

CLIENT ALERT

EPA Releases the Final TSCA Inventory Reset Rule

Jun.28.2017

What Every Company Needs to Know to Avoid Disruption

Last week EPA issued the pre-publication version of its much-anticipated final TSCA Inventory re-set rule. Because the new regulation affects every company that manufactures, imports or *processes* chemical substances in the U.S., a wide swath of industry will be impacted by the rule including almost every company in the manufacturing sector. Although the reporting requirements appear to be straightforward, the rule creates several potential traps for the unwary. This Alert is intended to help you understand how your company may be affected by the rule and to identify specific steps you can take to minimize disruption caused by the rule.

Key Features of the Rule

The main purpose of the Inventory Reset rule is to provide EPA with a clear picture of all chemical substances that are active in commerce in the U.S. To accomplish this, the rule establishes both “retrospective” and “forward-looking” reporting requirements for manufacturers, importers and processors of chemical substances that are listed on the TSCA Inventory. Substances that are reported during the “retrospective” reporting period will be designated as “active.” Substances that are **not** reported during the “retrospective” reporting period will be designated as “inactive.” Once a substance has been designated as inactive it can no longer be manufactured or processed in the U.S. until the *forward-looking* reporting requirements are satisfied.

Retrospective Reporting

Any person who manufactured or imported an Inventory-listed substance for a commercial purpose during the ten year period ending June 21, 2016 is required to report to EPA on those past activities. Substances that are reported in this manner will be designated as “active.”

- Under the new rule, **manufacturers** (including importers) of chemical substances must report to the Agency **not later than 180 days** after the final regulation is published in the Federal Register.
- To address the disruption that would result if a manufacturer or importer fails to report a chemical used by downstream industry, the rule allows **processors** to report on the substances they utilize **not later than 420 days** after the final rule is published in the Federal Register. This provision is intended to give processors sufficient time to search the interim “active” and “inactive” designations EPA makes based on submissions from the manufacturers.

Forward-looking reporting commences once EPA completes its review of the retrospective reports submitted by manufacturers and processors, and determines that certain chemical substances are “inactive.” Specifically, the rule requires forward-looking reporting by any company that intends to manufacture or process an “inactive” substance. The notice is required to be

submitted within 90 days of a company's intended date of initiating manufacture or processing of the "inactive" chemical for nonexempt commercial purposes.

How Companies Can Avoid Disruptions

Companies that fail to adequately prepare for the Inventory Reset rule may find their operations disrupted in one of several ways. A few of these potential pitfalls are highlighted below.

Interruption of Production Activities

If a substance critical to a company's operations is **not** reported or is **incorrectly** reported during the retrospective reporting period - so that EPA designates the substance as "inactive" - the company will have to discontinue its operations involving that chemical until the company submits a "forward-looking" report to EPA. This concern will manifest itself differently depending on whether a company is a domestic **manufacturer** of chemical products, an **importer** of chemical substances, or a company that **processes** chemical products (for example, companies that utilize coatings or adhesives as part of their manufacturing operations).

- For a domestic chemical manufacturer it will be essential to get an early start at identifying all of the substances the company manufactured for a non-exempt commercial purpose since June 2006. This task may be complicated for companies that have undergone mergers, acquisitions or other reorganizations since 2006. In addition, this effort might be especially complex for companies that manufacture "class 2" or "UVCB" substances, if their manufacturing processes have changed in the intervening years.
- Companies that import or process chemical products (e.g., companies that use lubricants or adhesives in their manufacturing operations) may find compliance with the Inventory Reset rule to be problematic unless their suppliers are willing to share specific information on the composition / chemical identities of those products. Although the regulations include mechanisms to facilitate cooperation between importers/processors and their suppliers, these mechanisms ultimately depend on the cooperation of suppliers as well as the suppliers' familiarity with TSCA nomenclature rules.

Enforcement Liability

The Reset Rule requires reporting of information to the extent that it is known to or "reasonably ascertainable by" companies subject to the rule. In order to assure compliance with the rule, and to avoid interruption of critical business operations, manufacturers and processors will have to conduct a thorough review of their chemical processing and manufacture/import activities over the past ten years. Companies that conduct these types of reviews often find anomalies in how they have reported (or failed to report) on their chemical-related activities in the past. This is especially true for companies that have undergone mergers or acquisitions as well as companies that have changed their manufacturing processes over the years. For this reason, and because of the large penalties that are often assessed for TSCA violations, it is strongly advised that as part of their preparations for compliance with the Reset rule, companies undertake a systematic review of their operations ***in a manner that will allow them to avail themselves of EPA's Audit Policy - and potentially obtain complete forgiveness of any penalties*** - if any reporting or other compliance anomalies are discovered as a result of conducting the type of investigation that's required to comply with the Reset Rule.

Loss of CBI Protection

The Reset Rule includes provisions for asserting and substantiating claims that certain reported information (*e.g.*, specific chemical identity information) should be protected against public disclosure, as Confidential Business Information (CBI). However, the rule also contains several potential traps that might cause an unwary company to inadvertently lose CBI protection. Perhaps most significantly, the rule includes several exemptions from reporting for certain chemicals that will be deemed to be “active.” For example, substances that were reported for the Chemical Data Reporting rule in 2016 or 2012 are exempt from reporting under the Reset Rule. However, if a company takes advantage of this exemption and decides not to report a substance for the reset, the substance may lose any CBI protection it had previously.

As these examples illustrate, while the Inventory Reset Rule’s reporting requirements appear to be straightforward, the rule raises a number of complex compliance challenges. Companies that fail to adequately plan for, and execute, their obligations under the rule may face significant disruptions in their operations.

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