



News & Types: Client Advisories

EPA Issues No Action Assurance Reprieve for PIP (3:1) Products

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Executive Summary

EPA Final Rule: On January 21, 2021, the U.S. Environmental Protection Agency (“EPA”) promulgated five final rules under the Toxic Substances Control Act to reduce exposures to five chemicals that are considered persistent, bioaccumulative and toxic (“PBT Chemicals”). The five PBT Chemicals covered by these final rules are Decabromodiphenyl ether (“DecaBDE”), 2,4,6-Tris(tert-butyl)phenol (“2,4,6-TTBP”), Hexachlorobutadiene (“HCBd”), Pentachlorothiophenol (“PCTP”), and Phenol, isopropylated phosphate (3:1) (“PIP (3:1)”). Among these five PBT Chemicals, this client advisory focuses on the Final Rule (“Final Rule”) on the regulation of PIP (3:1), which became effective as of February 5, 2021. PIP (3:1) is widely used throughout the electronics, automotive, construction, manufacturing, and other heavy industries on account of its flame-retardant properties and efficacy as a plasticizer in plastic components such as wire covers and casings.

Prohibitions. The Final Rule prohibits the processing and distribution in commerce of PIP (3:1), including PIP (3:1)-containing products or articles, after March 8, 2021. The Final Rule does not have a transition period for most PIP (3:1) products, which means that the prohibition fully went into effect on March 8, 2021 and PIP (3:1)-containing products can no longer be lawfully exported to or sold within the U.S. after that date unless subject to an exclusion or delay in enforcement.

Exclusions. The Final Rule contains several exclusions to the prohibition on PIP (3:1). These exclusions permit the processing and distribution of PIP (3:1) after March 8, 2021 for: (i) use in hydraulic fluids for the aviation industry or for military purposes; (ii) use in lubricants and greases; (iii) incorporation into products for use in new and replacement parts for motor and aerospace vehicles; (iv) use as an intermediate in a closed system to produce cyanoacrylate adhesives; (v) use in specialized engine air filters for locomotive and marine applications; (vi) plastic for recycling from products or articles containing PIP (3:1), where no new PIP (3:1) is added during the recycling process; or (vii) finished products or articles made of plastic recycled from products or articles containing PIP (3:1), where no new PIP (3:1) was added during the production of the products or articles made of recycled plastic.

Record Keeping, Downstream Notification and Non-Release Requirements. The Final Rule requires companies to maintain ordinary business records related to compliance with the prohibitions, restrictions and

other provisions in the Final Rule, and requires such records to be maintained for a period of three years. In addition, the Final Rule imposes downstream notification obligations, either through product safety data sheets or product labeling, for companies that manufacture, process or distribute in commerce PIP (3:1) or PIP (3:1)-containing products for any use after July 6, 2021, with notification made prior to or concurrent with the shipment of such products. The Final Rule also prohibits the release of PIP (3:1) to water during the manufacturing, processing and distribution in commerce of PIP (3:1) and PIP (3:1)-containing products.

Penalties. The penalties for violating the Final Rule are, per 15 U.S.C. § 2615, civil penalties in an amount not to exceed \$37,500 per violation, with each day that a violation continues constituting a new violation. In addition, knowing or willful violations of the Final Rule may, in addition to or in lieu of civil penalties, be punished with criminal penalties consisting of one or both of the following: (i) a fine not to exceed \$50,000 for each day of violation; or (ii) imprisonment for not more than one year.

No Action Assurance. For now, manufacturers and distributors will be allowed to continue using and distributing PIP (3:1) and PIP (3:1)-containing products for another six months. On March 8, 2021 the EPA issued a No Action Assurance (“NAA”) that stated that the EPA will exercise enforcement discretion under the Final Rule and not prosecute entities that continue to manufacture and distribute non-excluded PIP (3:1)-containing products after March 8, 2021 for a 180-day period ending on 11:59 pm, September 4, 2021. In particular, the NAA provides certain relief for violations of the Final Rule’s prohibitions on processing and distributing PIP (3:1) in commerce and the requirement to provide a statement that a company is in compliance with the Final Rule. However, entities continuing operations under the NAA will still need to comply with other aspects of the Final Rule, including the recordkeeping and downstream notification requirements. The NAA also provides for a 60-day public comment period for the EPA to collect additional input on the five PBT Chemicals final rules.

Public Comment Period. The NAA was issued in response to several industry groups informing the EPA that the Final Rule’s prohibition on manufacture and distribution of PIP (3:1)-containing products after March 8, 2021 would cause severe hardship because PIP (3:1) is widely used throughout various commercial industries as a flame retardant and plasticizer and is not easily replaced with other, less harmful, substances. It remains to be seen if the EPA, upon the conclusion of the 60-day public comment period, will expand the range of exclusions under the Final Rule to enable more permitted uses of PIP (3:1) after the NAA’s 180-day period expires on September 4, 2021.

What Companies Should Do. In light of the ubiquity of PIP (3:1)-containing products across several key industries and the severe penalties imposed for noncompliance with the Final Rule, companies should take advantage of the 180-day period to identify PIP (3:1)-containing products in their supply chains and find potential alternatives in the event that they are no longer able to manufacture and distribute such products after September 4, 2021. Companies should also monitor closely the EPA’s news announcements in the coming months to stay informed as to any new interpretations or exclusions that the EPA may issue regarding the Final Rule. If you have any questions regarding the Final Rule or its potential impact upon your business operations, please contact your Masuda Funai relationship attorney for a consultation.