

CLIENT ALERT

OSHA Issues HazCom Enforcement Guidance to Manufacturers, Importers, and Distributors

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In a memorandum to regional administrators dated February 9, 2015, the Occupational Safety and Health Administration (OSHA) established guidance for how it will enforce its Hazard Communication Standard (HCS) in circumstances where chemical manufacturers, importers, and distributors might have difficulty complying with upcoming regulatory deadlines through no fault of their own. The HCS – frequently referred to as HCS 2012, reflecting OSHA's 2012 overhaul of the standard to bring it in line with the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals – is being implemented in phases, and two important deadlines loom:

- By June 1, 2015, manufacturers and importers of chemicals must develop safety data sheets (SDS) and labels that comply to the HCS 2012.
- By December 1, 2015, distributors of chemicals must only ship those chemicals bearing labels that comply with the HCS 2012.

The February 2015 enforcement guidance will provide some relief from enforcement to those manufacturers, importers, and distributors who, despite the exercise of reasonable diligence and good faith in attempting to obtain the necessary information to comply with HCS 2012, are unable to meet the compliance deadlines for the classification of chemical mixtures but otherwise remain in compliance with the older HCS (frequently referred to as HCS 1994).

Manufacturers and Importers

Regarding the June 1, 2015 deadline applicable to manufacturers and importers, the guidance states that, with respect to chemical mixtures, where a compliance safety and health officer (CSHO) determines that the manufacturer or importer exercised reasonable diligence and good faith in attempting to obtain necessary SDS and hazard classification information from its upstream suppliers of raw materials, the CSHO shall not issue a citation to the manufacturer or importer. As for what constitutes "reasonable diligence" and "good faith efforts," the guidance states the manufacturer or importer must provide documentation of substantive efforts to:

- obtain the necessary classification and SDS information from the upstream suppliers, through both verbal and written communication;
- find the necessary information from alternative sources; and
- classify the data themselves.

If the manufacturer or importer can demonstrate, through documentation – including the dates of all relevant communications, written and verbal – that it did these things; that it maintained a dialogue with its distributors concerning its inability to comply with HCS 2012; that it also developed a course of action to follow to make the necessary changes to SDSs and labels; that it also

can provide the CSHO with a clear timeline for when it expects to become fully compliant with HCS 2012; and that it is otherwise in compliance with HCS 1994, a citation will not be issued to it.

In contrast, the guidance states that OSHA will consider an enforcement action against the upstream raw material supplier if it does not make an HCS 2012-compliant SDS or label available to downstream manufacturers or product formulators of mixtures by June 2, 2015.

The guidance also states that a manufacturer or importer must create an SDS compliant with HCS 2012 within six months from the date it receives all of the hazard information for the ingredients in a mixture, and then provide that SDS to downstream distributors or employers with the next shipment or when requested. Similarly, within six months from the date it develops the HCS 2012-compliant SDS, the manufacturer or importer must create compliant labels. If in the meantime the manufacturer or importer sufficiently documents its efforts to address the noncompliance and at all times remains in compliance with HCS 1994, it will not be cited.

Distributors

Regarding the December 1, 2015 deadline applicable to distributors, the enforcement guidance states that where there has been a delay in the ability of the upstream manufacturer or importer to comply, the distributor may likewise be excused from a citation upon demonstration to a CSHO that it exercised reasonable diligence and good faith to comply by the deadline. Documentation of the distributor's communications with its manufacturers and importers about the circumstances leading to the noncompliance will again be key to demonstrating its reasonable diligence and good faith in order to avoid a citation.

Effective Period of Guidance

Somewhat confusingly, the guidance states its effective period will not exceed two years but that in the limited circumstances covered by the guidance, *distributors* will be allowed to ship chemicals that are HCS 1994-compliant until December 1, 2017. OSHA might have meant to say that the guidance policy will be honored for up to two years from the date of each of the respective deadlines, but that is not made expressly clear.

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

Daniel W. Wolff

Partner – Washington, D.C.

Phone: +1 202.624.2621

Email: dwolff@crowell.com