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EPA TSCA PFAS Reporting Rule Finalized

Client Alert

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On September 28, 2023, the U.S. Environmental Protection Agency (EPA) announced the final rule for the reporting and recordkeeping requirements for per- and polyfluoroalkyl substances (PFAS) under the Toxic Substances Control Act (TSCA), 40 CFR Part 705. The rule sets forth extensive reporting and recordkeeping requirements for entities that currently or previously manufactured or imported PFAS “between January 1, 2011, and the effective date of the final rule.” Manufacturers of PFAS will have to report for each year PFAS was manufactured, information regarding PFAS identity, production volumes, industrial uses, commercial and consumer uses, byproducts, worker exposure, disposal, and any existing information related to environmental and health effects.

The rule covers manufacturers of PFAS chemicals as well as product manufacturers and product importers of articles containing PFAS. Thus, importers of articles, such as clothing, cookware, automobiles, automobile parts or equipment which contain PFAS, regardless of whether PFAS were intentionally added or used in the manufacturing process, would have to report information on the PFAS contained in those imported parts. As indicated in the proposed rule, waste management companies who import PFAS in a waste or produce PFAS at their site during the disposal of another chemical substance or mixture will also be subject to the reporting requirement. Recognizing the difficulty in determining whether PFAS are contained in a particular municipal solid waste stream (MSW), the lack of prior regulation and no approved testing methodology, EPA’s final rule exempts from the reporting requirements, companies who import only MSW for destruction or disposal. The importation of non-MSW waste streams or MSW imported for recycling or reuse of PCB containing articles is not exempt and companies importing such materials are subject to the reporting requirements.

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EPA has also taken a unique approach to defining “PFAS”. Rather than listing covered “PFAS” substances like it has in other PFAS regulations, EPA has chosen to include a “structural” definition of “PFAS”. Chemical substances that include at least one of the following structures, are considered “PFAS”:

- $R-(CF_2)_n-CF(R')R''$, where both the CF_2 and CF moieties are saturated carbons;
- $R-CF_2OCF_2-R'$, where R and R' can either be F , O , or saturated carbons; and
- $CF_3C(CF_3)R'R''$, where R' and R'' can either be F or saturated carbons.

While EPA has or is also putting together a list of substances that it has determined meet the structural definitions, it is not all inclusive. If a chemical is not on the list but nonetheless has one of the covered structures, it is still a covered “PFAS”.

Manufacturers and importers will need to make reasonable efforts to ascertain what is in the substances or articles they manufacture or import. The reporting standard is information “Known to or reasonably ascertainable” which includes “all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know”. This standard carries with it a certain degree of due diligence. EPA has created a compliance guide for article importers to assist in this regard.

Manufacturers will have one year from the effective date of the final rule to gather information after which there will be a six-month reporting period. Small manufacturers whose reporting obligations are exclusively from importing articles containing PFAS may have an additional six months to report.

If you have questions regarding this announcement, please contact the authors of this Client Alert.

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