

EPA Authority to Regulate Lead Bullets and Shot Under TSCA

In 2010 and again in 2012, the EPA denied petitions under the Toxic Substances Control Act (“TSCA”) seeking regulation of lead ammunition. In denying the 2010 petition, the EPA stated that “TSCA does not provide the agency with authority to address lead shot and bullets as requested in your petition, due to the exclusion found in TSCA § 3(2)(B)(v).”

However, Senate and House reports on the legislative history and intent of TSCA confirm that the agency indeed does have the regulatory authority to regulate the toxic components of ammunition. According to the House report on the history and intent of TSCA, “the Committee does not exclude from regulation under the bill chemical components of ammunition which could be hazardous because of their chemical properties.”

The legislative history of TSCA supports its plain language. Section 2605(a)(2)(A)(i) of TSCA, passed in 1968 as the federal mechanism for regulating toxic substances, allows the EPA to regulate any chemical substance for a particular use, up to and including prohibiting the manufacture, processing or distribution in commerce. Lead is plainly a “chemical substance” falling within the scope of TSCA. Although certain products are excluded from the definition of “chemical substances,” none of these exclusions are applicable to lead bullets or shot.

In adopting TSCA, Congress declared its policy that (1) “adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environment” and (2) “adequate authority should exist to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment.”

If “there is a reasonable basis to conclude that the issuance” of a proposed rule “is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment,” then the EPA must grant a petition for rulemaking and initiate rulemaking procedures under TSCA section 2605. (15 U.S.C. §2620(b)(4)(B)(ii)). Factual certainty of the magnitude of risk to health and environment is not required; the EPA may base its decision not only on known facts, but also on scientific theories, projections and extrapolations from available data, and modeling using reasonable assumptions (59 Fed. Reg. 11122, 11138, citing H.R. Rep. No. 1341, 94th Cong., 2d Sess. 32 (1976)).

Lead used in shot and bullets is a “chemical substance” falling within the scope of the Act (15 U.S.C. § 2602(2)(A)). Although certain substances are excluded from the definition of “chemical substances,” these exclusions do not apply to lead shot or bullets. The relevant section of TSCA, (15 U.S.C. § 2602(B)). Section 2602(B)(v), excludes from regulation “any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986.” However, Section 4181 of the Internal Revenue

Code only taxes firearms, shells, and cartridges (26 U.S.C. § 4181). Shot and bullets are explicitly not subject to this tax. In fact, a 1968 Revenue Ruling states, “The manufacturers excise tax imposed upon sales of shells and cartridges by section 4181 of the Internal Revenue Code of 1954 ***does not apply*** to sales of separate parts of ammunition such as cartridge cases, primers, bullets, and powder” (Rev. Rul. 68-463, 1968-2 C.B. 507 (emphasis added)). This ruling has been confirmed by subsequent administrative decisions (See, for example, Fed. Tax Coordinator ¶ W-2911(2d.)).

Because shot and bullets, as separate parts of ammunition, are not listed as taxable items in 26 U.S.C. § 4181, and additional evidence affirms they are not implicitly taxed under section 4181, the section 2602(B)(v) exception of TSCA to “chemical substance” does not apply. Thus, lead shot and bullets are properly classified as “chemical substances” subject to TSCA regulation.

The Senate and House reports on the legislative history and intent of TSCA are equally clear and instructive. The House report explicitly states on page 418: “Although the language of this bill is clear on its face as to the exemption for pistols, revolvers, firearms, shells and cartridges, the Committee wishes to emphasize that it does not intend that the legislation be used as a vehicle for gun control...However, ***the Committee does not exclude from regulation under the bill chemical components of ammunition which could be hazardous because of their chemical properties***” (emphasis added). The Senate report states, “In addition, the term [chemical substance] does not include pesticides, tobacco, or tobacco products, nuclear material (as defined in the Atomic Energy Act), firearms and ammunition (to the extent subject to taxes imposed under section 4181 of the Internal Revenue Code)...”

The IRS ruling, along with the legislative history of TSCA, makes clear that the component parts of ammunition, namely shot and bullets, may be regulated as chemical substances under TSCA. The TSCA petitions submitted to EPA do not request that the EPA regulate firearms or the manufacture and sale of ammunition, but rather the toxic, separate parts of ammunition, such as bullets and shot.