



December 21, 2021

Office of Pollution Prevention and Toxics
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Submitted online via the Federal eRulemaking Portal: <http://www.regulations.gov>

Re: Docket ID No. EPA-HQ-OPPT-2021-0598 - Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Phenol, Isopropylated Phosphate (3:1); Further Compliance Date Extension

The Consumer Technology Association™ (CTA), IPC, and Information Technology Industry Council (ITI) respectfully submit these comments on behalf of the approximately 5,000 member companies including printed circuit board manufacturers, electronics manufacturing services, cable and wire harness manufacturers, electronics industry suppliers, original equipment manufacturers, retailers, innovators, and information and consumer technology leaders. Collectively, over 80 percent of the companies represented by our membership are small and medium-sized businesses and start-ups. Our members represent the complex, global supply chain of electronics – what our members make is used in thousands of articles across dozens of industry sectors, including products found in homes and businesses across the world.

CTA and ITI submitted written requests to EPA in January and February 2021, for a targeted extension of the compliance dates, and CTA, IPC, and ITI engaged directly with the EPA in early March 2021, regarding the compliance timeframes for the Final Rule for Phenol, Isopropylated Phosphate (3:1) (PIP 3:1), 86 Fed. Reg. 894 (Jan. 6, 2021), pursuant to Section 6(h) of the Toxic Substances Control Act (TSCA). We sincerely appreciate EPA's responsiveness to the electronics industry's concerns raised at that time with the issuance of the 180-day No Action Assurance; the opportunity to submit written comments in response to the Proposed Rule¹ issued March 16, 2021; and the September 17 Final Rule² providing a short-term extension of the PIP (3:1) compliance date for PIP (3:1) containing articles to March 8, 2022.

We welcome this opportunity to provide comment on EPA's proposal to further extend the phased-in prohibition established in the September 2021 Final Rule for the processing and distributing in commerce of PIP (3:1) for use in certain articles and for the processing and distributing in commerce of certain PIP (3:1)-containing articles from March 8, 2022, to October 31, 2024. The extended compliance date will provide the electronics industry with necessary additional time to phase out PIP (3:1) from its supply chain while ensuring the adequate performance and safety of alternative solutions to the critical role PIP (3:1) has played in its articles. While we appreciate the compliance extension until October 31, 2024, we remain

¹ Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Request for Comments; EPA-HQ-OPPT-2021-0202

² Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Phenol, Isopropylated Phosphate (3:1); Compliance Date Extension; EPA-HQ-OPPT-2021-0202

adamant that the new compliance date specific to PIP (3:1)-containing articles must be based on a “manufactured by” date rather than a distribution in commerce date. We have also taken this opportunity to highlight several outstanding concerns that we look forward to addressing with EPA in the new rulemaking effort on PIP (3:1) and the other chemicals regulated under TSCA section 6(h).

1. Support for the October 31, 2024, Compliance Date but Must Be Based on a “Manufactured By” Date for PIP (3:1)-Containing Articles

CTA, IPC and ITI appreciate the October 31, 2024, compliance date extension for PIP (3:1)-containing articles. This extension is critical to ensuring the phase out of PIP (3:1) from articles based on a realistic and implementable timeline. While we requested a four (4) year extension, which was supported by the comments we submitted in response to the March 2021 Proposed Rule, we accept the roughly three and a half (3 ½) year extension provided by EPA for PIP (3:1)-containing articles.

However, as we requested in our comments to the March 2021 Proposed Rule, we request EPA establish a “manufactured by” compliance date for PIP (3:1)-containing articles as of October 31, 2024, versus a “distribution in commerce” date. The “date” over which industry has control during the manufacturing, distribution and retail chain is the “manufactured by” date. Critically, manufacturers and EPA can more readily determine compliance because a “manufactured by” date can be confirmed based on unique product identifiers such as lot or serial numbers often marked on the article.

Currently, the Proposed Rule provides no distinction between an article that was manufactured a week ago from one manufactured several months ago to one manufactured years ago. Rules based on a “manufactured by” date simplify implementation and verification for all parties. A “manufactured by” date enables manufacturers to direct their vast supply chain to comply by a certain cutoff date, while regulators can verify compliance based on the date of manufacture.

If EPA is unable to establish a “manufactured by” compliance date, we request EPA establish an “imported by” date. While this date is not ideal for a variety of factors noted below, an “imported by” date is preferable as a date that can be verified by manufacturers as well as EPA. The current “distribution in commerce” date is the most complex, the most problematic approach in controlling inventory, and the most difficult for manufacturers and EPA to verify as we outline below.

Challenges of Import and Initial U.S. Distribution

A distribution in commerce date is outside the control and visibility of the manufacturer based on several factors. For many PIP (3:1)-containing articles, manufacturing occurs overseas and thus the article is imported into the U.S. Manufacturers are not able to control the date of import and in some cases have no access to such information. Electronic components and finished good articles need approximately one week to be processed for export from their country of origin, if applicable. Shipment via boat or air to the U.S. can take upwards of 40 days depending on conditions. Processing to complete import into the U.S. typically takes an average of six or seven days. However, under COVID-19 conditions of the past almost two years, import processing times have extended to upwards of 20 days based on member experience. Additionally, delays and shipping backups at U.S. ports has been well documented throughout 2021. These delays are beyond the control of a manufacturer. Additionally, some companies may import through warehouses in “free trade zones”. While inventory in these warehouses is physically located in the U.S., the inventory is not considered fully imported to the U.S., adding yet another layer of complexity to the import process.

Once in the U.S., articles are typically taken to a manufacturer's warehouse. For component and part articles, those are held by the manufacturer until needed for repair or replacement. Electronics finished goods articles may have warranties upwards of 15 years meaning component and part articles for repair or replacement can be kept in a manufacturer's warehouse for well over a decade.

For finished good articles, inventory can stay in a manufacturer's warehouse for anywhere from two (2) weeks to upwards of two (2) months. From there, finished good articles are eventually distributed either directly to retailers or through distributors each of which will further transport and store the finished goods throughout the U.S. The retention time at this stage for inventory can anywhere from three (3) weeks to upwards of several months depending on the type of finished good article. All of the above activities constitute a "distribution in commerce" of articles subject to a "distribution in commerce" restriction even if the article is not yet available to a consumer.

Challenges at Retail Level

Retailers purchase products based on their contractual relationships with a manufacturer or distributor which typically includes provisions relating to compliance with applicable U.S. regulations and laws. Retailers do not have control over how quickly products are sold and do not necessarily operate under a "first-in, first-out" operation adding to the challenge of inventory management. As manufacturers have begun working with retailers on processes given the short-term resolutions provided to date on PIP (3:1)-containing articles, manufacturers quickly discovered that retailers wouldn't be able to distinguish a PIP (3:1)-containing finished good article from a non-PIP (3:1)-containing finished good article unless the finished good article underwent an official model change. Manufacturers cannot launch a new "model" of a product solely because of a chemical phase-out. The result is that retailers will have no visibility in their inventory to what is potentially a "PIP (3:1) free" finished good article versus one that contains PIP (3:1).

A prohibition in commerce date means a finished good on retail shelves can be compliant one day and out of compliance the next. The result is retailers would need to scrap finished good articles or return or export the articles back to the original manufacturer (where it may also be scrapped) if they can even make such a determination. There is an assumption on industry's part that actions such as a return or export back to the original manufacturer is also considered a "distribution in commerce". If finished good articles are scrapped, there is significant resource loss and an increase in environmental impacts as the materials and resources utilized to create the finished goods are lost and additional resources are utilized to create the new finished good to replace it. A better and more realistic path forward that avoids the unintended consequence of disposal or recycling is to avoid compliance dates associated with distribution in commerce.

The difficulty retailers face is particularly acute because TSCA imposes strict liability on retailers, but retailers often lack the information necessary to determine if the items in their store are compliant. The industries that supply or partner with retailers have identified concerns with the Final Rule for PIP (3:1) and such concerns trickle down to retailers, particularly as retailers face potential strict liability and high penalties for sale of PIP (3:1)-containing articles. Retailers can act where they have knowledge, but the TSCA regulations do not provide retailers with knowledge upon which to act. Imposing strict liability is particularly challenging for articles, which have multi-tiered supply chains over which retailers have no visibility and limited leverage. If new laws or regulations pass in the middle of a contract, retailers are forced to rely on a manufacturer or other supply chain participant notifying them to remove finished good articles from shelves if they're even able to identify those finished good articles that contain PIP (3:1).

Challenges with Returns

Manufacturers and retailers deal with customer returns, damaged packaging returns, and other returns. It can be assumed this will apply to PIP (3:1)-containing finished good articles. Not all of these returns – primarily returns by a retailer to a manufacturer due to damaged packaging – will qualify under the EPA’s acknowledgement in the regulations that articles previously sold and/or supplied to end use consumers are out of scope since these specific returns were never sold to an end use consumer. Manufacturers are unable to identify a return from a retailer that comes from an end use consumer versus a damaged packaging return directly from the retailer (a non-end user consumer). The result will be the scrapping of all returns versus the ability to refurbish or repair and replace those products back into commerce, including those that may not contain PIP (3:1).

A “manufactured by” date would resolve this concern on finished good articles that are returned. Regardless of the return date, as long as the article was manufactured after the “manufactured by” compliance date, a manufacturer will be able to confirm the non-use of PIP (3:1) in the finished good article. This would allow the article to be refurbished / repaired and placed back into the market, thus saving the critical resources used in the manufacturing of that finished good article.

Challenges with Spare and Replacement Parts

Electronic finished good articles can have warranties for a multitude of years (in some cases upwards of 15 years) from the date of the sales invoice to the end use consumer. Spare and replacement parts to support these warranties must be available throughout the entire warranty period, and in some cases, spare and replacement parts are needed to support customers outside of warranty. Spare and replacement parts are manufactured and warehoused worldwide based on projections for each part type to supply warranty and non-warranty demand in each region. In other words, manufacturers will keep spare and replacement parts warehoused in the U.S. in anticipation of warranty and non-warranty consumer needs. These spare and replacement part articles await distribution in commerce to an end user consumer or repair facility.

Additionally, finished good article development cycles (i.e., generations) lead to the release of finished good articles during a potentially five (5) year timeframe. This means that for one generation of a finished good article, from the first finished good article released to the last, spare and replacement part articles for warranty support are needed for up to 20 years. When transitioning from one generation to the next, spare parts for the old generation are bought under a “last time buy” from the supplier to create inventory needed to support warranty. After this “last time buy”, the tooling needed to manufacture those parts is decommissioned. It is expected that spare and replacement part articles that contain PIP (3:1) will be in inventory well past the October 31, 2024, proposed compliance date. A “manufactured by” date resolves the concern around any spare and replacement part articles that are in inventory as of October 31, 2024.

Criticality of a Long-Term Solution Based on a “Manufactured By” Compliance Date

While we appreciate EPA’s actions to date on this issue, the short-term resolutions provided by EPA have had significant impacts on member companies:

- Company A estimated a loss of over \$5M USD in an effort to remove finished good articles from commerce both in advance of March 2021, and then in advance of the September 2021, expiration of the No Action Assurance. Costs came from transitioning to shipment via air at a cost five times higher than shipment via boat; transferring impacted inventory back overseas; suspension of shipments to retailers; and unplanned sales promotions for finished good articles to incentivize consumers to purchase the articles quickly.

- Company B noted that there were new models they wished to introduce in the fall for the 2021 holiday season, but retailers refused for several months until EPA gave an indication in September 2021 that a longer-term resolution was likely forthcoming.

The importance of timely decisions by EPA with long-term resolutions for industry cannot be stressed enough. Many of the challenges that industry experienced at the beginning of 2021 remain. Several companies have estimated only about ten percent (10%) of suppliers have responded to inquiries regarding the presence of PIP (3:1) in part and component articles. Several companies have also noted that suppliers that initially responded negative on the use of PIP (3:1) have changed their response to positive. As stressed in our comments to the March 2021 Proposed Rule, PIP (3:1) is not widely known or understood throughout the supply chain. Thus, there are several additional parameters we request be incorporated as part of a chemical regulation framework as it relates to articles.

2. Future EPA Rulemaking on PIP (3:1)

We welcome EPA's indication that the Agency will commence a new rulemaking effort on PIP (3:1), and the other four PBT chemicals that have been regulated under TSCA section 6(h), with the intention of issuing that proposal in 2023. The additional rulemaking will provide the electronics industry with further opportunities to provide objective evidence to support additional requests and exemptions for specific market segments or article applications.

We understand that EPA has only requested comment during this rulemaking on concerns related to the compliance date extension. However, there are several additional critical components to the successful management of PIP (3:1) in articles that we wish to highlight from our comments to the March 2021 Proposed Rule. We are concerned that a rulemaking process in 2023 could mean a final rule published too close to the October 31, 2024, compliance date leaving industry scrambling on these critical components. We have reiterated those concerns below and look forward to working with EPA on these critical issues.

- **EPA must establish an adequate de minimis concentration for the prohibition.** Establishment of de minimis levels is critical to the management of chemicals within complex supply chains. Without a de minimis level, articles that contain only trace amounts of PIP (3:1) resulting from impurities, byproducts of the manufacturing process, or heavily diluted amounts will be considered non-compliant. Additionally, chemical restrictions without the establishment of de minimis concentrations are unmanageable in an international supply chain.
- **EPA must exempt spare and replacement parts for any finished good manufactured prior to the “manufactured by” compliance date.** EPA must provide an exemption for spare and replacement parts for any finished good article manufactured prior to the regulatory deadline. This should extend to finished good articles that have been repaired using these spare or replacement parts and are then placed back into the market. Without an exemption, companies will be forced to redesign spare and replacement part articles for finished good articles already in the market and, in some cases, which are no longer manufactured after the October 31, 2024, compliance date. Members are concerned with durability and longevity of their finished good articles; we want to avoid early obsolescence due to non-complaint spare and replacement parts especially for long-life finished good articles.
- **EPA must exempt the use of PIP (3:1) in chemical substances, mixtures and articles for research and development (R&D) purposes to allow entities to test and compare alternatives.** The Final Rule for PIP (3:1) prohibits PIP (3:1) in research and development activities. In the preamble to the Final Rule, EPA states that research and development (R&D) is not permitted for “the development of a new

product, or refinement of an existing product that contains the chemical substance.” The unintended consequence is that this would prohibit the use of a PIP (3:1)-containing articles from being imported for the sole purpose of identifying alternatives to PIP (3:1) here in the U.S. The ability to compare the functionality, performance, safety and quality of PIP (3:1)-containing articles to non-PIP (3:1)-containing articles is a critical piece in determining whether the substitute for PIP (3:1) is viable.

- **EPA must exempt monitoring and control instruments.** We request that the EPA consider an exemption from the prohibition on the use of PIP (3:1) in monitoring and control instruments including industrial or professional monitoring and control instruments (NAICS 334515 Instrument Manufacturing for Measuring and Testing Electricity and Electrical Signals). Examples of these instruments, produced by the test and measurement industry sector, include analytical spectrometers, chromatographs, scanning and transmission electron microscopes, signal generators, spectrum analyzers, oscilloscopes, and infrared cameras and thermometers. This equipment is primarily built to order and sold directly to professional and industrial customers by the manufacturers.
- **We continue to support the recycled content exemptions in the Final Rule.**
- **We request legal clarity on the application of allowed exemptions in the production of articles.** It remains unclear on the application of the existing exemption for products (e.g., adhesives and sealants) used in the production or manufacture of an article, such as electronics components.

3. Request for Correction to Reference #21

We appreciate EPA’s frequent citations of the May 2021 comments provided to EPA by CTA, IPC, and ITI. The reference to the comments inadvertently excluded IPC as a co-author. We request that Reference #21 be corrected to include IPC as a co-author such that it will read “Comment submitted by the Consumer Technology Association (CTA), IPC, and the Information Technology Industry Council (ITI) to EPA on May 17, 2021. EPA-HQ-OPPT-2021-0202-0148”.

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Closing

CTA, IPC and ITI appreciate EPA’s actions to date and this proposal to provide a long-term resolution for industry by extending the compliance deadline for PIP (3:1)-containing articles to October 31, 2024. We respectfully request the new compliance date be based on a “manufactured by” date for PIP (3:1)-containing articles.

Thank you for your attention to our concerns over the past several months and allowing CTA, IPC and ITI to submit these comments and requests. We thank the EPA for its continued collaboration and look forward to any follow-up conversations to these comments.

Sincerely,



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Consumer Technology Association

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IPC

IPC (www.IPC.org) is a global industry association dedicated to the competitive excellence and financial success of its 3,000+ member companies representing all facets of the electronics industry including design, printed circuit board manufacturing, and electronics assembly and test. As a member-driven organization and leading source for industry standards, training, industry intelligence and public policy advocacy, IPC supports programs to meet the needs of an estimated \$2 trillion global electronics industry. IPC maintains offices in the U.S, Europe, India, and other Asia-Pacific countries.

Information Technology Industry Council (ITI)

The Information Technology Industry Council (ITI) is the premier global advocate for technology, representing the world’s most innovative companies. Founded in 1916, ITI is an international trade association with a team of professionals on four continents. We promote public policies and industry standards that advance competition and innovation worldwide. Our diverse membership and expert staff

CTA, IPC, and ITI Comments

Phenol, Isopropylated Phosphate (3:1) (PIP 3:1) Final Rule – Further Compliance Date Extension

provide policymakers the broadest perspective and thought leadership from technology, hardware, software, services, and related industries.