

**Before the United States  
Environmental Protection Agency  
Flame Retardants: Significant New Uses Rules for Certain Non-Ongoing Uses  
88 Fed. Reg. 40728 (June 22, 2023); Docket EPA-HQ-OPPT-2023-0012**

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**Comments of the Chemical Users Coalition**

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The Chemical Users Coalition (“CUC”) appreciates the opportunity to provide these comments regarding the U.S. Environmental Protection Agency’s (“EPA”) proposed Significant New Use Rules (“SNURs”) for Certain Non-Ongoing Uses of Flame Retardants. 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 or import, chemical substances. CUC encourages regulators seeking to develop and implement requirements to protect health and the environment to do so in a manner that enables the regulated communities to pursue technological innovation simultaneously with sustainable economic development in the United States. This is particularly important in the area of chemical regulatory policy, which necessarily addresses how core technologies and products can be adapted to address emerging information about health and environmental risk.

**Background**

On June 22, 2023, EPA proposed SNURs for the following three flame retardants that are currently the subject of ongoing TSCA Section 6 risk evaluations:

- TCEP - Tris(2-chloroethyl) phosphate, CASRN 115–96–8;
- TBBPA - 4,4'-(1-methylethylidene)bis[2, 6-dibromophenol], also known as “tetrabromobisphenol A,” CASRN 79–94–7; and
- TPP - Triphenyl phosphate, CASRN 115–86–6.

The proposed significant new uses are manufacture (including import) or processing for any use, with the exception that the conditions of use that EPA expects to consider within the scope of the TSCA Section 6 risk evaluations are not proposed as significant new uses.

CUC’s comments regarding the SNUR proposal focus primarily on CUC’s concerns that:

- The long-standing exemptions in Section 721.45 of the SNUR regulations, and most importantly, the one pertaining to articles that contain substances subject to a SNUR, should be retained; and
- SNURs should be restricted to capturing truly “new” uses, and not uses that were once ongoing.

**The Article Exemption for SNURs**

EPA has requested comments concerning whether the articles exemption should be made inapplicable for these SNURs. CUC reminds EPA that the 2016 amendments to TSCA require that a specific statutory finding must be made before EPA may promulgate or amend a SNUR to require significant new use

reporting based on the presence of a specific chemical substance in a manufactured article. Accordingly, EPA may require a significant new use notice for import of a chemical substance as part of an article only “if the Administrator makes an affirmative finding ... that the reasonable potential for exposure to the chemical substance through the article or category of articles subject to the rule justifies notification.” CUC considers the terms of the 2016 amendment to TSCA (and good public policy more generally) to require EPA to very clearly address the technical underpinnings for concluding there is a more-than-theoretical basis to expect that exposures will occur from the presence of a substance subject to a SNUR in a manufactured article. EPA would need to make a finding on a chemical- or article-specific basis, considering whether there are differences in potential releases depending on the type and nature of the myriad substances and applications that might be covered by any SNUR addressing articles. There are likely to be countless substances that are not reasonably expected to be released from an article in a manner that creates an unreasonable risk, and there may be countless types of “articles” that present unique exposure scenarios.

In addition to the legal requirements that EPA must satisfy if it wishes to include articles in the scope of a SNUR, there are significant practical and policy issues that EPA must contemplate:

- CUC, as a group of downstream users of chemicals, is acutely aware of the challenges posed by trying to ascertain the presence of substances in articles. Downstream users often struggle to figure out when a product they use is covered by a SNUR. Investigations could become time-consuming, and some uses might only be discovered after the rules are in force.
- Further complicating matters is the possibility that suppliers may refuse to share information due to CBI concerns, making it impossible to determine the substance's use. It is crucial to recognize that downstream manufacturers dealing with articles often have less access to substance use information than upstream suppliers handling the substance directly.
- EPA must recognize that many articles are complex objects made up of thousands of sub-assemblies and individual parts. It does not make sense to issue article SNURs for full-size machines or objects.
- Chemicals used in articles may sometimes be incorporated into “internal” mechanisms of the article that are unlikely to come into contact with people or be released into the environment during normal use of the article.
- The physical form of a chemical often plays a significant role in its potential to cause exposure and contribute to risk. EPA must clarify whether a SNUR applies to articles containing the chemical of concern in a solid, liquid, particle, or gaseous form, and justify such application.
- In some articles, a chemical may be present at a very low concentration that is unlikely to be associated with a risk warranting EPA risk management action. If the article exemption is made inapplicable, EPA must establish a de minimis exclusion, based on either concentration or mass-based criteria, from the scope of an article SNUR.
- Previously manufactured products (existing stocks produced before a SNUR’s effective date), and spare/replacement parts for existing products should not be subject to an article SNUR. These parts often are not newly manufactured. Rather, when a new product is manufactured, spare and replacement parts are manufactured and maintained in accordance with either contractual or regulatory requirements so that the product can be continuously used and need not be replaced solely because a replacement part is not available. The availability of spare/replacement parts would also allow for the continued use and maintenance of existing products, thereby preventing the accumulation of unnecessary waste including e-waste.

- For many products that contain a large number of complex components (many of which in certain industries may be subject to customer, technical, and regulatory specifications), a lengthy compliance phase-in period will be necessary. EPA must take into consideration that many pieces of complex equipment must be tested and certified pursuant to legal as well as performance-based standards for which long lead times are required whenever components are updated or replaced. The pipeline for development of a product by a CUC member can be as long as a decade (and potentially longer for products placed on the global market). From global supply chains that can include thousands of suppliers of “OEM” equipment, manufacturers must select potential candidates and conduct lab-scale evaluations of the candidates, then perform pilot-scale tests to prove reliability and repeatability with respect to performance specifications. Following these steps, customers’ acceptance of the qualifications must be obtained. This may first require, or be followed by, obtaining certifications from US federal agencies (such as the Department of Defense and the Federal Aviation Administration) and/or their international counterparts. Additional time is required to move such modified products and instruments into commercial production for the market. For this reason, a short and inflexible compliance date that does not account for products that may require years in development is not appropriate.
- CUC believes that any product or equipment for which the manufacturing process has begun as of the effective date of the SNUR should be exempt. Additionally, there should be no time limitations or similar restrictions placed on the continued “sell through” of any regulated product that was manufactured before a specified date. Furthermore, CUC believes that an exemption of replacement parts for consumer products should apply regardless of the date of the replacement part’s manufacture. This would allow for the continued service and repair of the finished goods, without having to unnecessarily dispose of regulated products before the end of their useful lives.

### **New vs. Existing Uses**

Prior to EPA promulgating a SNUR, TSCA Section 5(a) requires EPA to consider:

- the projected volume of manufacturing and processing of a chemical substance;
- the extent to which a use changes the type or form of exposure of humans or the environment to a chemical substance;
- the extent to which a use increases the magnitude and duration of exposure of humans or the environment to a chemical substance; and
- the reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In the proposed SNURs, EPA states that if any entity were to resume a use of TCEP, TBBPA, or TPP that had been phased out, that use **could** both change the type and form and increase the magnitude and duration of human and environmental exposure to the substances. However, the mere fact alone that there **could** be changes in use and exposure is not sufficient to meet the standard for a SNUR. If that were the case, the statute would have stated that such changes automatically trigger a SNUR. Rather, it is clear that the statute requires EPA to “consider,” or conduct an analysis of the changes to see if such changes indeed create a “significant” new use. EPA has not presented any evidence that it has done any true consideration of the statutory factors and therefore reached a conclusion that the proposed “new” uses are significant new uses.

Furthermore, as stated, TSCA grants EPA the authority to regulate the manufacturing or processing of “any chemical substance for a use which the Administrator has determined ... is a significant new use.” Both prior to 2016, and under the amended law, the relevant provision of TSCA is unambiguous: SNURs are intended to address “new” uses, i.e., uses that were not previously existing. The cessation of use of a substance for certain uses for a period of time does not mean that such previous use should be considered “new” under the law once that use resumes. By proposing to subject these previously existing uses of a substance to review pursuant to a SNUR, EPA is plainly attempting to get a second opportunity to review these substances. Congress established other authorities in TSCA for EPA to use if the Agency needs to obtain information about existing chemicals and their potential hazards and past or current uses, such as Section 4 test rules and test orders, and Section 8(a) and (d) regulations.

CUC notes that there have been circumstances when EPA has promulgated a SNUR to address uses that had been deliberately discontinued (e.g., in the context of negotiated phase-down agreements). Unlike the current situation, those cases were situations where the manufacturers (and importers) of those substances voluntarily agreed to phase out their uses of a substance, and EPA used the SNUR mechanism to “level the playing field” and to ensure that the substances would not once again enter the marketplace without the Agency’s awareness. In such situations, the manufacturers consented to EPA taking such action and were fully aware of the circumstances and the new restriction on the substance’s use that the SNUR imposed (and were supportive of EPA’s use of SNURs in that manner). That situation simply does not exist in this case. EPA is unilaterally taking action to restrict uses of a chemical that are not necessarily “new.” That action is not supported by the SNUR provisions in TSCA. Accordingly, the SNUR, if finalized, should cover only actual “new” uses of TCEP, TBBPA, and TPP.

Furthermore, because the Chemical Data Reporting regulations and the exemption provisions of TSCA are such that EPA might not have a complete awareness of uses of these substances that might be ongoing, EPA should exercise its authority under Section 8(a) to request such information before issuing a SNUR as a vehicle to collect such information.

## **Conclusion**

CUC appreciates the opportunity to comment on the proposed SNURs and would be pleased to meet with EPA personnel to discuss these comments and related issues if doing so would assist the Agency in finalizing these rules.