

CLIENT ALERT

New EPA Regulations on Cadmium Target Manufacturers and Importers of Consumer Products; Retail Distributors to be Targeted Next

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An important update to this alert, reflecting EPA's most recent activity on the cadmium rule, is provided [here](#).

On December 3, 2012, the Environmental Protection Agency (EPA) published a direct final rule that requires manufacturers and importers of articles containing cadmium and cadmium compounds to provide EPA with unpublished health or safety data in their possession.¹ The rule, which was promulgated under Section 8(d) of the Toxic Substances Control Act (TSCA), applies specifically to manufacturers and importers of cadmium, cadmium compounds or articles containing cadmium or cadmium compounds that have been, or are reasonably likely to be, incorporated into consumer products.² The types of data that would have to be reported to EPA under this rule include the following:

- Data relating to the cadmium content of consumer products, including information on product formulations and the function of cadmium in the products;
- Data pertaining to the assessment of consumer exposure, including information on bioavailability, physical form of the product, and number of potentially exposed consumers;
- Migration data and data on potential routes, durations and frequencies of exposure;
- Biomonitoring data; and
- Studies showing any measurable content of cadmium or cadmium compounds in articles intended for consumer products.

These reporting requirements apply to any person who **currently** manufactures, imports or **proposes** to manufacture or import cadmium or articles containing cadmium, as well as any person who, **in the past 10 years**, manufactured, imported or proposed to manufacture or import cadmium or articles containing cadmium. There is no threshold quantity or *de minimis* concentration that would exempt a manufacturer or importer from reporting under the rule. The definition of importer can capture many in the distribution chain and, as EPA explains, the reach of the reporting requirement may encompass retailers such as discount department stores, warehouse clubs and supercenters, and wholesalers of consumer goods (although it appears likely that most retailers and wholesalers will not possess any unpublished health or safety studies pertaining to cadmium that must be reported under the rule).

This new regulation represents an initial regulatory response to a citizens' petition that was filed simultaneously with EPA and the Consumer Product Safety Commission (CPSC) in May of 2010. The petition followed on the heels of several high profile voluntary recalls by retailers of children's metal jewelry containing high levels of cadmium. Those recalls were followed by a highly publicized recall of movie themed drinking glasses also conducted voluntarily by McDonald's. The joint press release issued by the Commission indicated that the glass recall was being conducted in an "abundance of caution" because of a "potential risk." The petition, which preceded the glass recall by less than a month, asked both EPA and the CPSC to take action on children's exposure to cadmium, and specifically asked the CPSC to declare any toy metal jewelry that contained more than

trace amounts of cadmium to be regulated as a banned hazardous substance if it was reasonably foreseeable that such jewelry could be ingested by a child. According to CPSC's own data, small jewelry items are among the most commonly ingested across all age groups.³

In November of 2011, ASTM published a voluntary standard for cadmium in children's jewelry restricting the solubility or migration of cadmium in paints and surface coatings on children's jewelry to 75 mg/kg based on weight of the dried paint film. The standard further limits the cadmium content in components of children's jewelry, requiring further solubility testing of any small part that exceeds 300 ppm cadmium in order to ensure that the part meets a migration limit of 200 µg cadmium per component part. In December 2011, ASTM also released a revised toy standard with specific limits and test methods for cadmium content in both paint and substrate. In denying the citizens' petition earlier this year, CPSC referenced these voluntary standards as being "sufficient to reduce the risk of harm from exposure to cadmium." CPSC indicated that it was collaborating with EPA on the issue of cadmium in children's products and referenced the work being done by EPA on the direct final rule under TSCA.

EPA's new cadmium regulation is significant because this type of Section 8(d) information reporting rule is often a prelude to further regulation under TSCA. Indeed, in its response to the original citizens' petition, EPA indicated that the Agency "will initiate rulemaking" under TSCA Section 6 to impose restrictions on cadmium use, if the CPSC fails to act on the petition.⁴ In addition, EPA notes in the Federal Register preamble to the new rule that the Agency plans to propose a separate Section 8(d) rule for *distributors* of cadmium compounds and articles containing cadmium that are incorporated into consumer products.⁵

The new cadmium rule is also significant because it continues a recent trend on the part of EPA to expand the exercise of its TSCA regulatory authority to cover *articles*, not just chemical substances *per se*. Other examples of this trend include a Section 4 Test Rule and Significant New Use Rule (SNUR) proposed earlier this year for articles containing certain polybrominated diphenylether (PBDE) flame retardants⁶ and a proposed SNUR for articles containing certain benzidine dyes.⁷ This is noteworthy because EPA has traditionally exempted articles from most regulations under TSCA. Therefore, EPA's recent trend toward regulating manufactured articles points to the need for manufacturers and importers of articles to be vigilant in assuring that they continue to be aware of, and in compliance with, their expanding obligations under TSCA. Moreover, the scope of EPA's action is much broader than the original citizens' petition on children's metal jewelry and applies well beyond toys and children's products to encompass goods such as consumer electronics that often contain cadmium in their parts, even if those parts are inaccessible.

EPA's new reporting rule for cadmium will take effect on January 2, 2013. Any person who believes that the reporting requirements of the rule are not warranted or appropriate must notify EPA of those objections, and the basis for those objections, by December 17, 2012.

¹ 77 Fed. Reg. 71561 (Dec. 3, 2012). Since this is a direct final rule, it was not preceded by a notice of proposed rulemaking and was not subject to public comment.

² For purposes of this regulation, a consumer product is defined to mean "any product that is sold or made available to consumers for their use in or around a permanent or temporary household or residence, in or around a school, or in or around recreational areas." *Id.* at 71567 to be codified at 40 C.F.R. § 716.21(a)(9)(iii)

³ CPSC Staff Briefing Package, Petition HP 10-2 Requesting Restriction of Cadmium in Toy Jewelry, dated February

9, 2011.

⁴ EPA's response to the petition is available at

<http://www.epa.gov/oppt/chemtest/pubs/petitions.html#petition7>. It is unclear whether EPA will consider the CPSC's denial of the petition in reliance on the new voluntary standards for cadmium in children's metal jewelry and toys to be a "failure to act" that warrants further EPA regulation under TSCA Section 6.

⁵ 77 Fed. Reg. 71561.

⁶ See 77 Fed. Reg. 19862 (April 2, 2012).

⁷ See 77 Fed. Reg. 18751 (March 28, 2012).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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