RETAIL INDUSTRY LEADERS ASSOCIATION

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September 27, 2021

Via regulations.gov (EPA-HQ-OPPT-2020-0549)

ATTN: Stephanie Griffin, Data Gathering and Analysis Division
Office of Pollution Prevention and Toxics
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460-0001

Re: Proposed Rule – TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances; 86 Fed. Register 33926 (June 28, 2021); Docket ID: EPA–HQ–OPPT–2020–0549

Dear Ms. Griffin:

The Retail Industry Leaders Association (RILA) appreciates the opportunity to submit comments on the U.S. Environmental Protection Agency's (EPA's or Agency's) proposed Toxic Substances Control Act (TSCA) Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS) (hereinafter "PFAS Data Call-in").

By way of background, RILA's members include the largest and most innovative retailers. The retail industry employs over 42 million Americans and accounts for $1.5 trillion in annual sales. RILA and its member companies strongly support the mission and goals of the EPA to protect human health and the environment, including preventing exposure risk from chemical substances that may be present in consumer goods and products. RILA members have robust compliance programs in place and work closely with trusted suppliers to ensure that all products that they sell meet or exceed all applicable U.S. safety standards and legal requirements.

Background

EPA is promulgating the PFAS Data Call-In under TSCA Section 8(a)(7) following a related amendment to TSCA included in the National Defense Authorization Act (NDAA) for Fiscal Year 2020. That amendment required EPA to issue a rule "requiring each person who has manufactured a chemical substance that is a [PFAS] in any year since January 1, 2011, to report information described in TSCA section 8(a)(2)(A) through (G)."[1] EPA defines the term "manufacture" to include

[1] 86 Fed. Reg. 33926.

"import," and "manufacturer" encompasses "importers." EPA has also included reporting on PFAS contained in articles in its proposed rule.

EPA's proposed PFAS Data Call-in would impose new reporting and recordkeeping obligations on many retailers vis-à-vis their role as current or past importers of finished articles, or consumer products. The full framework of TSCA reporting in general is relatively new territory for retailers. Prior to the 2016 Lautenberg Chemical Safety for the 21st Century Act reporting on chemical substances contained within imported articles, including substances within components of those articles, was not within the scope of TSCA reporting and recordkeeping obligations for importers of articles. EPA's proposed PFAS Data Call-in includes imported articles containing one or more PFAS chemicals, including those not listed on EPA's TSCA inventory. PFAS is a very broad class of more than 3,000 chemicals; around 600 of which are still in commerce today.[2] PFAS have a variety of past and current uses, including as a processing chemical in the manufacturing of various end use products and are incorporated into surface coatings for their grease, stain, and water-resistant properties. Historically, the number of categories of imported products that may have contained PFAS is vast ranging from electronics, cookware, high performance textiles and apparel, sporting and outdoor equipment, as well as many other consumer product applications.

Furthermore, EPA's proposal includes all imported articles where PFAS may be present even in cases where PFAS are present only as byproducts of the manufacturing process, impurities and/or at *de minimis* levels. EPA's proposed Data Call-in requirements would apply to current and future imports and would also apply retroactively and would require reporting on all imported products containing PFAS dating back to January 1, 2011.

RILA previously submitted very brief comments to the Office of Management and Budget, Office of Information and Regulatory Affairs (OIRA) on July 28, 2021 to be considered as part of its review of the proposed PFAS Data Call-in under the Paperwork Reduction Act. The Association now submits the following comments to EPA to provide additional input and details on the unique challenges and undue burden the broad scope and retroactive nature of the proposed PFAS Data Call-in presents for retailers, and recommendations for mitigating these impacts.

Retailers face unique challenges in both: 1) conducting due diligence to determine whether they would even be required to report to EPA under the PFAS Data Call-In rule; and 2) in proceeding to gather and report on data required under the proposed rule for the following reasons:

- Retailers have limited visibility into manufacturing processes; and
- Retailers were not previously required to collect data on the presence of PFAS in products regulated under TSCA as articles that they have imported over the past decade; and

[2] *See e.g.*, 84 Fed. Reg. 66369 at 66371, Addition of Certain Per- and Polyfluoroalkyl Substances; Community Right-to-Know Toxic Chemical Release Reporting (Dec. 4, 2019).

- Theoretical reliance on product claims and other anecdotal evidence could result in grossly inaccurate estimates of PFAS-containing imported articles; and
- Performing retrospective supply chain verification would be extremely time and resource-intensive, if not impossible to execute; and
- Current testing lacks precision to identify and detect all PFAS with specificity and/or is not widely avaialble.

Given these significant reporting challenges, RILA makes the following recommendations:

- Exempt PFAS-containing articles from the final rule; or
- If EPA declines to exempt PFAS-containing articles from the final rule, at a minimum, the Agency should:
    - Set a prospective reporting date for PFAS-contained in articles; and
    - Exclude PFAS where they are present as byproducts, and/or impurities; and
    - Allow article importers to delegate reporting authority back to manufacturers; and
    - Add clarity to the "known to or reasonably ascertainable" reporting standard for article importers; and
    - Account for supply chain complexities when setting compliance timeframes.

Each of these issues is discussed in more detail below.

Data Gathering and Reporting Challenges

I. Determining Whether Imported Articles Contain PFAS and Gathering Any Requisite Reporting Data Would be Difficult If Not Impossible

In its proposed PFAS Data Call-in, EPA applies the "known to or reasonably ascertainable by" reporting standard under TSCA Section 8(b)(2). In describing this standard, EPA states:[3]

> "[the reporting standard] would be defined to include 'all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know.' This reporting standard would require reporting entities to evaluate their current level of knowledge of their manufactured products (including imports), as well as evaluate whether there is additional information that a reasonable person, similarly situated, would be expected to know, possess, or control. This standard carries with it an exercise of due diligence, and the information-

[3] 86 Fed. Reg. 33926 at 33928.

> gathering activities that may be necessary for manufacturers to achieve this reporting standard may vary from case-to-case . . ."

EPA goes on to state:[4]

> "This standard would require that submitters conduct a reasonable inquiry within the full scope of their organization (not just the information known to managerial or supervisory employees). This standard may also entail inquiries outside the organization to fill gaps in the submitter's knowledge. Such activities may, though not necessarily, include phone calls or email inquiries to upstream suppliers or downstream users or employees or other agents of the manufacturer, including persons involved in the research and development, import or production, or marketing of the PFAS."

With respect to imported articles, EPA then states that it:[5]

> "acknowledges that it is possible that an importer, particularly an importer of articles containing PFAS, may not have knowledge that they have imported PFAS and thus not report under this rule, even after they have conducted their due diligence under this reporting standard as described in this paragraph. Such an importer should document its activities to support any claims it might need to make related to due diligence."

The Agency states that in cases where a manufacturer (including importer) does not have actual data to report, such as measurements or monitoring data, it would be required to make and report "reasonable estimates" of this information which "may rely, for example, on approaches such as mass balance calculations, emissions factors, or best engineering judgment."[6]

For the following reasons, for a retailer-importer to even conduct the due diligence required by EPA to even answer the threshold question of whether they have any actual or "reasonable estimates" of PFAS data to report, would be extremely resource and time-intensive, and could result in grossly inaccurate estimates. A retailer-importer may overestimate and overreport out of an abundance of caution as they would be making a "best guess" based on a product characteristic or claim (e.g., stain resistance) without having actual knowledge of the underlying chemicals used in the formulation of the products and/or components within that product.

A. Retailers Have Limited Visibility into Manufacturing Processes

Retailers typically do not manufacture the finished consumer products they sell and have limited visibility into the manufacturing process and sourcing of raw materials and components. PFAS chemical manufacturers and formulators that have ready access to data and information on the production and distribution of these substances are several tiers upstream in the supply chain from manufacturers of finished articles and their customers, the retailer-importers that purchase their products. Due to business and product design confidentiality, retailers, as purchasers and

[4] Id.
[5] Id. at 33929.
[6] Id.

importers of finished consumer products, typically are not supplied with product composition information at a detailed level that would allow them to readily discern whether a product may contain PFAS.

Retailers' limited visibility is further attenuated where a chemical substance may only be present as a byproduct, impurity or in *de minimis* amounts. To conduct the type of due diligence that EPA has described under a "known to or reasonably ascertainable by" reporting standard each retailer-importer would be required to undertake a time and resource intensive process to review hundreds of thousands of products imported annually. Multiply this effort over the 10-year lookback period for reporting and the number of products to be reviewed quickly jumps up to a million or more.

With very limited actual knowledge of chemical substances used in the manufacturing of finished articles, retailer-importers are left with mostly anecdotal evidence of where a PFAS substance *may* be present in a finished article based on product related claims. For example, some product manufacturers have historically used PFAS substances in some surface coatings for their stain resistant, water resistant, and/or non-stick properties (e.g., cookware and outdoor apparel). Reference to these properties may be included in product description or in product packaging and claims. However, even with this anecdotal evidence, a retailer-importer would not typically have specific information on chemistries utilized to achieve these properties. Likewise, a retailer-importer is unlikely to have information on whether that chemical makeup includes any of the broad class of PFAS chemicals, and the specific PFAS substance and amount of those chemicals.

B. Retailer-Importers Have Not Been Collecting Documentation Relating to PFAS Chemistry

The EPA's proposal asks retailers to provide information that they simply do not have. It is difficult to mine data for substances when reporting or recordkeeping obligations did not previously exist. The lack of any related article reporting schema with this retrospective scope and scale should also give EPA pause.[7]

Only recently have certain PFAS become the subject of regulation in the U.S. and abroad. As a result, unless a retailer was previously required to report on this information or maintain records for regulatory or any other purposes, it is unlikely that retailers would have any data on the presence of any and all PFAS (a category of thousands of different chemicals) present in

[7] The due diligence exercise required by the proposed PFAS Data Call-in does *not* mirror various chemical data reporting (CDR) required by the U.S. EPA and some state authorities for certain chemicals of concern (*e.g.,* Washington State's Chemicals of high concern to children reporting). In those reporting scenarios, the reporting entities understand the scope (*i.e.,* raw chemicals, formulations, releasable chemicals) and have been collecting information over the course of the reporting period in preparation for submitting those reports. *See generally*, "Chemicals of High Concern to Children Reporting List (webpage)," WASH. DEPT OF ECOLOGY, available at https://ecology.wa.gov/Regulations-Permits/Reporting-requirements/Reporting-for-Childrens-Safe-Products-Act/Chemicals-of-high-concern-to-children (last accessed: Sept. 27, 2021). In contrast, retailer-importers have not been collecting any documentation related to the presence of PFAS chemistries in the articles they import.

imported products. EPA's proposal requires a look back of 10 years. Such an undertaking across the millions of previously imported products would be incredibly resource and time-intensive, if not impossible to execute.

Hypothetically, if a retailer-importer were to undertake gathering and reviewing any available documentation on imported articles dating back 10 years, the examples of documentation referenced in the proposed Data Call-in (*e.g.,* marketing studies, sales reports, customer surveys, safety data sheets) are not likely to have the information EPA is seeking with respect to articles containing PFAS. These documents would likely have no value in substantiating whether an article does or does not contain a PFAS substance. Ultimately, given companies' document retention policies, retailers often will no longer have any of the listed product-related document examples to review to attempt to glean required reporting information.

C. Relying on Product Claims and other Anecdotal Evidence Could Result in Grossly Inaccurate Estimates

Where actual knowledge and data is not available, EPA requires that reporting entities make "reasonable estimates," which may rely on "best engineering judgments." Simply put, retailers are not product engineers or manufacturers. Relying on product claims (*e.g.,* water resistant, stain resistant, non-stick) or other anecdotal evidence that a PFAS *substance may be present* is guesswork that is likely to result in grossly inaccurate estimates of the imported articles that included some amount of any PFAS. Retailers do not have the product engineering and chemistry expertise necessary to make such an estimate with any reasonable accuracy as to the quantity and type of PFAS substance that may be present in any product making such claims.

For example, outerwear is one category of products that historically has included some products that have a durable water repellant (DWR) fabric coating to make them water resistant. Just over the past year, one U.S. retailer has sold nearly 5,000 unique styles in the outerwear category, and roughly half of these include some type of DWR application. Each unique product style may represent multiple stock keeping units (SKUs). For example, in the case of outwear products, each unique style of outerwear may be available in a range of sizes and colors, so there may be multiple SKUs for each jacket with DWR claims. For just this one product category alone, if relying on DWR claims, the retailer is left with the best available estimate that there are tens of thousands of SKUs that may be within the scope of the proposed Data Call-in. The retailer could not better verify whether the DWR coatings include a PFAS without engaging each and every manufacturer-supplier to have them review their records down to the level of a particular product style. Again, this one example represents products sold over just the past year in one product category by one retailer. Additionally, another U.S. retailer that imports the very same products may end up with a very different "best available estimate." It is unclear how EPA would reconcile these differences in estimates.

The proposed Data Call-in is also not limited to just PFAS contained in surface coatings. Beyond DWR and other surface coating attributes (e.g., stain resistant, non-stick), there is little to no actual or anecdotal information readily available for a retailer to rely on to identify which of the

many other imported articles it sold over the last decade contain PFAS in some component of a finished article.

D. Supply Chain Verification Would be Extremely Time and Resource Intensive and Impossible to Execute In Many Cases

To avoid guesswork that could lead to grossly inaccurate estimates and reporting, a retailer will have to request each of its suppliers to examine their records to determine if they have information on the presence of a PFAS. In the previous outwear example alone, that may be hundreds of suppliers for any one year. Performing that verification for all the potential imported articles containing a PFAS substance could easily require engaging tens of thousands of individual suppliers.

One retailer's experience complying with Washington State's chemicals of high concern reporting regarding current products sold provides a point of reference for the time required to perform a similar type of supply chain verification. In this effort, the retailer-importer spent over 100 hours to engage with approximately 1,000 vendors. Of those, only around 20 vendors confirmed a need to report. Multiplying that level of effort by tens of thousands of suppliers, a retailer would easily expend thousands of hours determining which imported articles would require reporting under the proposed PFAS Data Call-in.

A 10-year lookback will cause the time and resources required to grow exponentially. In addition, in reaching back to suppliers used over the past decade, a retailer is also likely to encounter other challenges. A retailer may no longer have a relationship with the supplier and therefore have no leverage to obtain information regarding product chemical composition. Some suppliers may no longer be in operation. Suppliers' own record retention policies may mean that product documentation is no longer available. These circumstances make verifying whether a particular past imported article contained PFAS impossible.

In theory, even if a retailer were to undertake the herculean task of tracking down every manufacturer of millions of past imported products, they are likely to receive at best a yes/no answer from a finished product manufacturer in response to inquiries about the presence of a particular chemical substance in a finished product. Manufacturers of finished products are unlikely to know chemical formulations of individual product components and/or product surface coatings as these are the proprietary and confidential business information of manufacturers several tiers upstream from a finished product.

E. Lack of Precision and Availability of Testing for PFAS in Articles

Although the Proposed Data Call-in requires reporting on *any and all* PFAS (thousands of different individual chemicals), it is RILA's understanding that existing test methods may lack the precision necessary to identify the presence of all individual PFAS chemistries. At least one large commercial lab partner of a RILA member has expressed that there is no test currently available to test for the presence of all PFAS substances. This imprecision presents added challenges for

reporting on past and future imports. A retailer may not be able to independently verify whether a present-day import has a specific PFAS present. Additionally, retroactively obtaining samples to test past imported articles dating back to 2011 would be an impossible task. Retailers are unable to test products that are no longer in their possession.

Even if some test labs may have the capacity to test for all PFAS, it is unlikely that all commercial labs are equipped to provide PFAS testing with this specificity. Absent wide availability, testing bottlenecks and backlogs would result. Additionally, the fact that a testing framework may need to account for testing for PFAS in individual components of a finished article would create additional complexity, increase costs, and lengthen delays.

Recommendations

II. EPA Should Exempt Articles Containing PFAS from Reporting Requirements

The NDAA did not expressly require EPA to include articles containing PFAS in its Data Call-in under TSCA. It is well within EPA's discretion to exempt articles containing PFAS from TSCA Section 8(a)(7) reporting requirements. Indeed, EPA has chosen to exempt articles from TSCA reporting requirements in the past when the burden of including articles would outweigh any benefit obtained from data gathering and reporting on chemicals contained in articles.

As recently as March 2020, in its No Action Assurance Letter for self-identification under the TSCA Fees Rule, EPA recognized the extreme burden that would be created to require importers of articles to identify whether any of the twenty high priority chemicals that were the subject of that Fees Rule may have been used in the manufacture of articles it imports.[8]

The complexities of the global supply chain, and the resource-intensive undertaking for importers of articles to chase down answers on whether PFAS are present in those articles, is no different here than in these other TSCA reporting scenarios when the Agency appropriately and reasonably exempted articles from reporting requirements.

[8] "*. . . the broad scope of the current TSCA Fees Rule unintentionally imposes potentially significant burdens on importers of chemical substances in articles, and manufacturers of byproducts and impurities. Determining whether they may be subject to the TSCA Fee Rule and thus need to self-identify could be difficult or impossible for certain manufactures across the country. Your request indicates that the inherent uncertainties and difficulties associated with identifying the presence (or not) of one or more of the 20 high-priority chemicals by these stakeholders, especially those that have not previously been subject to a TSCA regulatory requirement, creates a compliance problem and adversely impacts the agency's implementation of the TSCA Fees Rule.*" U.S. Envtl. Protection Agency, "No Action Assurance Regarding Self-Identification Requirement for Certain 'Manufacturers' Subject to the TSCA Fees Rule," (letter dated March 24, 2020), *available at* https://www.epa.gov/tsca-fees/information-plan-reduce-tsca-fees-burden-and-no-action-assurance (last accessed: Sept. 27, 2021).

III. In The Absence of An Articles Exemption, EPA Should Appropriately Tailor the Scope of the Reporting Universe

RILA urges EPA to exempt articles from reporting in its final rule. Should EPA retain reporting on PFAS-containing articles, then RILA recommends EPA tailor the scope of the reporting universe in the following reasonable and appropriate ways:

A. Set a Prospective Reporting Date For PFAS-Contained in Articles

As discussed in more detail above, the challenges for articles reporting are compounded by the fact that retailer-importers were not previously required to collect information from their suppliers on the presence or absence of PFAS in a finished article's design and composition. If EPA retains reporting for articles in the final PFAS Data Call-in, it should exclude reporting on articles from the 10-year look back.

B. EPA Should Exclude PFAS Byproducts and Impurities

PFAS substances, due to their chemical properties and behaviors, are ubiquitous in the environment. Trace amounts of PFAS may be present in products as impurities due to their presence in the environment and/or historical manufacturing practices. Even where certain PFAS may have been phased out of a manufacturing process, trace amounts may still be present at a manufacturing facility and end up in finished articles in *de minimis* amounts. Likewise, PFAS that are present as byproducts of manufacturing and were not intentionally added to the manufacturing process and thereby not within the control of the manufacturer, should also be excluded, and reporting obligations should only apply to cases where PFAS are intentionally added in the manufacturing process for finished articles.

C. Allow Article Importers to Delegate Reporting Authority Back to Manufacturers

As previously discussed, product manufacturers, and not retailers, have greater visibility into the chemical processes involved in manufacturing products. For this reason, EPA should follow a delegated authority approach for importers of articles like the one used by the U.S. Department of Energy for its Compliance Certification Management System (CCMS). The CCMS provides a mechanism for importers to delegate authority back to manufacturers of products to report on the internal components/chemicals of a product.[9] This delegated authority approach offers multiple benefits, including that EPA will gather insights and data on global uses of chemicals in manufacturing articles and can place the reporting obligations with those more closely involved in product engineering and manufacturing. At a minimum, retailer-importers should have the option of having a foreign supplier submit data directly to EPA on PFAS content in articles on the retailer's behalf.

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[9] *See generally*, "Compliance Certification Management System" (webpage), U.S. DEPT. OF ENERGY, *available at* https://www.regulations.doe.gov/ccms. Another example of this delegated authority model, is Washington State's chemical reporting under its Children's Safe Products Report Rule. *See generally*, "Chemicals of High Concern to Children Reporting List" (webpage) WASH. DEPT OF ECOLOGY, *available at* https://ecology.wa.gov/Regulations-Permits/Reporting-requirements/Reporting-for-Childrens-Safe-Products-Act/Chemicals-of-high-concern-to-children (last accessed: Sept. 27, 2021).

D. Add Clarity to the "Known to or Reasonably Ascertainable" Standard for Article Importers

The term "known to or reasonably ascertainable" defined at 40 CFR § 704.3 is familiar to chemical manufacturers and importers, but not to retailers. EPA allows companies subject to its Chemical Data Reporting rule under TSCA to use this reporting standard for processing and use information (*i.e.*, information on how a chemical substance is used by the customer). For the PFAS Data Call-in, EPA should specifically address this definition in its final rule so that retailers understand the Agency's reporting expectations. In particular, the Agency should make it clear that retailers are not expected to go outside of their organization to satisfy the "known to" component, and may rely on existing data, such as customer surveys or supplier data, that satisfy the "ascertainable" component.[10]

IV. Compliance Timeframes Should Account for Supply Chain Complexities

Even if the scope is narrowed to eliminate retrospective review and reporting requirements, if retailer-importers are required to report on imported articles, data gathering for all imported articles that may contain PFAS will still require significant time to conduct supply chain verifications, compile documentation, and submit reports on potentially tens of thousands of imported articles. EPA needs to account for this complexity when setting submission deadlines for PFAS reporting under its final rule.

Closing

RILA appreciates the opportunity to provide these comments on EPA's proposed PFAS Data Call-in. The Association urges the Agency to consider the significant challenges retailers-importers of finished products will face when attempting to respond to EPA's Data Call-in as proposed, and to appropriately narrow the scope of the reporting universe in in its final rule. We look forward to continued engagement with EPA on this important issue.

If you have any questions or need any additional information, please contact me at susan.kirsch@rila.org / (202) 866-7477.

Sincerely,

Susan Kirsch
Senior Director Regulatory Affairs and Compliance

[10] Some examples of documentation and steps that retailers could take to satisfy the "reasonably ascertainable" component would be: obtaining a certification or attestation from a supplier as to the PFAS content in articles, or documentation demonstrating that the information was requested from a supplier.