

How are imported products affected by recent changes to exemptions for chemicals in articles under TSCA?

Importers of articles into the US must determine whether they are regulated under the significant new use rule (SNUR) for long-chain perfluoroalkyl carboxylates following recent changes – and if necessary, comply. Ashish Deshmukh, Gavin Thompson and David Liu of Ramboll consider the issues

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In the US, TSCA authorises the EPA to regulate chemical substances contained in articles. However, few such regulations have been implemented until recently. Generally the agency has chosen to exempt chemicals contained in articles from many of TSCA's provisions, such as pre-manufacture notices (PMNs), significant new use rules (SNURs), import certifications and export notifications.

In 1984, the EPA promulgated the article exemption from the significant new use notification (SNUN) requirements based on its interpretation that “people and the environment will generally not be exposed to substances in articles.” However, the agency retained its option to revoke the exemption, if warranted, for specific chemical substances.

Since then, evidence has shown that certain types of chemical substances may be released from articles during their intended uses or their end-of-life recycling and disposal activities. In response, the EPA has revoked the article exemption in specific cases. For instance, for the import of erionite fibre, elemental mercury and benzidine.

EPA regulates articles with coatings containing certain fluorochemicals

Long-chain perfluoroalkyl carboxylates (LCPFACs) have been applied to surface coatings of articles due to their concurrent hydrophobic and oleophobic properties. However, they have been a source of concern for the EPA due to their bioaccumulative and persistent properties. A 2013 LCPFAC SNUR amendment revoked the article exemption for imported carpets treated with certain LCPFACs. In 2015, the agency proposed additional SNUR amendments that were intended to revoke the exemption for LCPFACs contained anywhere within any imported article. However, the July 2020 final SNUR amendments limit the revocation of the exemption to imported articles that contain one or more of the 20 LCPFACs listed in the SNUR and/or perfluorooctanoic acid (PFOA), its salts or other derivatives only as part of a ‘surface coating’.

Further, under the 2020 final SNUR amendments, articles are subject to the SNUR regardless of the LCPFAC concentration in the surface coating; the importer's belief whether any release or exposure will result from the article; or whether the LCPFACs in surface coatings have undergone chemical reactions (curing) after application.

Some uses are not subject to the LCPFAC Snur

Certain uses that existed at the time of the publication of the proposed rule in 2015 and which did not cease by publication of the final rule in 2020, were identified in the final Snur as ongoing and are not subject to the SNUR. Also, if a covered LCPFAC is only present as an impurity in the surface coating, then the SNUR is not applicable. Despite revoking the exemption for imported articles, the other exemption (in 40 CFR 721.45(f)) for processing a chemical substance as part of an article within the US, has not been revoked. This allows processors to exhaust their existing stocks of LCPFAC substances and enables US importers of regulated articles to assemble them into larger articles. The SNUR also does not apply to LCPFACs that are neither listed in the SNUR nor belong to the category of PFOA or its salts (except in carpets for which the SNUR is applicable).

What surface coatings and articles may be impacted?

The EPA has not provided a regulatory definition for 'surface coating' but has clarified in the compliance guide released in January that it is "a material applied in a thin layer to a surface as a protective, decorative or functional film; often refers to paints such as lacquers or enamels, but it also refers to films, applies to other materials such as varnishes, sealants, adhesives, inks, maskants and temporary protective coatings."

LCPFACs in imported articles must meet one of two criteria to be part of a surface coating:

- be present in a coating on any surface of an article that is in direct contact with humans or the environment during the article's normal use or reuse, whether the coating is oriented towards the interior or exterior of the article; or
- be present in a coating on any internal component, even if facing the interior of the article, if that component is in contact with humans or the environment during the article's normal use or reuse.

The types of imported articles that are expected to be impacted by this requirement include fibre, yarn and apparel; carpets; computers and other electronic products; appliances; automotive parts; paper goods; and construction materials.

Importers should engage with their supply chains. Importers have varying levels of knowledge about the chemical composition of the articles they import, yet they are responsible for compliance with the LCPFAC SNUR. Hazardous chemicals in articles have been regulated for many years in several countries and certain US states, including in the EU via the REACH Regulation and RoHS Directive, in the US via the

Consumer Product Safety Improvement Act (CPSIA) and in California via its Proposition 65. To the extent that importers and processors of articles are already subject to these regulations due to existing businesses in these jurisdictions, they may have already instituted policies and procedures to manage these obligations.

What can importers of articles do?

To understand and monitor their liabilities, importers must determine whether they are importing articles that are regulated under the LCPFAC SNUR and if necessary, take steps to comply. The overall compliance process can be broken down into the following steps:

- identify articles containing LCPFACs;
 - determine applicability of the SNUR; and
 - consider options for addressing articles subject to the SNUR.
- Identify articles containing LCPFACs: importers must identify all imported articles that are likely to contain LCPFACs in surface coatings and their suppliers.

Obtaining compositional information can be complex (especially with proprietary components) and may present significant hurdles. This could potentially be achieved by executing confidentiality agreements and then collecting compositional data from suppliers. Alternatively, importers could engage the services of third-party databases or consultants, who in turn receive compositional information from suppliers, allowing certification of absence of these substances in articles. Although the EPA does not currently allow importers to rely on certification from foreign suppliers regarding compliance of imported articles with the LCPFAC SNUR, it has retained the option of proposing this method of compliance in the future. In certain cases, importers may require foreign suppliers to provide certificates of analysis for the articles or perform their own laboratory testing.

Determine applicability of the SNUR: the importer must determine whether the LCPFAC in question is covered under the SNUR and whether the use is an allowable existing use. They should then evaluate whether the LCPFAC substance meets one of the criteria defined by the EPA for being present in a surface coating. If the importer determines that the SNUR is applicable, steps must be taken to comply with its requirements prior to importing.

Options for addressing articles subject to the SNUR: there are several possibilities open to companies, ranging from elimination, substitution (using an alternate substance), ceasing importation or submitting a SNUN for the new use. If the first three options are not feasible, then the company must submit a SNUN to the EPA, which can be costly and time-consuming. The importer must review any physico-chemical property and toxicity data that may

be available for submission to the agency as part of the SNUN. After performing a gap analysis to identify critical data that would assist in EPA's risk assessment, the importer should consider developing such data, including actual exposure data. Importers can consider engaging with the agency in a pre-submission meeting to obtain feedback on data sufficiency.

Additional responsibilities

As stated above, a company that assembles products from multiple articles treated with LCPFACs would be considered a processor of the LCPFAC substance and must receive written notification from their supplier about the chemicals in the articles they process. Currently, the EPA is not requiring TSCA section 13 import certification for LCPFACs in imported articles or section 12(b) notification for those in exported articles.

What can we expect in the future?

Currently, the agency is unaware of any uses of LCPFACs in articles other than in surface coatings but has retained the option to propose future SNURs for LCPFACs in other parts of imported articles. The automotive, aerospace and defence industries have a history of using industry-supported global data systems to collect compositional information from their multi-tiered supply chains. For instance, the International Material Data System (IMDS) is an online database that suppliers use to provide information on substances in automobile parts. With increased regulation of articles under TSCA, we expect more industry groups to start tracking chemicals in their supply chains.

While the EPA is making changes to the article exemption, some non-governmental organisations (NGOs) have expressed concerns about regulating SNUR chemicals only in surface coatings of articles. These are based on the following conclusions of the EPA:

- LCPFACs are typically unbound to the matrix of the article and can be released quite easily even when present in their interiors;
 - numerous biotic and abiotic processes can accelerate releases of LCPFACs from surface coatings and interiors of articles; and
 - LCPFACs in articles could also be released to the environment during the recycling or disposal of articles.
- The EPA is therefore facing pressure to alter its policy to make SNURs applicable to whole articles not just surface coatings.

The views expressed in this article are those of the expert authors and are not necessarily shared by Chemical Watch.

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