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December 27, 2022

*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; Notice of Data Availability and Request for Comment (Nov. 25, 2022), 87 Fed. Reg. 72439, Docket ID: EPA-HQ-OPPT-2020-0549**

Dear Ms. Griffin:

The Retail Industry Leaders Association (RILA) appreciates the opportunity to submit comments on the supplemental notice of data availability (NODA) and request for comment pertaining to an Initial Regulatory Flexibility Analysis (IRFA) and Updated Economic Analysis (EA) for 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. 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**

RILA commented extensively on the on EPA's proposed PFAS Data Call-in rule in comments filed September 27, 2021<sup>1</sup> (hereinafter "2021 comments"). EPA now is supplementing its 2021 rule

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<sup>1</sup> RILA 2021 comments re: TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances (Sept. 27, 2021), [Comment ID: EPA-HQ-OPPT-2020-0549-0106](#); Docket ID: EPA-HQ-OPPT-2020-0549.

proposal with an IRFA and updated EA that assesses potential regulatory flexibilities and significantly revises the Agency's initial EA based on stakeholder input and recommendations from Small Business Advocacy Review Panel (hereinafter "Panel"). While RILA does not represent small businesses, many of the regulatory flexibility and burden reduction measures raised by the Panel's Small Entity Representatives (SERs) and discussed in EPA's IRFA, are also issues RILA raised in our 2021 comments related to the data gathering and reporting challenges for importers of finished articles. Additionally, EPA is also seeking comment on several important topics, including many "items ... that were not available for public comment during the proposed rule's [three-month] comment period."<sup>2</sup>

## Comments

### I. Significant Concerns Remain About the Scope and Scale of Reporting

RILA's 2021 comments described in detail the unique challenges retailers face, regardless of size, in conducting the threshold due diligence necessary to determine what, if any, reporting obligations they have under the proposed PFAS Data Call-in rule, and in subsequently proceeding to gather and report on requisite data. RILA also included several recommendations on how the Agency could reduce these significant reporting burdens, including exempting articles, or at a minimum tailoring the scope of reporting on articles to be prospective only and exempting PFAS byproducts and impurities from reporting. RILA wishes to incorporate by reference our 2021 comments<sup>3</sup> and directs the Agency to them for more detailed feedback on the challenges associated with reporting under the proposed PFAS Data Call-in rule and recommendations to mitigate those burdens.

Based on RILA's review of EPA's discussion of potential regulatory flexibilities in the IRFA, we remain concerned that the Agency appears to be leaning toward declining to pursue many of the regulatory flexibilities and burden reduction measures recommended by RILA and many other commenters on the 2021 proposal, and more recently by the Panel, including:

- Exemption for reporting on presence of PFAS in finished articles;<sup>4</sup>
- Elimination or shortening of the retrospective look-back period;<sup>5</sup>

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<sup>2</sup> U.S. EPA, TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances; Notice of Data Availability and Request for Comment, 87 Fed. Reg. 72439 at 72440.

<sup>3</sup> See RILA 2021 Comments, *supra* note 1.

<sup>4</sup> U.S. EPA, Initial Regulatory Flexibility Analysis (IRFA) and Updated Economic Analysis (EA) for TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances (November 2022), Document ID: EPA-HQ-OPPT-2020-0549-0125, at p. 9 ("If an importer determines that any article contains PFAS, they will be subject to the same reporting requirements as the PFAS manufacturers and are expected to incur compliance costs associated with form completion, CBI claim substantiation, recordkeeping, and CDX registration.")

<sup>5</sup> *Id.* at p. 68-67.

- Exemption for reporting the presence of PFAS as byproducts;<sup>6</sup> and
- Exemption for reporting the presence of PFAS as impurities.<sup>7</sup>

RILA strongly encourages the Agency to revisit the above burden-reducing recommendations and incorporate them into the final rule.

## II. New Regulatory Flexibilities Contemplated in IRFA and Updated EA

In the IRFA and updated EA, EPA tees up for stakeholder comment a number of regulatory flexibility measures aimed at reducing reporting burdens that were not included in the original 2021 notice-and-comment opportunity. RILA wishes to provide the below input on two of the new potential burden reduction measures.

### A. Proposed Simplified Reporting Form for Article Importers

EPA recognizes that article importers may have less information to report under the PFAS Data Call-in rule than manufacturers.<sup>8</sup> In the absence of an article exemption, RILA appreciates that the Agency is considering how it can better streamline and simplify reporting for article importers. In the IRFA and updated EA, EPA outlines a potential simplified reporting form of five data elements.<sup>9</sup> Based on RILA member review, this simplified data set would not significantly reduce burdens for retailer importers, including performing the necessary due diligence to engage each of their suppliers to retrospectively gather data on past imports.

Based on RILA member review of the harmonized tariff schedule (HTS) chapter headings included in the simplified form, it is unclear how that would eliminate any potential articles from the scope of the disclosure. The broad scope under the HTS chapter headings will require retailer importers to conduct a manual review of each product within the subheading to determine if it should be included or excluded from the reporting obligation.

As discussed in more length in RILA's 2021 comments, in their role as importers of finished articles, retailers do not have historical records on past imports that would have captured the

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<sup>6</sup> Id. at p. 71 (EPA gives only cursory mention to consideration of several recommended exemptions, stating, "EPA also considered providing reporting exemptions for research and development substances, byproducts, impurities, recyclers, and intermediates. Additionally, many SERs suggested that EPA implement such exemptions, and the SBAR Panel recommended that EPA consider such exemptions. Given the lack of data on all these types of substances, EPA is unable to estimate the total industry cost of exempting them from the rule.")

<sup>7</sup> Id.

<sup>8</sup> Id at p. 71.

<sup>9</sup> Id. ("The data elements required on the simplified form would include, for each year: (1) a checkbox/indicator for importing PFAS-containing articles, (2) volume/quantity of imported articles, (3) industrial processing/use and consumer/commercial use information (i.e., processing/use codes), (4) specific or generic chemical name/ID, or description of the PFAS-containing article/component (e.g., coating name), and (5) company information.")

data EPA is seeking in the simplified form. This simplified reporting scenario would still require retailers to engage each of their suppliers of the millions of products they imported dating back to 2011, some of which may no longer be in operation, to try and obtain the information necessary to complete the form. Engaging in and documenting this due diligence undertaking, even if ultimately not fruitful, would require significant time and resources.

Under the simplified reporting structure, retailers would still need to hire outside contractors to engage in the supply chain verification and data gathering necessary to meet their reporting obligations. For purposes of comparison, the closest similar reporting exercise one RILA member provided is a California Air Resources Board (CARB) survey conducted in 2014 and 2015 on formulated products (*i.e.*, non-articles). For this survey, the retailer enlisted the help of external consultants to assist with engagement of vendors at a significant consulting fee and over 800 hours of internal staff time. The CARB reporting effort was only a fraction of the scale of the reporting on PFAS in articles contemplated in the PFAS Data Call-in rule proposal even in the simplified format that EPA is considering.

Even if the forms are simplified for article importers, it is clear that significant time and resources will be expended by retailers to meet reporting obligations under the proposed PFAS Data Call-in rule. As RILA emphasized in our 2021 comments, the results of that time-and-cost-intensive undertaking are unlikely to yield the data that EPA is seeking.<sup>10</sup> It is difficult to understand how the limited information gained by the Agency will meaningfully help support future policy decisions, while the due diligence and supply chain verification needed just to meet many dead ends will come at an immense cost to retailers.

Additionally, although EPA included references in the proposed PFAS Data Call-in rule and in its IRFA regarding article importers only needing to conduct a "reasonable" due diligence inquiry, RILA members cannot rely on these vague assurances. Given the large potential civil penalties EPA can seek under TSCA, the risk of potential noncompliance (even if in EPA's view it's a small risk in the abstract) is a risk retailers take very seriously. This is particularly true due to the compounding nature of civil penalties. Many RILA members carry over one million individual stock keeping units (SKUs) if you combine in-store and online items. Even a small error or omission in due diligence scoping could get force-multiplied many times across a whole category of products, rather than just one or two individual items.

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<sup>10</sup> See *e.g.*, RILA 2021 Comments, *supra* note 1 at p. 6 (Section 1.B. "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.").

RILA reemphasizes its previous comments encouraging the Agency to exclude articles from reporting. This exemption is well within EPA's authority, and it is discretion that the Agency has exercised in the past when the burden of including articles would outweigh any benefit obtained from data gathering and reporting on chemicals contained in articles.<sup>11</sup> In the absence of an articles exemption, at a minimum the Agency should eliminate the retrospective 10-year look back requirement for articles, so that all reporting on articles will be forward-looking only.<sup>12</sup> EPA should also exclude reporting on PFAS that is present as a byproduct or impurity.

## **B. Limiting the Scope of PFAS Reporting Universe to a Finite List**

As a burden-reduction measure, the Agency is also considering "limiting the PFAS subject to the rule to a finite list rather than providing a structural definition for PFAS, as this alternative was recommended by multiple SERs."<sup>13</sup> Based on input from members, retailers do have a clear view on whether reporting a finite list of PFAS would be more or less burdensome than reporting based on a chemical structure definition. As previously emphasized, manufacturers are more likely to have actual knowledge of the chemicals used in the formulation of products. Assuming that a manufacturer has actual knowledge that a PFAS chemical is used, but is unsure if it is on the list, this could create an additional information-gathering step. Manufacturers are best suited to assess the burdens and implementation realities of reporting based on chemical structures or a finite list. RILA encourages the Agency to closely review input from manufacturers on this potential flexibility measure.

## **III. Article Importers Will Bear Greater Reporting Burdens than Chemical Manufacturers**

As RILA has previously emphasized in our 2021 comments, and has supplemented with additional feedback above, article importers are highly unlikely to have the data that EPA is seeking under the proposed PFAS Data Call-In rule. The due diligence and supply chain verification required to meet the reporting obligations will mean that the costs and efforts borne by retailer-importers will likely be more burdensome than the full reporting efforts needed for actual chemical manufacturers. A perverse result that only underscores the need for the Agency to narrow the scope and scale of reporting on articles in the final rule.

## **Closing**

RILA appreciates the opportunity to provide these additional comments on the PFAS Data Call-in Rule. The Association urges the Agency to consider the significant challenges retailers-importers

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<sup>11</sup> Id. at p. 8 (Section II., EPA Should Exempt Articles Containing PFAS from Reporting Requirements).

<sup>12</sup> Forward looking requirements similar to Chemical Data Reporting (CDR) could be a productive way to gather information. This approach would allow importers to prepare in advance and/or request the information real time during imports to ensure that accurate and timely information at reduced effort to all supply chain partners.

<sup>13</sup> See U.S. EPA, *supra* note 4, at p. 64.

of any size 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 its final rule.

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

Sincerely,

A handwritten signature in blue ink that reads "Susan Kirsch". The signature is written in a cursive, flowing style.

Susan Kirsch  
Vice President, Regulatory Affairs