

EPA is rethinking TSCA Section 6 PBT rules: Next steps with PIP (3:1)

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In September, we alerted¹ readers to the US Environmental Protection Agency's (EPA's) extension of compliance deadlines for one of five final rules EPA issued in January 2021 for certain persistent, bioaccumulative, and toxic (PBT) substances. At that time, EPA also announced that it would be proposing another rule that would address further compliance date extensions.

The rule prohibited processing and distribution in commerce of PIP (3:1) and all products containing PIP (3:1) as of March 8, 2021, except for nine specific product categories.

That proposal has finally arrived, along with a request from EPA and some more, potentially foreboding news about all five final PBT rules. This article summarizes and analyzes the latest developments.

PIP (3:1) — Part 1 (in case you missed it)

In January 2021, EPA finalized a rule containing significant restrictions on the processing and distribution of PIP (3:1) and products containing PIP (3:1), which can include consumer and commercial articles such as laptops, televisions, gaming consoles, medical devices, transformers, semiconductor wafers, fire prevention systems, engine emission control systems, paints, elastomers, foam, resistors, and components in scanning electron microscopes.

Most significantly, the rule² prohibited processing and distribution in commerce of PIP (3:1) and all products containing PIP (3:1) as of March 8, 2021, except for nine specific product categories. The rule also prohibited releases of PIP (3:1) to water stemming from manufacture, processing, or distribution in commerce of PIP (3:1) and products containing the substance starting March 8, 2021.

The Rule also required those who manufacture, process, or distribute PIP (3:1) or PIP (3:1) containing products in US commerce to notify their customers of the prohibitions on processing,

distribution, and release to water via language on a Safety Data Sheet or via labeling. Persons subject to the rule also must maintain records regarding compliance with the rule's requirements.

Almost as soon as the rule was finalized, stakeholders raised concerns about their ability to meet the compliance date and sought more time to allow already existing products to make their way through the supply chain, as well as time to find and qualify appropriate alternatives to PIP (3:1), and to produce or import new articles that do not contain PIP (3:1).

In March, EPA granted a very brief, initial reprieve from enforcement of the key March 8 deadline for the ban on processing and distribution in commerce of PIP (3:1)-containing articles and products and PIP (3:1) for use in articles. EPA also requested comment³ on the issue of the difficulties meeting the PIP (3:1) compliance date, as well as aspects of the other EPA PBT rules.

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EPA received comments supporting arguments that the prohibitions would adversely affect a wide range of consumer and commercial goods used in numerous industry sectors if the compliance deadlines were not extended.

PIP (3:1) — Part 2 (in which hope emerges)

In response to the outpouring of comments, and to avoid potentially severe economic consequences, on September 17, EPA amended the original rule⁴ to extend the compliance date for the prohibition on processing and distribution in commerce of PIP (3:1) for use in articles and of PIP (3:1)-containing articles until March 8, 2022.

In addition, the Agency clarified that the recordkeeping requirements do not apply to recycled plastics, and that the general recordkeeping requirement for PIP (3:1)-containing articles would not be effective until March 8, 2022.

Note that this extended deadline is specifically applicable only for PIP (3:1) in "articles," and not to PIP (3:1)-containing "products."



For purposes of this rule, a “product”⁵ is PIP (3:1) itself, a mixture containing PIP (3:1), or any material that contains PIP (3:1), or a mixture containing PIP (3:1), that is not an article.

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“Articles”⁶ are a manufactured item which is formed to a specific shape or design during manufacture; which has end use function(s) dependent in whole or in part upon its shape or design during end use; and which has either no change of chemical composition during its end use, or only those changes of composition which have no commercial purpose separate from that of the article, and that result from a chemical reaction that occurs upon end use of other chemical substances, mixtures, or articles; except that fluids and particles are not considered articles regardless of shape or design. (EPA has offered the following example as a distinction between the two categories: laptop computers are articles, as are the internal components such as chips, wiring, and cooling fans. Hydraulic fluids and motor oils are products).

Moving forward (light at the end of the tunnel ... or an oncoming train?)

On October 28, EPA issued a proposed rule⁷ that would further extend the compliance deadline for PIP (3:1)-containing articles and the start of the recordkeeping requirement until October 31, 2024. In line with the new Administration’s pledge to take a hard look at Trump-era regulatory actions, EPA reiterated its intention to commence a new rulemaking effort on PIP (3:1) and the other four PBT chemical substances.

The Agency anticipates issuing such proposals in 2023. Apparently, the Agency’s new leadership is concerned the five PBT rules issued in January 2021 did not go far enough. If EPA modifies other PBT rules to eliminate the few exemptions they allow, new supply chain challenges across significant sectors of the economy could follow.

At this time, however, EPA is still focused on taking comments on the adequacy of (and conversely, the necessity for) the latest

extensions in the proposed PIP (3:1) rule. Displaying some skepticism, EPA states that to the extent that any industry sector believes that it needs a compliance date beyond October 31, 2024, it must provide the Agency with very specific information and documentation supporting a further extension.

In particular, EPA is looking for detailed information and documentation on: the specific uses of PIP (3:1) in articles throughout supply chains; steps taken to identify, test, and qualify substitutes for existing uses, including details on the substitutes tested and certifications that require updating; estimates of the time required to identify, test, and qualify substitutes; and the continuing need for replacement parts, which may include substantiating service lives of the equipment in question and specifically identifying applicable regulatory requirements for the assurance of replacement parts.

The Agency also wants to learn about the efforts being made to identify substitutes for PIP (3:1) and to press suppliers of products containing the substance to phase out its use.

The Agency is showing signs of losing patience with the need to repeatedly address the specific needs of importers and distributors of articles that contain PIP (3:1), and implying expectations that the customers for such products should assert more control over the chemical contents of their supply chains. In light of this, businesses seeking to ensure the latest extension is finalized should prepare carefully documented and timely comments addressing and resolving any remaining skepticism at EPA.

The latest public comment deadline is December 27, 2021.

Notes

- ¹ <https://bit.ly/3qJgws7>
- ² <https://bit.ly/3oCOJab>
- ³ <https://bit.ly/3qQpuUy>
- ⁴ <https://bit.ly/3ciTsrY>
- ⁵ <https://bit.ly/3Fppeat>
- ⁶ <https://bit.ly/3Fppeat>
- ⁷ <https://bit.ly/3Dn8Z5Q>

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