

Publications

USEPA Proposes New Rule Requiring Additional (and Retroactive) Reporting and Recordkeeping Requirements For PFAS Manufacturers

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On June 28, 2021, the United States Environmental Protection Agency (USEPA) issued a proposed rule detailing new reporting requirements under section 8(a)(7) of the Toxic Substances Control Act (TSCA) for per- and polyfluoroalkyl substances (PFAS).¹ In accordance with obligations under the 2020 National Defense Authorization Act, the proposed rule generally requires that any person (broadly defined under TSCA, to include natural persons, companies, and state or federal political entities) that manufactured or imported PFAS **since January 1, 2011** must report information about the types, amounts, and uses of PFAS. USEPA explains that the purpose of the rule is “to better characterize the sources and quantities of manufactured PFAS in the United States.”

The proposed rule includes specific information about the entities affected by the new reporting requirements. First, the rule only applies to manufacturers, including importers, of PFAS materials that are covered as a “chemical substance” under TSCA Section 3(2). Certain notable materials are excluded from this definition, such as pesticides (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act); foods, food additives, drugs, and cosmetics (as defined by the Federal Food, Drug, and Cosmetic Act); and other chemicals as explained in the proposed rule. Second, the rule **does** apply to entities that manufacture PFAS as a byproduct. Third, the rule also applies to small manufacturers and processors; there is no small manufacturer exemption under Section 8(a)(7). Last, the proposed rule includes a non-exhaustive list of NAICS codes most likely to be affected by the proposed rule.

Under the reporting and recordkeeping requirements in the proposed rule, covered entities will need to provide a one-time report of the information described in TSCA Section 8(a)(2)(A) through (G), “which includes specific chemical identity, categories of use, production volume, byproducts, environmental and health effects, number of persons exposed and duration of exposure, and disposal.” The proposed rule includes a more detailed list of the 22 types of data, which would be required under the reporting requirements.

The reporting standard for this proposed rule requires regulated entities to provide “information [that] is known to or reasonably ascertainable by the manufacturer.” The rule explains that “[k]nown to or reasonably ascertainable by” 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.” Under this standard, regulated entities might need to assess their current knowledge of their products and potentially conduct a reasonable inquiry, both within and outside the organization, to supplement existing knowledge. As a result of this broad standard, USEPA explains that it anticipates this rule will involve inquiries and communication between and among different levels of regulated supply chains.

Finally, the proposed rule explains that manufacturers would have one year after the effective date of the final rule to complete the reporting and recordkeeping requirements.

USEPA seeks public comment on the proposed rule on or before August 27, 2021. If you have questions about this proposed rule, how it might apply to your business, or would like assistance submitting comments on the rule, please reach out to Mark Norman, Kristin Watt, Anthony Giuliani, David Edelstein, or your Vorys attorney.

¹ See TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances 86 Fed. Reg. 33926 (June 28, 2021); available at <https://www.govinfo.gov/content/pkg/FR-2021-06-28/pdf/2021-13180.pdf>.