



EARTHJUSTICE



Consumer Federation of America

*Via First Class Mail and Email*

November 23, 2015

Chairman Elliot F. Kaye  
Commissioner Robert S. Adler  
Commissioner Ann Marie Buerkle  
Commissioner Joseph Mohorovic  
Commissioner Marietta S. Robinson  
Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

RE: *Petition Requesting Rulemaking on Products Containing Organohalogen Flame Retardants, Docket No. CPSC-2015-0022*

Dear Chairman Kaye and Commissioners Adler, Buerkle, Mohorovic and Robinson:

We write to address questions about the Petition Requesting Rulemaking on Products Containing Organohalogen Flame Retardants (“Petition”)<sup>1</sup> raised by representatives of the American Chemistry Council and flame retardant manufacturers (“chemical industry”) in individual meetings with four commissioners on November 9 and 16 (“chemical industry meetings”). The chemical industry alleged that the Petition’s scope is unclear and inconsistently presented, that we have focused on hazard but overlooked exposure, and that the Consumer Product Safety Commission (“CPSC”) can and should rely on the Environmental Protection Agency (“EPA”) to address any concerns that consumers may be harmed due to flame retardant use in products. We write this letter to resolve any ambiguities regarding the scope of the Petition, and to respond to the chemical industry’s additional critiques, prior to the December 9 public meeting. We would also be pleased to meet in person prior to the December 9 meeting if any Commissioner would find that useful.

A. Is the Petition limited to non-polymeric, additive organohalogen flame retardants?

The chemical industry repeatedly stated that polymeric flame retardants would be encompassed within the Petition. This is not correct: the Petition covers only organohalogen flame retardants

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<sup>1</sup> The Petition was submitted on behalf of American Academy of Pediatrics, American Medical Women’s Association, Consumer Federation of America, Consumers Union, Green Science Policy Institute, International Association of Fire Fighters, Kids in Danger, Philip J. Landrigan, M.D., M.P.H., League of United Latin American Citizens, Learning Disabilities Association of America, National Hispanic Medical Association, and Worksafe.

in non-polymeric, additive form. As stated in the beginning of the Petition, we are asking the CPSC to:

promulgate regulations under the Federal Hazardous Substances Act (“FHSA”) declaring that [certain products] are banned hazardous substances if they contain any **non-polymeric, additive** organohalogen flame retardant. When used in **non-polymeric, additive form**, organohalogen flame retardants migrate from consumer products, leading to widespread human exposures.

Petition at 1-2 (footnotes omitted) (emphasis added).

The chemical industry claims confusion because they say the Petition does not consistently use the term “non-polymeric” when describing the chemicals subject to the Petition. They also stated in some meetings that flame retardants in reactive form would somehow be swept within the scope of the Petition.

We reject these assertions because they are not consistent with our intent or the text of the Petition. Footnote 1 of the Petition makes clear that polymeric flame retardants are not covered. It says: “Due to their high molecular weights, polymeric organohalogen flame retardants are believed to be not readily bioavailable, and thus may be less likely to be harmful to humans. **Therefore, they are not addressed by this petition. The term ‘organohalogen flame retardants’ will be used henceforth in this petition to refer to non-polymeric chemicals only.**” Petition at 1-2, note 1. In light of this footnote defining the term “organohalogen flame retardant” to exclude polymeric chemicals, we believe it is clear that all references in the Petition to organohalogen flame retardants are limited to these chemicals in their non-polymeric form.

Footnote 2 of the Petition explains why the Petition covers organohalogen flame retardants in additive form, and does not cover them in reactive form: “Additive (as opposed to reactive) flame retardants are not chemically bound to the products containing them, thus they can migrate out of products, resulting in human exposure.” Petition at 2, note 2. Throughout the Petition, we use the term “additive,” or “in additive form,” to limit the scope of the regulation we are seeking (the word additive appears 42 times in the Petition), which should leave no doubt that we are not seeking rulemaking that affects organohalogen flame retardants in reactive form.

#### B. Which products are covered?

We also heard the chemical industry say that the product categories addressed in the Petition are broad and undefined. We disagree. The Petition seeks a rulemaking under the FHSA covering:

- any durable infant or toddler product, children’s toy, child care article, or other children’s product (other than children’s car seats) that contains *additive* organohalogen flame retardants
- any article of upholstered furniture sold for use in residences and containing *additive* organohalogen flame retardants

- any mattress or mattress pad with *additive* organohalogen flame retardants
- any electronic device with *additive* organohalogen flame retardants in its plastic casing.

Petition at 3-4. To be clear about the scope of the products, we specified that these terms should have the meaning given to them in CPSC's statutes, regulations and rulemakings. Thus, "durable infant or toddler product" has the meaning given in 15 U.S.C. § 2056a(f); "children's toy" has the meaning given in 15 U.S.C. § 2057c(g)(1)(B); "child care article" has the meaning given in 15 U.S.C. § 2057c(g)(1)(C); "children's product" has the meaning given in 16 C.F.R. § 1200.2(a)(1); the term "upholstered furniture" has the definition used by the CPSC in its Notice of Proposed Rulemaking proposing a "Standard for the Flammability of Residential Upholstered Furniture," 73 Fed. Reg. 11702 (March 4, 2008), Proposed 16 C.F.R. § 1634.2(a); the term "mattress" has the meaning given in 16 C.F.R. § 1632.1(a); and the term "mattress pad" has the meaning given in 16 C.F.R. § 1632.1(b). Petition at 3-4, notes 5-11. While these terms may be broad, they are the definitions familiar to CPSC.

#### C. Which chemicals are covered?

During the chemical industry meetings, there seemed to be much confusion regarding *which* organohalogen flame retardants are covered by the Petition. The short answer is: the Petition seeks a regulation governing **the class of non-polymeric organohalogen flame retardants that are used or could be used in additive form in the products covered by the Petition.** We do not claim to know the precise number of chemicals within this class. Indeed, the chemical industry likely has a better understanding of the precise number than we do. Our best understanding comes from work performed by a research group at the University of California ("UC") Riverside, which identified 83 non-polymeric organohalogen flame retardants as in use or available for potential use in consumer products in 2012. *See* Petition at 48-49 of the Petition; Accompanying Statement of David Eastmond, Ph.D., Professor and Chair of the Department of Cell Biology and Neuroscience, and Research Toxicologist at UC Riverside.<sup>2</sup>

During the chemical industry meetings, multiple references were made to a list of 25 chemicals covered by the Petition. Several representatives referred to this list as indicating that the Petition "lacked rigor" because some of the chemicals listed are not organohalogens. We believe that the list the chemical industry is referring to is a list that appears after the signature page of the Petition, and

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<sup>2</sup> Dr. Eastmond's group screened the 83 chemicals for nine priority hazard categories (acute mammalian toxicity, carcinogenicity, reproductive toxicity, developmental toxicity, mutagenicity/genetic toxicity, endocrine disruption, acute aquatic toxicity, persistence, and bioaccumulation). Of the 83 chemicals, 78 chemicals (94%) received a final grade of F (due to toxicity and/or excessive data gaps), and the remaining five chemicals (6%) received a final grade of D (high concern). Based on these results, Dr. Eastmond concluded that all the organohalogen flame retardants "have the potential to pose significant hazards for human or environmental health." *See* Petition at 48-49; Statement of David Eastmond, Ph.D.

which is entitled “FLAME RETARDANTS REFERENCED IN THIS PETITION.” This list is not intended to represent the organohalogen flame retardants for which we seek rulemaking. Rather this list of chemicals and their abbreviations was provided as a tool for the CPSC to more easily identify chemicals “referenced in this Petition” and to provide a simple way to link the full name of a referenced chemical and its abbreviated name. Some of the chemicals listed are not organohalogens; while they are discussed in the Petition, we are not asking the CPSC to regulate products containing these chemicals.

D. The Petition Alleges That Consumers are Exposed to Non-Polymeric Organohalogens That Migrate Out of Consumer Products

Chemical industry representatives alleged that the Petition fails to indicate that humans are exposed to this class of chemicals as a result of their presence in additive form in consumer products. We disagree, and refer the CPSC to pages 31-41 of our Petition. This section of the Petition describes in detail the mechanism for, and evidence of, human exposures to organohalogen flame retardants from consumer products. This is also discussed extensively in the Statement of Miriam L. Diamond, Ph.D., submitted with the Petition.

E. Action by CPSC to Protect Consumers Would Not Be Redundant

A recurring assertion in the chemical industry meetings was that it would somehow be “redundant” for CPSC to take action to protect consumers from the migration of non-polymeric organohalogen flame retardants in additive form out of consumer products because if any of their chemicals were unsafe, then EPA has addressed or will address it. We unfortunately disagree. The nearly 40 years during which the Toxic Substances Control Act has been in effect demonstrates that the law does not give EPA the authority it would need to meaningfully protect the public against risks posed by toxic chemicals. Indeed, that is why there is bipartisan support for the idea of TSCA reform, although there is no certainty that such reform will occur or what form it will take. For many reasons, two of which we discuss below, CPSC should not assume that EPA is adequately protecting consumers from the risks of flame retardants in products.

First, the fact that a chemical substance has been approved for sale by EPA does not mean it is safe. As TSCA is currently written, chemicals that were in commerce prior to 1976 could remain in commerce without any safety testing or review. “New” (meaning post-1976) chemicals can be sold 90 days after the manufacturer provides EPA with a Pre-Manufacture Notice (“PMN”), so long as EPA does nothing to stop the sale. EPA does not have to make a safety finding before a chemical can be sold; indeed, if EPA simply fails to act on a PMN within 90 days, manufacture can commence. As part of the PMN process, TSCA does not require companies to submit a minimum base set of data on a chemical’s toxicity, ecotoxicity or its environmental fate and behavior. Although EPA encourages such data to be included in the PMN, the great majority of PMNs do not contain it.

Second, the fact that EPA has initiated risk assessments for a relatively small number of organohalogen flame retardants should not affect the CPSC’s consideration of this Petition. These risk assessments are in early stages of development and it is not clear if or when EPA will finalize them. Moreover, the standard for regulating chemicals under TSCA is different than the FHSA legal standard. In addition, EPA’s focus is on the chemical substance itself, and while EPA does have

authority to regulate “articles” under TSCA, it rarely uses it. EPA has banned only a handful of chemical substances under its TSCA authority.

Thank you very much for your consideration of the Petition.

Sincerely,

A handwritten signature in black ink that reads "Eve C. Gartner". The signature is fluid and cursive, with a long, sweeping underline.

Eve C. Gartner  
Earthjustice

A handwritten signature in black ink that reads "Rachel Weintraub". The signature is cursive and elegant, with a long, horizontal stroke at the end.

Rachel Weintraub  
Consumer Federation of America

cc:

Jana Fong Swamidoss  
Sarah Klein  
Jennifer Feinberg  
Bryce Dustman  
Mike Gentine  
Boaz Green  
Heather Bramble  
Gib Mullan  
Nancy Lowery