CLIENT ALERT

Warning: You May Owe EPA New Risk Evaluation Fees and Reporting Under TSCA

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EPA Announces Preliminary Lists of Manufacturers and Importers

On January 27, 2020, the U.S. Environmental Protection Agency (EPA) identified companies that it believes are manufacturing or importing any of 20 “high priority” chemical substances undergoing EPA-initiated risk evaluations under section 6 of the Toxic Substances Control Act (TSCA). These companies could be subject to a mandatory share of a $1.35 million EPA risk evaluation fee for each substance.

EPA published its preliminary lists of current manufacturers and importers that are potentially liable for a share of the cost of risk evaluations for 20 chemical substances that EPA recently designated as a high priority for risk evaluation under TSCA. EPA has published a separate list for each of the 20 high-priority chemical substances undergoing a TSCA risk evaluation, and the Agency has made each chemical-specific list available in two formats, as an Excel spreadsheet and a Portable Document Format file.

EPA’s publication of the preliminary lists begins a 60-day period ending on March 27, 2020, during which all manufacturers and importers of the 20 high-priority chemical substances must “self-identify” electronically, on EPA’s Central Data Exchange (CDX). This self-identification requirement applies regardless of whether a specific manufacturer or importer was actually listed on any of EPA’s preliminary lists.

All manufacturers and importers of any of the 20 high-priority chemical substances are subject to the self-identification requirement. Significantly, the self-identification requirement includes anyone who imports any of the 20 high-priority chemicals as part of an article or who manufactures or imports any of the substances as an impurity or byproduct. Byproducts, impurities, and substances imported as part of an article are often exempted from specific TSCA requirements.

In addition, EPA is providing the public with an opportunity to correct errors or provide comments on the preliminary lists. For example, if a manufacturer knows of a competitor that is not and should be included on any of EPA’s preliminary lists, the omission can be brought to EPA’s attention in a comment. In such an event, EPA will first notify the manufacturer or importer alleged to be missing from any list before adding the importer or manufacturer to the list. If appropriate, a manufacturer or importer also can use the 60-day reporting period to certify facts that would reduce or eliminate its responsibility to pay a share of EPA’s risk evaluation fee.

Failing to comply with the self-reporting obligation could subject a manufacturer or importer to a civil or criminal penalty under TSCA that could exceed the share of the EPA risk evaluation fee that is owed. EPA has explained that each day of failing to self-identify "past the payment due date" is a continuing violation and subjects a manufacturer or importer to a separate penalty.

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EPA will publish a final list of manufacturers and importers subject to a share of the risk evaluation fee by the time that it publishes the final scope document for the risk evaluation of any given high-priority substance. A manufacturer or importer that is identified on a final list will be assessed a mandatory share of the $1.35 million EPA risk evaluation fee.

**What Do I Need To Do?**

First, review the list of 20 high-priority chemical substances and determine whether you have manufactured or imported any of the substances in any form since January 27, 2015. Your review should include manufacture and import of a high-priority substance as part of an article or as an impurity or byproduct. If you are unsure whether you have manufactured or imported any of the 20 high-priority substances, for example, whether you have imported a substance as an impurity or as part of an article, an audit of your recent activities may be helpful, and you should seek counsel regarding the best approach to auditing.

If you have manufactured or imported a high-priority since January 27, 2015, you must notify EPA of this fact by March 27, 2020. Companies must notify EPA electronically by means of CDX. If you do not already have an account on CDX, you will need to register with CDX and obtain an account. The self-identification notice must include the company’s name and address, the name and address of the authorized official for the company, and the contact information for a person who can answer any questions.

If your company is listed on any of EPA’s preliminary lists but your review shows that you have not manufactured or imported the relevant substance since January 27, 2015, your company should certify this fact by March 27, 2020. This certification will remove you company from the final list and will prevent your company from incurring a share of EPA’s risk evaluation fee.

All companies that are required to report should consider whether they can file a certification to reduce or eliminate their fee liability. Any company that is obligated to self-identify, whether or not it is listed on any of EPA’s preliminary lists, can certify during the reporting period that the company has not recently manufactured or imported the substance and will not do so at any time within the next five years. This certification, too, will remove the company from the final list of manufacturers and importers or prevent the company from being added to the list and will thereby preclude any liability for the EPA risk evaluation fee. In addition, any small business subject to the reporting obligation can use the reporting period to identify as a “small business concern” and qualify for a greatly reduced share of the EPA risk evaluation fee.

Any manufacturer or importer subject to the self-identification requirement can form or join a consortium and inform EPA of this decision. There are, however, many factors relevant to whether forming or joining a consortium would be helpful in a given case. Before doing so, manufacturers and importers should seek counsel regarding the advantages and disadvantages.

Finally, manufacturers and importers that are potentially subject to a share of EPA’s risk evaluation fee should consider whether competitors are included on EPA’s preliminary lists. When manufacturers and importers self-identify to EPA on CDX, they can comment on EPA’s preliminary lists, including errors and omissions. If a person knows that a manufacturer or importer is missing from any of EPA’s preliminary lists, that person should comment by March 27, 2020 and identify the manufacturer or importer that EPA should add to the list. Because the total EPA risk evaluation fee is divided among all manufacturers and importers included on the final list, manufacturers and importers of any high-priority chemical substance have a strong incentive to identify as many other manufacturers and importers as possible.

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