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Submitted Via Regulations.gov

Michael Regan, Administrator
Michal Freedhoff, Assistant Administrator, Office of Chemical Safety and Pollution Prevention
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, D.C. 20460-0001

RE: Docket ID No. EPA- HQ-OPPT-2022-0867; Multi-state Comments in Response to U.S. Environmental Protection Agency's Proposed Rule: Significant New Use Rules; Per- and Polyfluoroalkyl Substances Designated as Inactive on the Toxic Substances Control Act Inventory

Dear Administrator Regan and Assistant Administrator Freedhoff:

The Attorneys General of the Commonwealths of Pennsylvania and Massachusetts, States of Arizona, Colorado, Connecticut, Hawaii, Illinois, Maine, Maryland, New Jersey, New Mexico, New York, Oregon, Rhode Island, Washington, Wisconsin and the District of Columbia offer these comments on the U.S. Environmental Protection Agency's ("EPA") proposed Significant New Use Rule ("Proposed SNUR") designating as significant new uses under the Toxic Substances Control Act ("TSCA") certain inactive per- and polyfluoroalkyl substances ("PFAS") thereby restricting the reintroduction of these PFAS into our environment. PFAS have already been widely released throughout the United States, causing wide-spread contamination of communities in our states. The reintroduction of these currently inactive PFAS into commerce would significantly increase PFAS exposure to humans and the environment. We urge EPA to promptly finalize this proposal and strengthen the Proposed SNUR as indicated below.[1]

[1]The undersigned Attorneys General also applaud EPA's recently announced proposed rule setting maximum contaminant levels for six PFAS in drinking water. Members of this group are preparing comments on that action and will submit those to that docket. *See* Pre-Publication Federal Register Notice; PFAS NPDWR_Final_3.13.23: https://www.epa.gov/system/files/documents/2023-03/Pre-

Summary of Comments

We strongly support EPA's Proposed SNUR to prevent resumed production and use of legacy PFAS. PFAS, known as "forever chemicals" because of their persistence in the environment, are a large class of chemicals comprised of thousands of substances that pose significant risks to human health at even extremely low levels of exposure.[2] It is now clear, based upon robust science, that in order to protect human health and the environment, exposures to all PFAS must be greatly minimized if not eliminated. The Proposed SNUR is another positive step in this direction.

We Attorneys General are working hard to address the public health and environmental challenges posed by PFAS. Our states are shouldering significant costs to address contamination in drinking water sources. For example, some of our states are installing equipment to remediate PFAS contamination, providing alternative drinking water supplies, testing the blood of impacted communities, sampling fish and wildlife for consumption advisories, and investigating numerous areas of known and potential contamination, among other efforts. Other states are just beginning to investigate the extent of PFAS contamination within their borders, with estimates in the billions of dollars to address drinking water contamination nationwide. Contaminated sites include but are not limited to areas in or around military bases where firefighting foam was used, firefighting training centers, civilian airports, industrial facilities, landfills, and wastewater residuals disposal facilities. PFAS from many of these sites have migrated to contaminate nearby public and private drinking water supplies, at great costs to impacted communities and our states.

We applaud EPA's recognition of the toxicity of numerous PFAS and the agency's demonstrated commitment to regulate and gather data regarding certain PFAS.[3] Many of the undersigned Attorneys General have submitted comments supporting EPA's proposed PFAS rulemakings.[4] As described in those comments and below, there is significant data about the negative health impacts of two of the most widely studied PFAS, PFOA and PFOS, and their prevalence in public drinking water

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Publication%20Federal%20Register%20Notice_PFAS%20NPDWR_NPRM_Final_3.13.23.pdf; to be posted at Docket ID No. EPA-HQ-OW-2022-0114

[2]https://www.epa.gov/pfas/pfas-explained.

[3]EPA recently determined that two PFAS, PFOA and PFOS, likely cause cancer and that there is no dose below which either chemical is considered safe. *See* Sections IV.A and V.A through B of preamble at: Pre-Publication Federal Register Notice; PFAS NPDWR_Final_3.13.23, Sections III.C and VIII of preamble: https://www.epa.gov/system/files/documents/2023-03/Pre-Publication%20Federal%20Register%20Notice_PFAS%20NPDWR_NPRM_Final_3.13.23.pdf; to be posted at Docket ID No. EPA-HQ-OW-2022-0114
https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024

[4]*See* Multi-State AG Comments on EPA's PFAS proposal on reporting under the Toxics Release Inventory at EPA-HQ-TRI-2022-0270; see also Multi-State AG comments on EPA's TSCA PFAS Reporting Rule at EPA-HQ-OPPT-2020-0549.

supplies.[5] PFAS contamination detected in the environment is generally made up of mixtures of PFAS, which often contain PFOA or PFOS, and/or other PFAS that can break down to PFOA and/or PFOS, and which can be assumed to act in a dose-additive manner.[6]

While we support the Proposed SNUR, we also urge EPA to enlarge its scope by having it apply to a broader and science-based definition of PFAS that captures all known PFAS. We believe the definition included in the Proposed SNUR is too narrow. As the proposed rule is currently drafted, excluded PFAS could return to active use without EPA being given the opportunity to review and address potential risks associated with their new uses. This would deprive EPA, states and the public of critical information. We also urge EPA to expand the scope of this rulemaking to include uses of inactive PFAS in "articles," in "byproducts" and in "unintentional impurities," avenues for exposure exempted from the Proposed SNUR. Finally, we urge EPA to modify the Proposed SNUR to identify those PFAS whose generic names do not include "fluor" or "fluorine." This limited disclosure would be consistent with TSCA Section 14(d) and provide helpful information to the agency, states and the public.

Background: TSCA

Statutory purpose:

Congress enacted TSCA in 1976 — and significantly strengthened it in 2016 — with the express purpose of preventing "unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use or disposal of chemical substances."[7] Congress intended that no chemical would enter or remain in commerce unless science demonstrates that the uses of the chemical "will not present an unreasonable risk of injury to health or the environment, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified by the Administrator under the conditions of use."[8]

Despite this goal, many existing chemicals, including many PFAS, are currently not subject to any type of restriction under TSCA. When TSCA was first passed, the statute allowed thousands of "existing chemicals" to remain in commerce without additional EPA review. Absent restrictions, manufacturers are free to resume use of abandoned chemicals at any time.

The TSCA Inventory:

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[5]PFOA is an abbreviation for perfluorooctanoic acid and PFOS, for perfluorooctane sulfonate.
[6]*See* Section III.B, Section IV.B, C and VII of EPA's preamble of the following: Pre-Publication Federal Register Notice; PFAS NPDWR_Final_3.13.23, https://www.epa.gov/system/files/documents/2023-03/Pre-Publication%20Federal%20Register%20Notice_PFAS%20NPDWR_NPRM_Final_3.13.23.pdf; to be posted at Docket ID No. EPA-HQ-OW-2022-0114.
[7]S. Rep. No. 94-698, at 1 (1976), reprinted in 1976 U.S.C.C.A.N. 4491, 4491; 15 U.S.C. Section 2601.
[8]15 U.S.C. § 2604(a)(3)(b)(ii).

TSCA Section 8(b) requires EPA to compile, keep current and publish a list — the TSCA Inventory — of each chemical substance that is manufactured (including imported) or processed in the United States.[9] The 2016 TSCA amendments require EPA to designate each of these existing chemical substances on the TSCA Inventory as either "active" or "inactive" in U.S. commerce.[10] Starting August 5, 2019, under this "Active-Inactive Rule," manufacturers (including importers) and processors have been required to notify EPA before reintroducing inactive substances into U.S. commerce.[11]

"Significant New Use" Under TSCA:

EPA has authority to require the submission of information before a manufacturer (including importer) or processor puts an existing chemical to a significant new use. TSCA Section 5(a)(2) authorizes EPA to determine that a use of a chemical substance is a "significant new use" after considering all relevant factors. Once EPA determines that a use of a chemical substance is a significant new use, TSCA Section 5(a)(1) requires persons to submit a significant new use notice ("SNUN") to EPA at least 90 days before they manufacture (including import) or process the chemical substance for that use.[12]

TSCA further prohibits manufacturing (including importing) or processing from commencing until EPA has conducted a review of the notice, made an appropriate determination on the notice, and taken such actions as are required in association with that determination.[13] EPA can assess potential risks to health and the environment and require safety measures to address unreasonable risks before allowing the significant new use.

Under TSCA, EPA can designate uses of a chemical that are not currently ongoing – and potentially all uses of an inactive chemical – as significant new uses.[14] By doing so, the regulated entity must first submit a SNUN to EPA which EPA then reviews and makes affirmative determinations for these inactive or abandoned chemicals before their use can be resumed.

EPA's Authority to Regulate Articles:

Additionally, Section 5(a)(5) of TSCA authorizes EPA to require notification for the import or processing of a chemical substance as part of an article or category of

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[9] *Id.* at § 2604(a)(2). The initial reporting period for manufacturers, processors and importers was January to May, 1978 for any chemical substance that had been in commerce since January, 1975. The TSCA Inventory was initially published in 1979; a second version was published in 1982, listing about 62,000 chemical substances; the TSCA Inventory now lists more than 86,000 chemicals. The TSCA Inventory, at: https://www.epa.gov/tsca-inventory/about-tsca-chemical-substance-inventory.

[10] 15 U.S.C. § 2607(b)(4)(A).

[11] *Id.* 82 Fed. Reg. 37520 (Aug. 11, 2017); 40 C.F.R. §§ 710 et seq.

[12] *Id.*, at § 2604(a)(1)(B)(i).

[13] *Id.*, at § 2604(a)(1)(B)(ii).

[14] *Id.*, at § 2604(a)(2).

articles. Specifically, notification may be required if EPA makes an affirmative finding in a rule promulgated under TSCA Section 5(a)(2) that this notification is justified by the reasonable potential for exposure to the chemical substance through the article or category of articles.[15]

Background: PFAS

Congress has acknowledged that PFAS contamination presents a national crisis.[16] As EPA has explained, for far too long, communities across the country have been suffering from exposure to PFAS pollution.[17] Over 12,034 different PFAS may have been manufactured and used in a variety of industries worldwide since the 1940s.[18] The TSCA Inventory lists over one thousand PFAS, of which approximately half are known to be commercially active. Thousands of these structurally similar chemicals have been used across various industries and consumer goods, including in firefighting foams, cookware, food packaging and many other household products. Because of the widespread use of PFAS in commerce and their tendency to persist in the environment, most people in the United States have been exposed to PFAS.[19] As a result, several PFAS have been detected in the blood serum of almost all U.S. residents.[20]

The weight of the scientific evidence demonstrates that certain PFAS, even in very small quantities, can lead to adverse human health impacts with PFAS exposures being linked to increased cholesterol levels, changes in liver enzymes indicative of liver damage, decreases in infant birth weights, decreased vaccine response in children, increased risk of high blood pressure or pre-eclampsia in

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[15] *Id*., at § 2604(a)(5); § 2604(a)(1)(A)(ii); § 2604(a)(2).

[16] *See,* e.g., the significant PFAS provisions in NDAA 2020 at §§ 7301-7362. During the 116th Congress (2019-2021), Congress used the NDAA and government-wide appropriations bills to adopt PFAS-related programs and provisions. Many pieces of stand-alone PFAS legislation were also introduced in the 116th Congress focusing on four main areas: (1) enhanced PFAS detection and research; (2) new regulatory mandates; (3) cleanup assistance; and (4) exposure to PFAS contamination at or near military installations. https://www.law.nyu.edu/centers/state-impact/press-publications/research/pfas-federal-legislation-116thcongress.

[17] PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024 (October 26, 2021) at: https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf.at https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf; *see* also EPA, *Our Current Understanding of the Human Health and Environmental Risks of PFAS, (*Oct. 18, 2021), https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas.

[18] *See* EPA's Masterlist of PFAS at: https://comptox.epa.gov/dashboard/chemical-lists/pfasmaster. *See* also EPA's Per-and Polyfluoroalkyl Substances (PFAS) Action Plan, https://www.epa.gov/sites/default/files/201902/documents/pfas_action_plan_021319_508compliant_1.pdf.

[19] *Id.,* at pg. 1.

[20] *See* NIEHS website at: https://www.niehs.nih.gov/health/topics/agents/pfc/index.cfm#:~:text=One%20report%20by%20the%20Centers,blood%20of%2097%25%20of%20Americans.

pregnant women, and increased risk of kidney and testicular cancers.[21] Cumulative exposures to such PFAS increase the risks and disproportionately impacts susceptible subpopulations such as breastfed infants, women of reproductive age, and communities near where these PFAS are manufactured, processed, used, and disposed of.[22]

This evidence also indicates that many PFAS are highly persistent, that many PFAS are highly mobile across environmental media and are therefore difficult to contain once released, and that PFAS precursors can transform into other PFAS once released in the environment, including long- and short-chain PFAS.[23] As the federal government's scientists have recognized, the entire class of PFAS is comprised of structurally similar compounds and can reasonably be expected to act through the same pathways and have similar effects.[24]

EPA's Proposed SNUR

EPA's Proposed SNUR would apply to "inactive" PFAS — those PFAS that are currently on the TSCA Inventory but have not been manufactured (including imported) or processed since 2006 and are consequently designated as "inactive" on the Inventory.[25]

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[21]ATSDR. 2021. Toxicological Profile for Perfluoroalkyls. Atlanta, GA: U.S. Department of Health and Human Services. https://www.atsdr.cdc.gov/ToxProfiles/tp200.pdf

[22]*Id.*

[23]PFAS are often described in two groups – long and short-chain PFAS. Long-chain PFAS typically are designated as perfluoroalkyl sulfonic acids containing ≥ 6 carbons, such as perfluorooctanoic acid (PFOA) and perfluoroalkyl carboxylic acids with ≥ 7 carbons. Short-chain PFAS have fewer carbons such as perfluorobutanoic acid (PFBA). Long- and short-chain PFAS were manufactured, but they can also be the result of degradation of more complex PFAS. For additional information re: characteristics of PFAS, *see* US EPA March 13, 2023 Pre-publication Notice: PFAS National Primary Drinking Water Regulation Rulemaking at: https://www.epa.gov/system/files/documents/2023-03/Pre-Publication%20Federal%20Register%20Notice_PFAS%20NPDWR_NPRM_Final_3.13.23.pdf; *See* also USEPA. 2022. Lifetime Drinking Water Health Advisories for Four Perfluoroalkyl Substances. Washington, DC: U.S. Environmental Protection Agency Office of Water. https://www.govinfo.gov/content/pkg/FR-2022-06-21/pdf/2022-13158.pdf

[24] *See Examining the Federal Response to the Risks Associated with Per- and Polyfluoroalkyl Substances (PFAS): Hearing Before the S. Comm. on Env't & Pub. Works*, 116th Cong. 2 (Mar. 28, 2019) (testimony of Linda S. Birnbaum, Dir., Nat'l Inst. Env't Health Sci. & Nat'l Toxicology Program, Nat'l Ins. Health); Wang, Z., DeWitt, J. C., Higgins, C. P., & Cousins, I. T. (2017). A Never-Ending Story of Per- and Polyfluoroalkyl Substances (PFASs); Environmental science & technology, 51(5), 2508–2518. https://doi.org/10.1021/acs.est.6b04806; For further listing of health effects studies, please see PFAS-1.itrcweb.org/references/#_ENREF_2235.

[25]EPA has previously issued significant new use rules under Section 5(a)(2) for PFAS. *See* 67 Fed. Reg. 11008 (Mar. 11, 2002). These were PFAS imported or manufactured by 3M which 3M committed to phase out. Thus, pursuant to the 2002 SNUR, any manufacture or import of those chemicals would be new and "that any new manufacture or import of the PFAS chemicals listed in this rule, particularly for their historic, high volume uses, would significantly increase the magnitude and duration of exposure of these chemicals by adding to the existing burden of PFOS in the environment." *Id.*

In the Proposed SNUR, EPA defines PFAS as: a chemical substance that contains at least one of these three structures:

(1) R-(CF2)-CF(R')R", where both the CF2 and CF moieties are saturated carbons;
(2) R-CF2OCF2-R', where R and R' can either be F, O, or saturated carbons; or
(3) CF3C(CF3)R'R", where R' and R" can either be F or saturated carbons.

The Proposed SNUR applies to a person who manufactures or processes a PFAS compound that meets the above structural definition; is inactive; and is not subject to exemption as further described below. The structural definition, in (1) above, reflects the "working definition" of PFAS included in prior proposals; in (2) adds ether compounds; and, in (3) adds very specific branched PFAS structures.

In the proposal, EPA determined that there are 330 inactive chemicals that fit this definition. Of these, EPA explains that specific chemical identities for 30 substances have been claimed as Confidential Business Information ("CBI") and are nominally identified using generic names that do not contain "fluor" or "fluorine" in the names. These generic names mask the chemicals' structural elements, thus rendering it impossible for the public to identify them as PFAS. EPA seeks comment on whether the agency should take further action to list out in the regulation either the specific chemical identity or generic names of these masked PFAS.

Recommendations

The undersigned Attorneys General urge EPA to finalize the Proposed SNUR promptly and to enlarge the scope of this action as indicated below to better protect our residents from the risks posed by PFAS in the environment.

A. EPA Should Promptly Finalize The Proposed SNUR and Ensure These Inactive PFAS Do Not Reenter U.S. Commerce.

The Proposed SNUR gives EPA the authority to designate as significant new uses those uses of inactive PFAS that impact exposure to the subject chemicals and to review potential risks associated with any significant new use prior to such use. Under the Proposed SNUR, EPA may, if necessary, prohibit or limit a use before it occurs. The Proposed SNUR also allows EPA to take action to mitigate any use that the agency deems harmful to the environment or human health. In short, the Proposed SNUR would allow EPA to assess the potential environmental and human health effects of reintroducing these currently inactive PFAS into commerce.

This is not an abstract issue. Many of our states are grappling with a legacy of contamination from PFAS that are now inactive, with serious health consequences for our residents and the environment. According to the United States Department of Health and Human Services, Agency for Toxic Substances and Disease Registry ("ATSDR"), the persistence and mobility of some PFAS, combined with decades of widespread use, have resulted in their presence in surface water, groundwater,

drinking water, rainwater, soil, sediment, ice caps, outdoor and indoor air, plants, animal tissue, and blood serum across the globe.[26] Because of the widespread use of such PFAS in commerce and their tendency to persist in the environment, most people in the United States have been exposed to PFAS.[27] As stated above, exposure to these PFAS can lead to adverse human health impacts with PFAS exposures being linked to increased cholesterol levels, changes in liver enzymes indicative of liver damage, decreases in infant birth weights, decreased vaccine response in children, increased risk of high blood pressure or pre-eclampsia in pregnant women, and increased risk of kidney and testicular cancers.[28]

Due to the above-noted concerns and the overwhelming contamination and prevalence of PFAS in the environment, our states have expended significant public resources regulating PFAS, addressing contamination in drinking water, and responding to contaminated sites. Many of our states and residents have already incurred substantial costs for testing public and private water resources, installing water treatment technologies for drinking water, and providing for alternate water supplies, at the expense of the taxpayers of our states.

Accordingly, we applaud EPA's efforts in the Proposed SNUR to reduce PFAS exposure to the residents of our states and urge EPA to adopt the Proposed SNUR as promptly as possible.

B. EPA Should Broaden the Definition of PFAS to Cover All PFAS Chemicals.[29]

EPA's proposed definition of PFAS in this rulemaking is the same as the definition that EPA published in its updated final Safe Drinking Water Contaminant Candidate List ("CCL 5"). In that rulemaking, the agency expanded its definition of PFAS compared to that used in the CCL 5 proposal to include some additional PFAS compounds. EPA's reasoning for that expansion was that it would include additional

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[26] *See* NIEHS website at: https://www.niehs.nih.gov/health/topics/agents/pfc/index.cfm#:~:text=One%20report%20by%20the%20Centers,blood%20of%2097%25%20of%20Americans.
See also ATSDR. 2021. Toxicological Profile for Perfluoroalkyls. Atlanta, GA: U.S. Department of Health and Human Services. https://www.atsdr.cdc.gov/ToxProfiles/tp200.pdf

[27] *See* ITRC generally and https://pfas-1.itrcweb.org/fact_sheets_page/PFAS_Fact_Sheet_History_and_Use_April2020.pdf

[28] *See* US EPA March 13, 2023 Pre-publication Notice: PFAS National Primary Drinking Water Regulation Rulemaking at: https://www.epa.gov/system/files/documents/2023-03/Pre-Publication%20Federal%20Register%20Notice_PFAS%20NPDWR_NPRM_Final_3.13.23.pdf; *See* also ATSDR. 2021. Toxicological Profile for Perfluoroalkyls. Atlanta, GA: U.S. Department of Health and Human Services. https://www.atsdr.cdc.gov/ToxProfiles/tp200.pdf

[29] EPA is working on another TSCA rule mandated by Congress in the FY20 National Defense Authorization Act ("NDAA"). In comments on that rule, a group of Attorneys General urged EPA to use a broader definition – as the group is doing herein. https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0549-0086.

PFAS substructures that are ethers, highly branched, persistent in water and known to occur in drinking water and/or source water.[30]

Although we appreciate EPA's use of the expanded definition from the final CCL5 rule,[31] we recommend that EPA further expand this definition here. As we said in prior comments joined by many of the undersigned states, EPA should define PFAS broadly to ensure all PFAS are included in its rulemakings.[32] As EPA acknowledges, the definition of PFAS included in this proposed rule may fail to include some PFAS chemicals already known to be in the environment, such as very short chain PFAS.[33] Thus, the definition of PFAS in the Proposed SNUR likely leaves out chemicals that should be included in this rulemaking. As a result, EPA, states and the public will be left without important information concerning the scope of PFAS contamination and its sources and left without the benefits of the Proposed SNUR.

By expanding the definition, EPA would be following the congressional lead to address an appropriately broader swath of PFAS in it TSCA regulations. For example, TSCA Section 8(a)(7), as amended by the FY20 National Defense Authorization Act ("NDAA 2020"), requires EPA to collect information on PFAS substances. In NDAA 2020, Congress did not identify specific PFAS to be addressed by the agency; instead it required reporting by "each person who has manufactured a chemical substance that is a perfluoroalkyl or polyfluoroalkyl substance" in any year since 2011.[34] We urge EPA to follow this congressional model and to finalize this rule to apply to all PFAS and not merely the subset of PFAS defined in its proposal.

Moreover, recent federal, state and international legislation has defined PFAS differently, and in many instances more broadly, than the Proposed SNUR. For example, the 2021 NDAA defines PFAS as "a perfluoroalkyl or polyfluoroalkyl substance with at least one fully fluorinated carbon atom, including the chemical GenX."[35] Vermont recently enacted a statute defining PFAS as "a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom."[36] Similarly, the Organization for Economic Co-operation and Development ("OECD") employs a very broad definition of PFAS.[37] It defines PFAS as "fluorinated substances that contain at least one fully fluorinated methyl or methylene carbon atom (without any

[30]https://www.epa.gov/ccl/ccl-5-frequent-questions#what-changes-from-draft.
[31]https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0549-0086.
[32]*See* the multi-state Attorneys General's comment on EPA"s proposed TSCA PFAS reporting rule at: https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0549-0086.
[33]See 88 Fed. Reg.4940. The proposed definition would likely exclude some PFAS that are not fully fluorinated despite the fact that these substances are persistent in the environment.
[34]15 U.S.C. § 2607(a)(7).
[35]William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 335(e)(2) (2021).
[36]Vt. Stat. Ann. tit. 18, § 1661(5) (effective July 1, 2022); 2021 Vt. Acts & Resolves 36, § 1.
[37]OECD (2021), Reconciling Terminology of the Universe of Per- and Polyfluoroalkyl Substances: Recommendations and Practical Guidance, OECD Series on Risk Management, No. 61, OECD Publishing, Paris (OECD PFAS Guidance), at 8, 23.

H/CL/Br/l atom attached to it), i.e., with a few noted exceptions, any chemical with at least a perfluorinated methyl group (-CF3) or a perfluorinated methylene group (-CF2-) is a PFAS."[38] This definition was promulgated by OECD to provide a coherent and consistent definition across compounds that "is easily implementable for distinguishing between PFAS and non-PFAS by nonexperts."[39] These various broad definitions offer a simple way to ensure all PFAS are covered and have the potential to be more protective of public health and the environment.

We urge EPA to adopt a definition of PFAS as a class so that EPA's definition aligns with the OECD's broad definition.

C. EPA Should Promulgate this Proposal without Regulatory Exemptions and Extend this Proposed SNUR to Articles, Byproducts and Unintentionally Present Impurities Because All Are Significant Sources of PFAS Exposure.

EPA is proposing to exempt from the Proposed SNUR PFAS that are present as certain byproducts, the importing or processing of inactive PFAS-containing articles and inactive PFAS unintentionally present as impurities. Scientific evidence developed over the last decade has shown that these PFAS exemptions may present unreasonable risks to public health and the environment.[40] We recommend that EPA remove these exemptions from the final rule.

Exemptions under 2604(h)(4) are for chemicals that EPA believes pose a low risk of injury to health or the environment.[41] EPA has acknowledged that a group of chemicals should not be exempt "when EPA can no longer conclude that such chemicals will not present an unreasonable risk to human health or the environment" – a determination necessary to support an exemption under TSCA.[42] PFAS do not pose a low risk of injury to health or the environment and thus should not be subject to exemptions from the Proposed SNUR even if present in articles, as byproducts or as unintentional impurities.

Since the potential for environmental releases from articles, unintentional impurities and byproducts is significant, EPA should require notifications for inactive PFAS used in these ways so the agency, states and the public are in the position to

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[38] *Id.*

[39] EPA has a history with TSCA rulemaking of incorporating OECD rules and codes. For example, in 2020 amendments of the Chemical Data Reporting Rule, EPA changed the requirements for making confidentiality claims and replaced certain processing and use codes with OECD functional use and product and article use codes. *See* 85 Fed. Reg. 20122 (April 9, 2020).

[40] 15 U.S.C. § 2604(h)(4).

[41] 71 Fed. Reg. at 11,498.

[42] Amendment of Polymer Exemption Rule to Exclude Certain Perfluorinated Polymers, 71 Fed. Reg. 11,484, 11,484 (Mar. 7, 2006) (codified at 40 C.F.R. pt. 723.250); see also Amendment of Polymer Exemption Rule to Exclude Certain Perfluorinated Polymers, 75 Fed. Reg. 4,295, 4,295 (Jan. 27, 2010) (codified at 40 C.F.R. § 723.250); 71 Fed. Reg. at 11,498 (explaining that 15 U.S.C. § 2604(h)(4) authorizes EPA to amend and repeal rules it enacted under that section). Wendy Wagner et al., Dynamic Rulemaking, 92 N.Y.U. L. Rev. 183, 206 (2017)

understand the scope of PFAS in the environment and to potentially act on that knowledge. These proposed exemptions potentially leave a formidable gap that could hinder the implementation of TSCA protections. By applying this Proposed SNUR to the broadest possible set of inactive PFAS, EPA will be able to review more robust information and will be better able to protect the public from further exposure to PFAS.

1. Articles

In the Proposed SNUR, EPA exempts from the notice requirements the importing or processing of inactive PFAS present in PFAS-containing articles. Because of the potential for exposures from such articles, we support EPA's suggested alternative approach of lifting the articles exemption.[43] As stated above, the Attorneys General strongly support the application of this rule to PFAS-containing articles and urges EPA to include this requirement in the final rule.

EPA, in this proposal, recognizes that it may not have been notified about certain PFAS-containing articles becoming active — and therefore presenting exposure risks —because those articles were not subject to the Active-Inactive Rule.[44] Thus, EPA recognizes that some previously inactive PFAS could currently be used in exempt articles of which EPA is unaware.

Information about PFAS in articles is critical to states that are now beginning to regulate PFAS-containing products. PFAS are contained in many consumer products including but not limited to cosmetics, nonstick cookware, clothing, furniture, carpets and food packaging materials.[45] However, because of a lack of reporting on articles, comparatively little is known about what specific articles contain PFAS, or the concentrations of PFAS in those articles and thus the potential exposure pathways associated with consumer uses. Accordingly, we may know only a small part of the story of PFAS in articles. By requiring the reporting of inactive PFAS in articles, states will be able to better understand the extent of potential exposures and how to protect public health and the environment from the harms caused by these contaminants.

2. Byproducts

In the Proposed SNUR, EPA also solicits comments on whether to broaden the exemption for manufacturing or processing of PFAS as a byproduct. We urge EPA to

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[43]TSCA provides EPA the authority to regulate articles containing PFAS. *See* for example EPA's analysis of its authorities to regulate "articles" contained in the following rulemaking: Notice of Proposed Rulemaking, TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances, 86 Fed. Reg. 33926 (June 28, 2021) (to be codified at 40 C.F.R. Part 705). https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0549-0001.

[44]*See* Section II, B of Proposed SNUR, 88 Fed. Reg. 4937-4945. (01/26/23)

[45] www.atsdr.cdc.gov/pfas/health-effects/exposure.html. NIH's estimates that PFAS are used in hundreds of products globally, with many opportunities for human exposure. https://www.niehs.nih.gov/health/topics/agents/pfc/index.cfm

not broaden the byproducts exemption in the final SNUR. To the contrary, we urge EPA to eliminate the byproducts exemption from this SNUR.

The Proposed SNUR and EPA's general SNUR regulations currently contain a limited exemption for certain PFAS that are created as byproducts and then:

> used only by public or private organizations that (1) burn it as a fuel, (2) dispose of it as a waste, including in a landfill or for enriching soil, or (3) extract component chemical substances from it for commercial purposes. 40 CFR 721.45(e).

In the proposal, EPA refers to the Active-Inactive Rule exemption from notification for byproducts at 40 CFR 720.30(h) as it explains its reasoning for exempting byproducts here.

The above referenced exemptions for byproducts in the general SNUR regulations are subject to modification in chemical-specific rules such as this Proposed SNUR. Since PFAS are frequently generated as byproducts of other commercial activities, we urge EPA to exclude the exemption from the final SNUR.

EPA does not have sufficient evidence to determine that PFAS in byproducts will not present an unreasonable risk to public health or the environment. As stated above, such a conclusion is necessary in order for EPA to exclude a condition of use from regulation.[46] As such, EPA cannot justify exempting byproducts.

Both in the U.S. and abroad, primary manufacturing facilities produce PFAS and secondary manufacturing facilities use PFAS to produce goods. Disposal of wastes generated during primary PFAS production and secondary manufacturing using PFAS can be sources of PFAS environmental contamination. Byproducts produced when manufacturing with PFAS may exhibit negative impacts of PFAS reference above in these comments. EPA acknowledges in this proposal that there may be inactive PFAS that were not reported under the Active-Inactive Rule because they were only manufactured or processed as byproducts that are not used for commercial purposes. We urge EPA to expand the scope of this Proposed SNUR to cover such byproducts.

3. Impurities

In the Proposed SNUR, EPA also includes an exemption for inactive PFAS present as unintentional impurities. The undersigned Attorneys General urge the agency to reconsider this exemption given the scientific consensus that even minute

[46]Amendment of Polymer Exemption Rule to Exclude Certain Perfluorinated Polymers, 71 Fed. Reg. 11,484, 11,484 (Mar. 7, 2006) (codified at 40 C.F.R. pt. 723.250); see also Amendment of Polymer Exemption Rule to Exclude Certain Perfluorinated Polymers, 75 Fed. Reg. 4,295, 4,295 (Jan. 27, 2010) (codified at 40 C.F.R. § 723.250); 71 Fed. Reg. at 11,498 (explaining that 15 U.S.C. § 2604(h)(4) authorizes EPA to amend and repeal rules it enacted under that section). Wendy Wagner et al., Dynamic Rulemaking, 92 N.Y.U. L. Rev. 183, 206 (2017)

levels of exposure can result in identifiable health risks. (See the above comments as to why exemptions are not appropriate for PFAS regulations.) This is particularly significant because data shows that PFAS appear as an impurity in various items to which the public is commonly exposed.[47]

Reconsidering this exemption is consistent with general TSCA regulations which consider impurities as part of the substance that contains them. For example, in EPA's reporting and recordkeeping provisions for Section 8(a) information-gathering rule, EPA clarifies in a definition of "import for commercial purposes" to include:

> If a chemical substance or mixture containing impurities is imported for commercial purposes, then those impurities also are imported for commercial purposes.[48]

Given the known extreme toxicity and persistence of certain PFAS in the environment and the expected toxicity of all PFAS, the undersigned believe the Proposed SNUR misses the mark by exempting some of the abandoned PFAS present as unintentional impurities from its notice requirements for the reintroduction of any of the inactive substances addressed by the rule.

D. We Urge EPA to Disclose Those PFAS Whose Generic Names Mask That the Substances are PFAS.

Of the 330 inactive PFAS that are subject to this Proposed SNUR, 30 have been claimed as CBI and have been given generic names (the nonconfidential substitute for the specific chemical name) that do not contain "fluor" or "fluorine." This designation has allowed the regulated entities to disguise their PFAS from the public ostensibly to protect CBI.

In the Proposed SNUR, EPA seeks comment on whether the agency should take further action to disclose either the specific chemical identity or generic name of all of the chemicals that fall within the scope of the Proposed SNUR, including those with generic names that mask that the chemical substances are PFAS. We urge EPA to include such disclosures in the final SNUR.

TSCA protects the public disclosure of certain business information deemed CBI.[49] However, the CBI provisions in Section 14(d)(3) of TSCA provide that information shall be disclosed "if the Administrator determines that disclosure is

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[47] *See* U.S. Food & Drug Administration, *Per and Polyfluoroalkyl Substances (PFAS) in Cosmetics*, available at: https://www.fda.gov/cosmetics/cosmetic-ingredients/and-polyfluoroalkyl-substances-pfas-cosmetics ("Some PFAS may also be present in cosmetics unintentionally as the result of raw material impurities or due to the breakdown of PFAS ingredients that form other types of PFAS").

[48] 40 C.F.R. § 704.3. The same is true in other TSCA regulations. See 40 C.F.R. 40 C.F.R. § 723.175(i)(1)(iii).

[49] 15 U.S.C. § 2613(a).

necessary to protect health or the environment against an unreasonable risk of injury to health or the environment."[50] Thus, TSCA contemplates public disclosure of information for the benefits of states and the public, which should override CBI claims in the context of this Proposed SNUR.[51]

Here, EPA should identify those PFAS whose generic names do not include "fluor" or "fluorine." Knowing which of these substances is PFAS is critical for identifying potentially exposed populations and potential pathways of exposure and taking steps to reduce risks. By releasing at least this data, states and others may be able to determine whether and where these PFAS have been used in their states and thus may be able to pursue appropriate cleanup actions and hold accountable the proper and responsible parties for the costs of cleanup. Further, since these PFAS are inactive, any business interest in their confidentiality is minimal at best and overridden by the need of states and the public for the information.

Conclusion

We recommend that EPA promptly finalize this Proposed SNUR as one of many necessary steps to address PFAS contamination and exposure risks. We also urge EPA to: (1) enlarge the scope of the Proposed SNUR by adopting a science-based, broader definition of PFAS that ensures the entire universe of these chemical substances with known or expected highly toxic properties is appropriately addressed by the Proposed SNUR; (2) expand the scope of this rulemaking by including uses of inactive PFAS in articles, in byproducts and where PFAS are unintentionally present as impurities; and (3) identify those PFAS whose generic names do not include "fluor" or "fluorine," information that is currently being withheld as CBI. Thank you for this opportunity to provide these comments.

Sincerely,

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[50] *Id*. at § 2613(d)(3).
[51] *Asbestos Disease Awareness Organization v Wheeler,* 508 F.Supp3d 707 (December 22, 2020).

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