Keller & Heckman

Serving Business through Law and Science®

khlaw.com
202.434.4100

Keller and Heckman LLP
1001 G Street, NW
Suite 500 West
Washington, DC 20001

Writer's Direct Access
David B. Fischer
(202) 434-4224
fischer@khlaw.com

May 2, 2025

Via Electronic Mail

Lee Zeldin, Administrator
Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C.

Re: TSCA Section 21 Petition to Initiate a Proceeding for the Amendment of 40 C.F.R. Part 705 – Reporting and Recordkeeping Requirements for Certain Per – and Polyfluoroalkyl Substances

Dear Administrator Zeldin:

On behalf of a coalition of chemical companies ("the Coalition") directly impacted by the reporting requirements of 40 C.F.R. Part 705, we respectfully submit this petition to amend Part 705, pursuant to §21 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2620 ("Citizens' petitions"), and the February 19, 2025, Executive Order, *Ensuring Lawful Governance and Implement the President's 'Department of Government Efficiency' Deregulatory Initiative*.

We also request that the Environmental Protection Agency ("EPA") withdraw the current reporting obligations that begin on July 11, 2025, ending on Jan. 11, 2026, to allow EPA sufficient time to repropose the rule in accordance with this petition and issue a new reporting deadline.

I. Background

On June 28, 2021, EPA proposed reporting and record keeping requirements for per and polyfluoroalkyl substances ("PFAS") pursuant to the 2020 National Defense Authorization Act[1], which amended the Toxic Substances Control Act ("TSCA") by adding a new §8(a)(7):

> (7) PFAS DATA.—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

[1] The National Defense Authorization Act for Fiscal Year 2020 (Pub. L. No. 116-92, section 7351).

> 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). (emphasis added).

Despite the absence of any legislative history, the Biden EPA asserted that "Congress chose to add an entirely new, standalone subsection to TSCA section 8(a)."[2] And that by doing so, Congress intended §8(a)(7) to be unfettered and unconstrained by exemptions that EPA has applied to other 8(a) reporting rules (*e.g.*, Chemical Data Reporting ("CDR") rule). Thus, in its proposal, EPA did not include **any** reporting exemptions or production volume thresholds. Despite voluminous public comments advocating for exemptions and thresholds, EPA held fast to its mistakenly narrow read of §8(a)(7).

Consequently, the rule as finalized on October 11, 2023, will impose costly and time-intensive data collection burdens on many thousands of companies, including small businesses, without commensurate tangible benefits. Indeed, EPA's cost estimates total nearly a staggering billion dollars.[3] Moreover, without properly limiting PFAS reporting, EPA inevitably will be inundated with mountains of data on potentially thousands of PFAS, outstripping its capacity to systematically review and timely utilize these data.

II. TSCA § 8(a)(7) is Not a Standalone Provision

EPA's narrow read of the new PFAS reporting provision fails to comport with *Loper Bright* because EPA's interpretation of §8(a)(7) fails to reflect the "best reading" of this provision of TSCA.[4] Congress specifically directed EPA to "promulgate a rule *in accordance with this subsection* ...." (emphasis added). As used in TSCA, the term "subsection" refers to the first rank subdivision below the numbered section level. Accordingly, this cross reference in §8(a)(7) refers to TSCA subsection 8(a) and requires that EPA promulgate the PFAS rule "in accordance with" that subsection, (See, e.g., references to "subsection" (b) in TSCA §8(a)(1) and (3); references to "subsection" (a) in TSCA §8(b)(1)). EPA, therefore, can and should apply to paragraph 8(a)(7) the typical TSCA 8(a) reporting exemptions (e.g., by-products, impurities, articles, R&D materials, and a production volume threshold) applied to other TSCA subsection 8(a) reporting rules.[5]

---

[2] 86 Fed. Reg. 33926, 33929 (June 28, 2021).

[3] 88 Fed. Reg. 70516, 70517 (October 11, 2023).

[4] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 373, 144 S. Ct. 2244, 2247, 219 L. Ed. 2d 832 (2024).

[5] EPA also recognized the importance of reporting exemptions in its final TSCA fees rule, in which EPA specifically included exemptions from fees for: research and development activities; entities manufacturing less than 2,500 lbs. of a chemical undergoing risk evaluation; chemicals produced as non-isolated intermediates;

(continued …)

EPA does not provide a cogent rationale for not including any of these exemptions.[6] With respect to articles, for example, EPA candidly admits that even after fully satisfying the reporting standard, an importer of an article containing PFAS "may not have knowledge that they imported PFAS and thus not report under this rule." [7] We agree. Then why subject imported articles that contain PFAS to the reporting rule?

Equally striking, EPA applies its "standalone" interpretation inconsistently. EPA states that both the §8(a)(2) "known or reasonably ascertainable" due diligence standard and the §8(a)(5) bar against duplicative or unnecessary reporting are applicable to limit the scope of §8(a)(7) PFAS reporting, but the §8(a)(1) exemption for small manufacturers is not.[8]

Moreover, under the Paperwork Reduction Act ("PRA"), EPA has not demonstrated that "it has taken every reasonable step" to collect information from submitters in a manner which "is the least burdensome;" "is not duplicative of information otherwise accessible to the agency;" and "has practical utility."[9] The PRA approval criteria – properly applied – will help to ensure that private and government resources to gather more information on PFAS uses and exposures are properly focused to collect useful information for TSCA purposes from those most likely to have it.

---

chemicals imported in articles; chemicals produced as byproducts; and chemicals produced or imported as an impurity. 89 Fed. Reg. 12961, 12969 (February 21, 2024).

[6] 86 Fed. Reg. at 33,930.

[7] 86 Fed. Reg. at 33,929.

[8] *Id.* at 33,930. Section 8(a) burden limiting provisions include the following: EPA may only require reporting that is "reasonable" (§8(a)(1)(A)); reporting can be required for mixtures (e.g., articles) and R&D material only if EPA determines that such reporting is necessary for effective enforcement of TSCA (§ 8(a)(1)(B)); reporting is required only to the extent that the information sought is "known or reasonably ascertainable" (§ 8(a)(2)); only existing health and safety information must be reported, new data development cannot be required (§ 8(a)(2)(E)); reporting rules must specify the level of detail to be reported, including the manner by which exposure and use information may be reported (§ 8(a)(4)(B)); 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)); and 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)).

[9] 5 CFR §1320.5(d)(1).

III. EPA Should Include Reporting Exemptions to Reduce the Anticipated Burdens on Potential Submitters

We respectfully request that EPA narrow the scope of required reporting by revising and reissuing the PFAS reporting rule to explicitly exempt from reporting the following activities described in 40 CFR §711.10 (a) – (c), (*e.g.*, imported articles, R&D materials, impurities, byproducts, non-isolated intermediates); and PFAS manufactured in quantities of less than 2,500 lbs.

a. Imported Articles

The burden on article importers to investigate their supply chains to identify products that contain reportable PFAS materials can be extreme. As EPA has acknowledged, in most cases, where articles containing a reportable PFAS are identified, the importer is unlikely to have information of practical utility for EPA's stated TSCA use for the information – assessing new and existing chemicals. Given its typically limited value and high cost, EPA should exempt imported articles from reporting.

Requiring every company that imports the same type of article to make the same kind of investigation, make the same kind of report and provide EPA with the same information is highly duplicative and very costly. Indeed, for many products, EPA may already know that the type of article often contains a PFAS. EPA is required to avoid wasteful and duplicative reporting to the extent feasible. EPA also is required to focus reporting on persons likely to have responsive information.

b. Certain Chemicals

The TSCA definition of "manufacturer" is very broad. In addition to conventional understandings of manufacturing, it also includes both import activity and a wide range of other activities that technically result in a chemical reaction but that are only incidental to other activities, de minimis in scope or otherwise occur in circumstances not warranting EPA oversight. Consistent with the limitations in §8 and the "reasonable and prudent manner" in which EPA shall implement TSCA[10], EPA should exempt from PFAS reporting PFAS that is manufactured or imported, intentionally or unintentionally, only:

- as an impurity
- as a byproduct
- as an R&D material; and
- as a non-isolated intermediate

The PFAS reporting requirement put EPA and industry in the same unfortunate position recently experienced with the TSCA Fees Rule. There, EPA initially failed to recognize the unintentionally broad reach of its rule and the practical impact of not adopting standard TSCA exemptions (including for articles). It ultimately used enforcement discretion (a "No Action Assurance" letter) as short term,

[10] TSCA section 2(c).

emergency means to limit applicability, which otherwise would have drawn millions of (unintended) individual responses. EPA also recognized the practical inability of downstream users and importers to identify the presence (or not) of particular chemicals in articles they import. EPA concluded that these issues would "adversely impact[ ] the agency's implementation of the TSCA Fees Rule."[11]

c. Small Volumes

An annual production volume threshold would serve as an effective screening tool for companies reviewing operations and investigating for the presence of potentially reportable PFAS. For the CDR program, this level is set at 2,500 lbs. (for substances subject to some form of risk management action). Exemption at this level represents a reasonable balance between the limited value of information to be obtained and the costs of obtaining it.

Finally, as part of the PFAS reporting rule, manufactures must also submit "'all existing information concerning the environmental and health effects' of the chemical substance covered by the [PFAS] rule."[12] This information includes fully study reports and support documents, which EPA claims are "necessary for EPA to understand the full context and evaluate the quality of the data, which is necessary for the Agency to review to determine whether such data *may be used for any future Agency actions*."[13] Given the burden on industry to painstakingly review and sanitize study reports to remove CBI, and the speculative nature of the actual need for full study reports, we also request that EPA remove this requirement, and instead allow robust summaries, similar to the approach adopted by the European Chemicals Agency ("ECHA").

Sincerely,

David B. Fischer

Attachment: Appendix A

cc: Chad McIntosh, Acting Deputy Administrator
Travis Voyles, Assistant Deputy Administrator
Nancy Beck, Principal Deputy Administrator
Lynn Dekleva, Deputy Assistant Administrator

[11] See EPA "No Action Assurance Regarding Self-Identification Requirement for Certain 'Manufacturers' Subject to the TSCA Fees Rule" Letter, March 24, 2020.

[12] 88 Fed. Reg. 70516, 70523 (October 11, 2023).

[13] *Id.* at 70524. (emphasis added).