

CLIENT ALERT

OSHA Issues HazCom Interim Guidance in Conjunction with Compliance Deadline

June 5, 2015

The Occupational Health and Safety Administration (OSHA) issued Interim Enforcement Guidance for Hazard Communication 2012 (HCS 2012) in conjunction with the June 1, 2015 effective date for manufacturers and importers. In the interim guidance, OSHA attempts to answer questions it has received from manufacturers, importers, and distributors relating to the necessity of re-labeling existing stock that has been packaged for shipment. OSHA states that the interim guidance will expire upon its issuance of a revised HCS 2012 directive, which it says is forthcoming.

Limited Exceptions for Manufacturers and Importers

According to the interim guidance, manufacturers and importers of hazardous chemicals may continue using HCS 1994-compliant labels after the effective date, provided that they can demonstrate that they have exercised reasonable diligence and made good faith efforts to obtain the necessary information from upstream suppliers and attempted to find hazard information from alternative sources to classify the data. Manufacturers and importers who can make the necessary showing will have until six months after they develop updated Safety Data Sheets (SDSs) to create HCS 2012-compliant labels. All containers shipped thereafter must bear the HCS 2012-compliant label.

Manufacturers and importers may continue to ship existing stock that was packaged for shipment prior to June 1, 2015 that bears HCS 1994-compliant labels without re-labeling them with HCS 2012-compliant labels. This limited exception applies only to existing, packaged stock; any hazardous chemicals that are packaged for shipment after June 1, 2015 must be labeled with HCS 2012-compliant labels prior to shipping. Manufacturers and importers taking advantage of this limited exception must provide HCS 2012-compliant labels and SDSs for all individual containers shipped unless HCS 2012-compliant labels and SDSs are unavailable despite the exercise of reasonable diligence and good faith, as discussed above.

The interim guidance notes that, for the purposes of the limited exceptions it describes, businesses that repackage, blend, or mix chemicals are considered manufacturers rather than distributors.

Downstream Effect on Distributors

Under HCS 2012, distributors are not subject to the new labeling requirements until December 1, 2015. However, if a manufacturer or importer cannot comply with its June 1, 2015 effective date despite its reasonably diligent and good faith efforts, there may be a ripple compliance effect on distributors. Thus, OSHA compliance safety and health officers (CSHOs) are instructed to apply the same analysis and determine whether distributors exercised reasonable diligence and good faith to comply with the December 1, 2015 effective date. If so, for existing stock packaged prior to their December 1, 2015, they may avail themselves of the same limited exception. Distributors must label all containers shipped after December 1, 2017 with HCS 2012-compliant labels.

Reasonable Diligence and Good Faith Efforts Defined

CSHOs will assess the overall efforts of manufacturers and importers to comply with HCS 2012 and specifically request documentation of their efforts to: (1) obtain classification information and SDSs from upstream suppliers; (2) find hazard information from alternative sources; and (3) classify the hazard data themselves.

Manufacturers and importers must demonstrate their attempts to obtain the required information through both written and oral communications with the supplier. For each non-HCS 2012-compliant hazardous chemical shipped by a manufacturer or importer after June 1, 2015, the CSHO will consider whether the manufacturer or importer:

- Developed and documented the process used to gather the necessary classification information from its upstream suppliers and the current status of such efforts.
- Developed and documented efforts to find hazard information from alternative sources (e.g., chemical registries).
- Provided a written account of its continued communications with upstream suppliers, including dated copies of all relevant written communication.
- Provided a written account of continued communications with its distributors, including dated copies of all relevant written communication with its distributors informing them why it has been unable to comply with HCS 2012.
- Developed the course of action it will follow to make the necessary changes to SDSs and labels once the information becomes available.

The touchstone of the analysis is whether the manufacturer or importer attempted to obtain the hazard information in a way that would have enabled it to comply with the June 1, 2015 effective date. Where they were unable to do so, manufacturers or importers are also expected to provide a clear timeline of when they expect to comply with HCS 2012.

Similarly, where distributors cannot comply with the extended December 1, 2015, CSHOs will apply a case-by-case analysis of whether the distributor exercised reasonable diligence and good faith. The distributors must present documentation of any and all communications with the manufacturer or importer regarding its reasons for noncompliance with HCS 2012.

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

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