager to assist EPA in developing an effective system for mitigating risk from PBT chemicals. ACA and its members further appreciate OMB's review and the opportunity to discuss this rulemaking with you.

I. Introduction

ACA is concerned that the rule is overly broad affecting antifouling coatings typically exempt from TSCA rules, while providing no environmental benefit from restricting use in antifouling products. As a result, companies would be required to discontinue certain product lines, with no comparable environmental benefit from this loss. Considering the extreme effect of this rule, ACA recommends an extended phase-out period of five years, to allow for reformulation.

EPA's rule would eliminate a FIFRA registered product, discontinue a product line and assert broad and unjustified jurisdiction into FIFRA-registered products while providing little to no environmental benefit. As such, the proposal violates several regulatory principles articulated in Section 1(b) of EO 12866, as identified below, but not limited to this list:

- (3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.
- (4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.
- (5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.**
- (7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.
- (8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.
- (10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.**

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

II. EPA's rule would conflict with FIFRA

EPA's proposed ban of PIP(3:1) has an unintended impact on FIFRA-registered anti-fouling coatings that are normally exempt from TSCA. EO 12866, Section 1(b)(10), recommends that such conflicts must be avoided. Although the final product is exempt from the ban on PIP(3:1) as a FIFRA registered product, EPA has informed us that the raw material is banned under its rule on PIP(3:1). EPA explains that the raw material is regulated under TSCA, until the point that it is incorporated into the FIFRA registered product. EPA has not published a clear statement of this policy in rules or readily available EPA guidance. In support of this policy, EPA referenced a 1977 federal register notice for the Inventory Update Rule (IUR).² Notably, EPA has also designated the raw material as an inert ingredient for use in pesticides.

Within this 25 page notice, EPA includes a few paragraphs addressing raw materials used in FIFRA-registered products. EPA also notes that jurisdictional issues between TSCA, FIFRA and FFDCa are complex and statements in the notice address issues for the purpose of the IUR, but further explanation may be needed.³ The IUR, currently known as the Chemical Data Reporting Rule (CDR), is a chemical reporting rule requiring manufacturers and importers report volumes, uses and other information to EPA every four years, for chemicals manufactured and imported above threshold amounts, usually 25,000 pounds per year. The jurisdictional determination in the notice is for the purpose of inclusion of pesticide raw materials for reporting. It does not contemplate a ban of a raw material imposed 44 years after publication of this notice.

ACA had requested a clear statement of EPA's policy on this matter in our comments filed in response to EPA's re-evaluation of the rule in March 2021. EPA did not address this issue, maintaining its focus on articles.

III. Manufacturer's compliance costs are unnecessarily burdensome

Manufacturers would incur significant and unnecessary costs from discontinuation of the product line. Annual sales from one manufacturers are around \$1 million with another \$1 million from sales of associated products used in conjunction with the antifouling paint, such as

² 42 Fed. Reg. 64572, 64586 (Dec. 23, 1977).

³ 42 Fed. Reg. 64572, 64585 (Dec. 23, 1977).

required primers and coatings. EPA also notes that it has received similar inquiries and perhaps other manufacturers would be affected. In effect, EPA has not adequately considered compliance costs as contemplated in Section 1(b)(5) of EO 12866; nor has it adequately considered minimizing the regulatory burden contemplated Section 1(b)(11) of EO 12866.

IV. Conclusion

A limited exemption for the raw material is appropriate, under recommendations of EO 12866 considering the conflict with FIFRA and significant compliance costs of a ban. Use of the raw material poses little to no potential for environmental release during formulation, use or application of the final product. Further, the manufacturer is phasing out the PIP (3:1) raw material, but would require additional time to do so. An immediate ban would provide little to no environmental benefit.

ACA requests that OMB also consider the significant need for the product and burden associated with reformulating. The product is manufactured according to a military specification and is used on naval vessels. The manufacturer must gain dual approval to reformulate. It must gain EPA's approval, as a registered pesticide under FIFRA, and approval of the Navy to modify the military specification.

Considering the conflict with FIFRA presented by the rule and the unwarranted costs of prematurely eliminating a FIFRA-registered product coupled with the lack of any significant environmental protection, ACA requests that OMB deny approval of the rule, while remanding the rule to revise accordingly.

Sincerely,

/s/

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