

ALERT

# Industries Need To Challenge EPA's Decision To Disregard Statutorily Required Exemptions for Articles and Replacement Parts When Banning or Restricting PBT Chemicals Under TSCA

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October 1, 2019

Numerous industries – including electronics, textiles, plastics, and even golf balls – have until October 28, 2019, to file comments challenging a fundamental legal flaw with the U.S. Environmental Protection Agency's (EPA) precedent-setting proposed rule concerning certain persistent, bioaccumulative, and toxic (PBT) chemicals: the failure of EPA to apply the statutory exemptions for articles and replacement parts as required by section 6(c)(2) of the Toxic Substances Control Act (TSCA).<sup>1</sup>

TSCA section 6(h) directs EPA to take expedited action on certain PBT chemicals by using its authority under section 6(a) to address risks of injury to health or the environment and reduce exposure to the PBT chemicals to the extent practicable. When regulating under its section 6(a) authority, EPA is required to act "in accordance with subsection (c)(2)." This subsection contains the exemptions for articles (e.g., a manufactured finished item) and replacement parts. Specifically, TSCA forbids EPA from enacting any prohibitions and restrictions on articles and replacement parts, *unless* an EPA risk evaluation has found that either the replacement part contributes significantly to an identified risk or regulation of an article is necessary to address such risk. Here, EPA neither performed risk evaluations nor identified any risks. Because EPA exercised its discretion under section 6(h) not to conduct risk evaluations for these PBT chemicals, the agency has taken the unprecedented position that the exemptions for articles and

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replacement parts do not apply.<sup>2</sup>

The PBT chemicals subject to this rulemaking are widely used in electrical appliances and equipment (stereos, computers, televisions, circuit boards, casings, and cable insulation), textiles, plastics, adhesives, foams, carpets, curtains, fabrics, cushions, mattresses, tents, wires and cables, paints and coatings for building materials, fuels, lubricants (grease, oil, and hydraulic fluid), rubber compounds, and golf balls.

TSCA's articles exemption, in particular, is a necessary bulwark to protect those who manufacture, sell, or use articles containing prohibited or restricted chemicals from unforeseen and unintentional liability, especially when many entities are unable to know the chemical composition of their products. This interpretation will have wide-ranging impacts if upheld and will not be confined to the PBT rulemaking.

EPA will not be able to ignore these important exemptions when issuing risk management rules in response to section 6(b)(4)(A) risk evaluations. But a citizens' petition under section 21 to initiate a section 6(a) proceeding to prohibit or restrict a chemical substance – similar to TSCA's PBT mandate – does not require EPA to conduct a section 6(b)(4)(A) risk evaluation. Therefore, if EPA were to grant a section 21 petition for a section 6(a) rule or if a court were to order such a rule in a legal challenge to a section 21 petition denial, EPA would likely point to this PBT rulemaking in the future to support a decision to disregard the statutory exemptions for articles and replacement parts in the section 21 context. In this way, EPA's improper interpretation of section 6 today could have significant impacts on future risk management actions affecting high-profile chemistries tomorrow, especially given the increased interest in using section 21 petitions to circumvent EPA's risk evaluation process.<sup>3</sup>

Therefore, affected industries should file comments on this proposed rule to preserve this important exemption. If you have any questions or need assistance regarding comments on this proposal, please contact Erik Baptist or Martha Marrapese in Wiley Rein's Environment & Product Regulation practice.

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[1] Wiley Rein provided initial background information on the proposed PBT rule in a previous alert and held a webinar as well.

[2] Section 6(h) allows, but does not require, EPA to skip the standard TSCA step of conducting risk evaluations. EPA has *chosen* not to conduct risk evaluations on the PBT chemicals.

[3] "The Future of Chemical Risk Evaluations Under TSCA" (Aug. 9, 2019).