AmericanCoatings
ASSOCIATION℠

December 27, 2022

Michal Freedhoff
Assistant Administrator
Office of Chemical Safety and Pollution Prevention.
1200 Pennsylvania Ave. NW,
Washington, DC 20460–0001

Re: EPA Docket No. EPA-HQ-OPPT-2020-0549
Initial Regulatory Flexibility Analysis
TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances; Proposed Rule, 86 Fed. Reg. 33,926 (Jun. 289, 2021)

Dear Assistant Administrator Freedhof:

The American Coatings Association ("ACA")[1] appreciates the opportunity to comment on the Initial Regulatory Flexibility Analysis (IRFA) related to the EPA's proposed TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl substances. We are committed to working with EPA to help ensure accurate understanding of risk of PFAS chemicals.

The Association's membership represents 90% of the paint and coatings industry, including downstream users (or processors) of chemicals, who sometimes import small amounts of raw materials, raw materials suppliers, as well as chemical manufacturers. ACA appreciates EPA's willingness to interact with stakeholders during this process. We are optimistic that through continued involvement with the public and stakeholder community, EPA will successfully implement a strong, risk-based approach to managing risk posed by PFAS chemicals.

ACA and its members respectfully submit the following comments:

[1] ACA is a voluntary, non-profit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services. ACA's membership represents over 90 percent of the total domestic production of paints and coatings in the country.

I. Introduction

ACA appreciates EPA's effort to gather information about fluorinated chemicals to develop a clear understanding of risks associated with individual chemicals. ACA further appreciates EPA's willingness to engage with the SBAR panel and review recommendations made by ACA and other Small Entity Representatives (SERs), while issuing EPA's Initial Regulatory Flexibility Analysis (IRFA). With the IRFA, EPA notes significantly greater costs to industry, small entities and the agency. Costs remain underestimated. EPA eliminates all regulatory alternatives by concluding either that the alternative would not significantly affect costs and/or the alternative would lead to under reporting of PFAS. In effect, EPA mostly does not significantly advance the initial proposal.

In June 2021 EPA issued the initial proposal, being a data call-in rule under Section 8(a)(7) of TSCA, as required in the NDAA 2020, Sec. 7351.[2] In that section, Congress amends Section 8(a) of TSCA to add paragraph 8(a)(7) requiring:

> Not later than January 1, 2023, the Administrator shall promulgate a rule in accordance with this subsection requiring each person who has manufactured a chemical substance that is a perfluoroalkyl or polyfluoroalkyl substance in any year since January 1, 2011, to submit to the Administrator a report that includes, for each year since January 1, 2011, the information described in subparagraphs (A) through (G) of paragraph (2).

EPA has not altered its novel interpretation of Section 8(a)(7) as a "stand alone subsection."[3] In effect, exemptions and limitations in other parts of Section 8(a) do not apply, in EPA's understanding, so it must require reporting from "each person" including small businesses and importers of de minimis amounts.

In the IRFA, EPA also has not considered regulatory alternatives against the regulatory parameters of Section 8(a)(5).[4] Under that section, EPA must:

- Not require reporting which is unnecessary or duplicative.
- Minimize the cost of compliance with this section and the rules issued thereunder on small manufacturers and processors.
- Apply any reporting obligations to those persons likely to have information relevant to effective implementation.

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[2] *National Defense Authorization Act 2020,* S. 1790, 116th Congress, available online at: https://www.congress.gov/bill/116th-congress/senate-bill/1790/text

[3] EPA Proposed PFAS Reporting Rule, 86 Fed. Reg. 33926, 33929, Section D (June 28, 2021).

[4] Section 8(a) of TSCA limits reporting rules in the following ways:

- "Small manufacturers and processors" are exempt from Section 8(a) reporting in most circumstances [§8(a)(1)].
- To the extent feasible, EPA must not require reporting that is unnecessary [§ 8(a)(5)(A)].
- To the extent feasible, EPA must not require reporting that is duplicative [§ 8(a)(5)(A)].
- To the extent feasible, EPA must minimize the cost of compliance with section 8(a) reporting rules to small manufacturers and processors [§ 8(a)(5)(B)].
- To the extent feasible, EPA must direct any reporting obligations to those likely to have the information relevant to the effective implementation of TSCA (and avoid burdening those that do not) [§ 8(a)(5)(C)].

Section 8(a) also prescribes the standard of due diligence as information "known to or reasonably ascertainable by." Section 8(a) requires reporting of *existing* health and safety information, rather than requiring new information. It also requires EPA to prescribe the manner by which exposure and use information may be reported.

In its IRFA, EPA did not provide detailed analysis of regulatory alternatives against factors described in Section 8(a)(5). EPA did not consider a key recommendation of the SBAR panel, recommending tiered reporting where large scale producers and bulk importers report prior to other entities. ACA supports tiered data reporting, reporting based on a discreet list of PFAS chemicals, increasing the reporting period and adding further guidance about the due diligence standard considering issues faced by small scale importers and manufacturers. These issues are further discussed below.

The IRFA provides underestimates of costs based on the number of companies that reported PFAS in the last cycle of CDR reporting. EPA estimates the average number of PFAS per reported per firm by dividing the total amount of reported PFAS chemicals by the number of companies reporting PFAS chemicals for the CDR. At page 32 of the IRFA, EPA recognizes that this approach does not account for chemicals and entities that are not subject to the CDR due to various exemptions. Additionally, EPA develops an estimate based on census data that 93% of reporting entities will be small businesses. Small businesses will bear the bulk of the reporting burden under EPA's estimates. EPA can expect significantly more chemical manufacturers reporting to the agency than recognized by the IRFA.

ACA also notes that the timing of publication of the IRFA does not allow for meaningful consideration of comment with the opportunity to modify the proposed rule. The timing of publication also minimizes potential for considered public engagement. EPA's IRFA, published on November 25, with a comment deadline 2 days after the Christmas Holiday on December 27, is oddly published at time when most people are trying to decrease workload and take some time away from work for the holidays. If EPA intends to meet its statutory deadline of January 1, 2023 for publication of the final rule, it cannot meaningfully consider comment received by December 27, 2022. The public also does not have the same level of opportunity to analyze the IRFA and provide comment due to timing of publication.

II. A tiered data collection system would reduce duplication of submissions and costs without compromising data collection

The agency declined to consider a key recommendation of the SBAR panel to implement a tiered reporting system with domestic producers and bulk importers reporting prior to small scale manufacturers and importers and manufacturers of articles. This approach would reduce costs while ensuring that EPA gathers a complete set of PFAS-related information from the entities most likely to have that information, including information about downstream uses, safety practices and de minimis amounts in mixtures. Small scale manufacturers and importers and importers of articles would then report in the second tier for specified chemicals, based on identified data gaps in the first tier. This approach would also reduce duplicative reporting of similar information from multiple entities.

a. EPA's IRFA indicates that large scale manufacturers would provide most of the reportable information.

A tiered data submission requirement would reduce overall costs to the agency and industry by reducing the number of duplicative reports, from multiple entities reporting the similar information, while

avoiding costly due diligence by small manufacturers and importers. EPA estimates indicate that overall amount of PFAS-related data subject to reporting increases with a company's revenue. At Table 17 of the IRFA, EPA ranks the expected number of PFAS related reports by expected revenue, ranked by revenue percentile for the 1st, 5th, 25th, 50th, 75th, 95th and 99th percentile. EPA concludes:

> Manufacturers with lower sales are expected to manufacture proportionally fewer chemicals and incur lower costs, and similarly for article importers. Note that because firm revenues are positively skewed (see Table 15), this assumption results in the expectation that most firms will only submit reports for 1 or 2 PFAS, with the highest earners accounting for the majority of submissions, as shown in Table 16. Additionally, Table 17 shows the estimated distribution of total PFAS reported, by revenue percentile.
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> (IRFA, p. 50)

EPA can similarly expect companies beyond the small business revenue range to continue this trend, with large manufacturers supplying a vast majority of data. In most cases large scale manufacturers have information about downstream usage, including safety and handling instructions and de minis amounts in mixtures. These are provided to downstream customers, who may occasionally import or manufacture a raw material. In a tiered reporting system, EPA can fill in any data gaps for information not known to or reasonably ascertainable by domestic producers and bulk importers during the second tier of reporting, with targeted shorter form reporting for listed chemicals. This could include information about any imported volumes not reported by bulk importers.

b. An exemption for small businesses is required by statute and it would not compromise completeness of data.

With domestic producers and bulk importers providing most reportable PFAS information, reporting from small businesses is largely redundant. EPA also estimates a high cost burden for small business, with 93% of effected businesses being small businesses, a burden that is unnecessary. ACA recommends an exemption for small businesses as required by TSCA Section 8(a)(1), especially considering the unique and unnecessary compliance burden faced by small businesses. EPA's IRFA does not adequately consider the burden on small businesses or EPA's unique interpretation of Section 8(a).

TSCA Section 8(a)(1) excludes small manufacturers from being subject to reporting rules. EPA argues that NDAA 2020 authorizes data collection from all manufacturers since Section 8(a)(7) provided, "each person who has manufactured a chemical substance that is a perfluoroalkyl substance" shall be subject to the rule.[5] The term "manufacture" is commonly used in TSCA and is broadly defined to include importers of a chemical, as well chemical manufacturing, but not downstream processing or use of a chemical. Small businesses are commonly exempted from reporting requirements for "manufacturers" to reduce duplicative information while reducing the burden on small business, where compliance costs can have a pronounced impact. EPA's decision to read this Section 8(a)(7) independent of the small business exemption in Section 8(a)(1) is not justified and violates a plain reading of Section 8. As such, EPA goes beyond its congressional mandate to issue a rule under Section 8(a) of TSCA.[6]

[5] EPA Proposed PFAS Reporting Rule, 86 Fed. Reg. 33926, 33929, Section D (June 28, 2021).
[6] *National Defense Authorization Act 2020,* S. 1790, 116th Congress, available online at: https://www.congress.gov/bill/116th-congress/senate-bill/1790/text

c. Thresholds would not compromise quality of data

EPA did not adequately consider the burden placed on small scale importers subject to reporting of information that will largely be reported by domestic producers and bulk importers. Formulators often import a chemical mixture to supplement domestic supply of a raw material. Some raw materials may contain trace amounts of reportable fluorinated chemicals and/or trace amounts as a by-product. In some instances, trace amounts are not disclosed on a Safety Data Sheet (SDS).

ACA suggests a tiered reporting system so domestic producer and bulk importers report first, when manufactured in amounts above a volume-based threshold of 2,500 pounds per year. This would mitigate costly due diligence from companies from supplementing their domestic supply by importing a raw material. Such companies would still need to assess whether imports with undisclosed amounts exceed the 2,500 pound threshold during a year, but the approach would provide some cost mitigation. EPA excludes thresholds as a viable alternative, arguing that compliance costs would not be reduced since "The majority of costs for this rule come from rule familiarization and article compliance determination activities."[7]

EPA underestimates the costs of collecting a complete set of reportable data for manufacturers and importers of chemicals in small quantities, over a 10 year look back period, further considering that data is often not readily available. Data gathering for this rule is a significant undertaking. ACA suggests a second tier of reporting for manufacturers and importers of small quantities by requesting information for clearly identified data gaps, with reportable chemicals identified by CAS number, TSCA Accession Number or other identifier for chemicals with confidential identities.

d. Use of reporting forms.

As a secondary alternative to a tiered reporting system, ACA supports the use of reporting forms with a restricted data set for small businesses and manufacturers of small amounts. ACA recommends this as a secondary alternative because a tiered reporting system is more likely to provide EPA with complete requested information while minimizing redundant reports and costly due diligence for companies handling small amounts. With a tiered data system, EPA can identify any data gaps after the first tier of reporting to request information in the second tier. With reporting forms, EPA enhances the risk of over reporting or under reporting of information, depending on data submitted by domestic producers and bulk importers.

III. Reporting of PFAS identified on a list would not compromise completeness of submitted information.

EPA has not adequately considered requiring reporting for listed chemicals in lieu of a structural definition, a rule adjustment that can streamline identification of reportable information. EPA indicates that listing chemicals on the confidential inventory by generic name would compromise CBI by disclosing one structural element, the element of containing fluorine. EPA further notes that were it to limit the list to chemicals on the public inventory, it would receive reports for fewer chemicals than all PFAS in commerce. ACA suggests limiting reporting to a discreet list of PFAS chemicals, including those with confidential identities. These could be listed using one of several identifiers commonly used in public

[7] IRFA, p. 66

facing documents, including accession number, PMN number, unique identifier or generic name. EPA has several options when identifying confidential chemicals in public documents.

EPA explains in the IRFA that it already plans on making any making any non-CBI information available to the public, presumably by identifying chemicals with confidential identities using one of the noted methods.[8] This information is going to be publicly available, regardless of whether EPA ultimately settles on requiring information based on a structural PFAS definition or by creating a list using identifiers for confidential chemical identities. Further, EPA's proposed CBI policies will also result in disclosure of confidential identities, since EPA plans on disclosing any confidential chemical identity when not claimed as CBI, even when the submission is not from the original CBI claimant. To the extent EPA will not provide the public with identifiers or chemical identity, EPA has options to collect the information directly from manufacturers using the updated inventory and authority under Section 4.

IV. ACA recommends further extending the timeline for data submission at least an additional 6 months, beyond the 18 months from the effective date currently suggested in the IRFA

ACA appreciates EPA's willingness to suggest additional reporting time so companies would have 18 months from the effective date to report, by suggesting a 6-month extension from the proposed 12-month reporting time. Assuming rule publication in early January 2023, PFAS reporting would coincide with the next CBI reporting period in June 2024. This additional 6 months of reporting time, from the original proposal, is necessary. Companies must review all chemical inventories and documentation for the presence of broadly defined PFAS, and then identify and compile relevant information. In some instances, companies will need to contact downstream users and/or suppliers for additional information.

Coordinating PFAS reporting with CDR reporting causes increased workloads for regulatory compliance staff in industry, rather than decreasing the regulatory burden, as EPA suggests. Rather than coordinating compliance dates, ACA suggests allowing later submission of PFAS reports by allowing an additional 6-month extension, so reports would be due 24 months from the rule's effective date. This would allow for developing CDR submissions for PFAS chemicals with needed additional time to complete gathering any additional information required for this rule.

V. Additional guidance interpreting the due diligence standard would assist industry, especially considering challenges faced by small-scale chemical manufacturers and importers.

ACA appreciates EPA's attempt to further explain the due diligence standard. ACA suggest that EPA not use due diligence as a substitute for examination of regulatory options. ACA also suggests that EPA provide guidance in a separate document or as part of the preamble of the final rule, rather than in the IRFA. EPA's due diligence guidance in the IRFA focuses on scenarios faced by manufacturers of articles. Many of these also apply to chemical manufacturers, but further analysis of due diligence for chemical manufacturers of all sizes would be helpful.

For example, one scenario commonly faced by ACA members relates to import of raw materials used in chemical manufacturing or processing formulated products. Can such an importer rely on the SDS and any accompanying documentation from a raw materials supplier? In prior ACA webinars and meetings,

[8] IRFA, p. 27

EPA staff has indicated that importers do not need to make external inquiries to their suppliers. If this is the case, companies may be justified in relying on documentation from a supplier, even when small amounts of PFAS are not disclosed therein. Additionally, considering this scenario, what kind of documentation is EPA referring to as documentation that a "reasonable person similarly situated might be expected to possess, control, or know." ACA requests EPA's guidance on these matters.

VI. Conclusion

ACA appreciates the opportunity to submit comment on EPA's IRFA. Please consider the following suggestions, noting their relevance to TSCA Section 8(a)(5) factors:

- Implement a tiered reporting system with initial reporting by large scale processors and bulk importers, who maintain most of the data set requested by EPA including information about *de minimis* amounts in mixtures and information about downstream uses and safety practices.
- Require reporting for a discreet list of chemicals including chemicals with confidential identities listed by commonly used identifiers for chemicals on the confidential inventory.
- Publish additional guidance related to the due diligence standard considering challenges faced by chemical importers and manufacturers relying on supplier notification.
- Further extend the reporting timeline to 24 months from the effective date of the rule.

Respectfully submitted,

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