# Before the United States Environmental Protection Agency Draft Compliance Guide for Imported Articles Containing Surface Coatings Subject to the Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances Significant New Use Rule; Notice of Availability and Request for Comment 85 Fed. Reg. 81,466 (Dec. 16, 2020) Docket EPA-HQ-OPPT-2020-0621

#### **Comments of the Chemical Users Coalition**

The Chemical Users Coalition ("CUC") appreciates the opportunity to provide these comments regarding the U.S. Environmental Protection Agency's ("EPA's" and "the Agency's") draft compliance guide for imported articles containing surface coatings subject to the significant new use rule ("SNUR") for long-chain perfluoroalkyl carboxylate ("LCPFAC") and perfluoroalkyl sulfonate chemical substances (the "Draft Compliance Guide").

CUC is an association of companies from diverse industries interested in chemical regulatory policy from the perspective of entities that typically acquire and use, rather than manufacture, chemical substances and manufactured products (including articles).<sup>1</sup> CUC encourages regulators, such as EPA, to develop a robust body of information concerning chemical substances and articles when such materials are under consideration for regulatory action, including a thorough understanding of the conditions of use for such substances and articles. When such information is sought, acquired, and considered carefully by regulators, they can more effectively develop and implement potential requirements when necessary to effectively and efficiently protect health and the environment in a manner that enables the regulated community to pursue technological innovation simultaneously with sustainable economic development in the United States.

A primary concern of CUC members regarding the implementation of the LCPFAC SNUR continues to be the rule's application to companies that, like CUC members, operate on a global scale, with manufacturing operations in the US that may rely on affiliated companies and independent suppliers and sub-suppliers located in both the US and abroad. Consequently, CUC members acquire a wide range of formulations and articles from suppliers, often importing complex pieces of equipment that may contain a multitude of components, each of which are finished articles themselves. Accordingly, CUC has closely monitored and provided constructive public comment in those instances in which EPA has considered using its authority under TSCA to regulate manufactured articles on the basis of the chemical content of an article, including in the context of the LCPFAC SNUR rulemaking.

It is with these important considerations in mind, that CUC offers these comments on the Draft Compliance Guide.

<sup>&</sup>lt;sup>1</sup> The members of CUC are Airbus S.A.S., The Boeing Company, HP Incorporated, IBM Company, Intel Corporation, Lockheed Martin Corporation, and Raytheon Technologies Corporation.

## I. <u>EPA Should Delay Enforcement to Take into Account That Companies with Complex</u> <u>Products and Supply Chains May Necessarily Require More Time to Obtain</u> <u>Complete Information About Imported Articles</u>

The LCPFAC SNUR is a new and novel application of TSCA, and CUC believes it would be reasonable for the Agency to allow more time for companies that import manufactured articles (including component and replacement parts) to accommodate the SNUR's requirements into their supply chains before targeting enforcement efforts. The LCPFAC SNUR took effect on September 25, 2020, only six months after the supplemental proposal that provided the details of its application to articles with surface coatings containing one of the regulated substances. It was then more than two months before the Draft Compliance Guide was released. Because of this timeframe, companies are likely to still be in the process of investigating complex supply chains to determine what products may be within scope of the new SNUR requirements, and simultaneously engaging with their suppliers to understand what components of their supply chains may implicate the LCPFAC SNUR.

Other factors, including supplier concerns about confidential business information (CBI), present additional complexities that make it difficult for importers of articles and component parts to gain a full understanding of the chemical composition of such products. CBI issues can particularly pose hurdles to timely acquisition of information about chemical composition when a company is dealing with suppliers who in turn are working with sub-suppliers in a highly competitive field with technologically sophisticated products.

In addition, CUC is not aware that EPA has provided definitive guidance on what level of due diligence the Agency would accept as demonstrating compliance.<sup>2</sup> In the absence of well-understood standards in this new regulatory regime, it would be particularly appropriate to offer in an enhanced version of the Guidance document some explicit statement of policy concerning EPA's willingness and intention to exercise leniency if an imported article is later determined to contain a LCPFAC-containing surface coating when an importer's good-faith efforts at compliance can be documented. CUC recommends the Agency advise the regulated community in a revised Guidance document of the Agency's intent to waive the imposition of civil penalties for violations of the final SNUR that might occur during the first full year following the issuance of the Guidance document in final form.

# II. <u>EPA Should Provide a Reasonable Safe Harbor for Companies that Learn that</u> <u>Ongoing Uses Included Articles with Surface Coatings Subject to the Rule</u>

It is reasonably likely that situations may occur where an entity that imports and uses manufactured articles and component parts may discover that it has made use of imported articles from a period of time that preceded the 2015 proposed rule but which the user had no reason to believe contained a surface coating regulated by the final LCPFAC SNUR. Such a user would have had no reason to believe it was necessary to advise the Agency of the "ongoing use" at the time of the January 2015 proposal to amend the LCPFAC SNUR to include imported articles. If such a user later

<sup>&</sup>lt;sup>2</sup> In the preamble to the final SNUR amendments, the Agency includes a passages from the Agency's regulation concerning import certifications under Section 13 of TSCA (40 CFR Part 707) which encourages a good-faith effort.

learns of the presence of a regulated LCPFAC substance in a surface coating on or in such an article and can demonstrate that the importation and use of such an article was "ongoing" with ordinary business records, CUC believes that it would be reasonable to allow the user to submit a written notification to EPA upon learning of such use, to include documents (such as business records) to substantiate that the use was ongoing prior to January 2015, and to continue to operate and engage in such use lawfully while EPA amends the list of "ongoing uses" codified in the final SNUR. Such a "compliance assistance benefit" would help EPA identify and document such uses and gain an awareness of the conditions of use and consider the likelihood of the uses being phased down voluntarily in the near term or whether regulatory action (such as a negotiated Section 5(e) Order or other regulatory mechanisms) should be considered.

Such an approach will not, as EPA suggests in its "responses to comments" document, "incentivize" the regulated community, and importers in particular, to elect not to participate in the public comment process for SNURs (because they would simply wait until a rule is issued in final form to exploit a safe harbor period). There is no incentive that currently exists for members of the regulated community to avoid commenting on proposed SNURs. Providing the opportunity for an entity at a later date, and at some risk of an EPA enforcement action, to disclose to EPA an ongoing use that heretofore has not been known to an importer operating in good faith creates no incentive on a going-forward basis for importers to avoid commenting on subsequent rulemakings. The Agency can reasonably recognize that certain SNURs and complex supply chains can present significant challenges with compliance. This is especially true, as here, where the rule involves a list of numerous chemicals, the majority of which are not subject to tracking or other forms of regulatory requirements in numerous countries involved in the manufacturing and assembly stages of import supply chains for manufactured articles and their components. The unique nature of the final LCPFAC SNUR amendments and the final rule's considerable impact on importers of complex manufactured goods has officially been recognized in the Agency's responses to comments document and the preamble to the final rule. This facet of the final rule can (and should) be reasonably accommodated by permitting the kind of safe harbor notification process described above.

## III. <u>The Draft Compliance Guide's Discussion of the SNUR's Application to Surface</u> <u>Coatings that Have Cured or Undergone Chemical Reaction After Application to an</u> <u>Article Should Be Revisited and Removed</u>

The Draft Compliance Guide briefly (and without explanation or technical analysis) states that "[a]rticles that have surface coatings that contain certain LCPFAC chemical substances that have been cured or undergone chemical reaction after being applied to an article are subject to the SNUR." The preamble to the LCPFAC SNUR indicates that EPA found that the regulated LCPFAC chemical substances still present a "reasonable potential" for exposure after curing or chemical reaction. 85 Fed. Reg. at 45114.

This interpretation fails to take into consideration that many coating materials are formulated and applied in a manner that is intended to ensure complete adhesion (e.g., through chemical bonding and cross linkages) to the underlying surface. Such chemical conversions and cross linkages are critical to the surface coating's efficacy in performing its intended function to remain in place and provide a protective barrier that will not be removed during use. This is often achieved through

techniques such as radiation curing and other processes that enable such cross linking and chemical reactions and which may eliminate or completely convert a chemical substance that was a component of the original coating product. Recognizing that coating products may react to form other substances upon use, it has been EPA's regulatory policy and long-standing guidance in the context of implementing the TSCA Section 5 new chemical and new use notification requirements that substances that are formed during the manufacture of an article do not require new chemical (and new use) notifications.

For example, the Agency does not require new chemical notification for substances that are formed during reactive processes that occur during manufacture of an article. *See* 40 CFR § 720.36(h)(6) and EPA's New Chemicals Q&A (<u>https://www.epa.gov/sites/production/files/2015-09/documents/qanda-newchems\_new.pdf</u>).

Q: Would a chemical substance that results from a chemical reaction that occurs upon use of any other chemical substance, and formed during the manufacture of an article, such as curable plastic, be subject to notification requirements?

A. No. 40 CFR § 720.30(h)(6) exempts any chemical substance which results from a chemical reaction that occurs upon use of curable plastic or rubber molding compounds, inks, drying oils, metal finishing compounds, adhesives, or paints, or any other chemical substance formed during the manufacture of an article destined for the marketplace without further chemical change of the chemical substance except for those chemical changes that occur as described elsewhere in §720.30(h) is excluded from notification requirements.

The basis for the exemption for such substances is that the substance formed is not being distributed in commerce as a chemical substance *per se*. Likewise, there is no intent on the part of an article manufacturer to have the components of a surface coating be easily removed or for exposure to the component to occur. Moreover, there is no reason to require reporting if the coating applicator has reason to believe the components of the coating are no longer present in the finished article because the substances have reacted to form other materials that are no longer within the scope of the LCPFAC substances identified in the final rule.

The Agency has incorporated this understanding in the context of multiple chemicals-specific SNURs. For example, the SNUR for certain new uses of polyurethanes containing PFBS/POA which is codified at 40 CFR § 721.10918 excludes the substance when it has been "completely reacted (cured)."<sup>3</sup>

CUC believes it would be appropriate for EPA, in recognition of its long-standing regulation at 40 CFR § 720.30(h)(6) and as applied in the SNUR regulations generally (and specific SNURs cited here) to simply remove from the final version of the Guidance document its statements concerning cured and cross linked coatings. Removing these statements from the final Guidance document

<sup>&</sup>lt;sup>3</sup> Similar exemptions in SNURs (and Section 5(e) Orders) that exclude notification for completely cured substances include: 40 CFR §§ 721.1450 (1,3-Benzenediamine, 4-(1,1-dimethylethyl)-ar-methyl); 721.5185 (2-Propen-1-one, 1-(4-morpholinyl)-); 721.10155 (Multi-walled carbon nanotubes); and § 721.10201 (Cobalt lithium manganese nickel oxide).

will permit importers of articles (and the manufacturers of coated articles) to evaluate technical characteristics of coatings materials as well as application methods and analyses that might be available to the suppler or importer, and to conclude on a scientific basis whether a surface coating no longer contains a regulated LCPFAC substance.<sup>4</sup> If such information is available to the importer, no SNUR notification would be required.

CUC notes that the above scenario differs from the one described on pages 9–10 of the Draft Compliance Guide, where EPA addresses an importer's belief that a regulated chemical substance "is believed to not be released." In that case, the Draft Compliance Guide indicates that the SNUR would still apply. CUC's proposal is to modify the final Guidance to provide that when an importer has reasonable and science-based information to demonstrate that a coating's application methods (e.g., curing or other chemical reaction) has changed the chemical composition such that no LCPFAC substance is present on the coated surface, the SNUR should not apply.

## IV. <u>The Clarifications that Processors and Impurities Are Not Subject to the SNUR</u> <u>Should Be Retained in the Final Compliance Guide</u>

The Guidance should be clarified to specify that the "surface coating" reporting requirement is applicable only to importers of articles, and that only the act of importing is a reportable event. Thus, the final Guidance should state unequivocally that processors and users of articles have no reporting obligations. Although the Draft Compliance Guide currently does not directly address end-of-life issues, CUC understands EPA's discussion of the exemption for processors on page 10 of the Guidance is intended to include both recycling and other end-of-life operations, including disposal. Likewise, the final Guidance should clarify that the final SNUR does not require reporting by entities that engage only in the assembly of already-coated component parts into complex articles when such components were acquired from a supplier located within the United States.

# V. <u>The Draft Compliance Guide's Discussion of the Export Certification Requirement</u> <u>Is Inconsistent with the Preamble to the LCPFAC SNUR</u>

The preamble to the LCPFAC SNUR explicitly provides that "[i]n accordance with 40 CFR 707.60(b), this final SNUR does not trigger notice of export for articles." 85 Fed. Reg. at 45116. The Draft Compliance Guide, however, states:

Under TSCA section 12(b) and the implementing regulations at 40 CFR part 707, subpart D, exporters must notify EPA if they export or intend to export a chemical

<sup>&</sup>lt;sup>4</sup> Thus, an importer that reasonably understands that the coating's contents, at the time of an article's importation to the US, no longer contains an LCPFAC substance, would have no reporting obligation under the SNUR. The importer might base its conclusion on factors such as the importer's understanding of the coating's components, the methods of the coating's application, features of the curing methods or other chemical reactions that occur during or following the coating's application to the imported article, or technical information or data that might be provided by the importer's supplier. For example, such information might include analyses or data demonstrating that, even if a LCPFAC substance might hypothetically be present as part of a finished coating, it has not been observed at levels exceeding detectable limits using reasonably available and reliable test methods.

substance or mixture, including as part of an article, for which, among other things, a rule has been proposed or promulgated under TSCA section 5. Pursuant to these export notification requirements, persons exporting a substance that is the subject of a SNUR must submit a one-time notice to EPA each calendar year for the first export or intended export to a particular country.

Draft Compliance Guide at 12. Because this portion of the Draft Compliance Guide is at odds with explicit language in the final rule promulgated by EPA and with long-standing policy that exported articles do not require notices of export, the discussion should be revised to make clear that the LCPFAC SNUR does not trigger export notification requirements for articles. A change in this position would require notice and comment rulemaking.

#### VI. EPA Should Clarify Only Exposed Surfaces in Articles Need Be Considered

CUC requests that the Agency confirm in the final Guidance that an importer must concern itself only with coated surfaces that are in "direct contact with humans or the environment" (on page 8 of the Draft Compliance Guide) when the article is in the physical state and configuration in which it appears at the time the article arrives to the US at the time of its import, and during the article's intended use (or reuse). Such confirmation will clarify that an importer of a complex article only needs to evaluate whether there is a surface of the article it imports that is directly exposed to humans or the environment. Thus, the importer of a complex article can be assured that it need not consider whether a component part that already is embedded within the assembly (and which is not expected to become exposed to a human or the environment during use or reuse of the article) might itself have a LCPFAC-containing coating.<sup>5</sup> EPA should state clearly in the final Guidance that the presence of a LCPFAC-containing coating which appears solely on an interior component to which humans or the environment will never have direct contact during the anticipated use (or reuse) of the article would not trigger reporting under the final SNUR. In addition, the final Guidance should clearly state that the rule does not require an importer to give consideration to exposures that might occur only during deliberate misuse or abuse of a manufactured article or during disposal of the article at the end of its useful life.

## Conclusion

CUC members appreciate the opportunity to contribute these comments and suggestions for changes in the Draft Compliance Guide and would be pleased to meet with EPA personnel to discuss the comments.

<sup>&</sup>lt;sup>5</sup> By way of example, CUC interprets the draft Guidance to provide that the importer of a complex finished article such as a cell phone, that includes internal components, such as an embedded circuit board, would not need to concern itself with the contents of a coating on the interior circuit board if it is not reasonably expected that the internal circuit board would become directly exposed to a human or to the environment.