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EPA Issues Expansive Proposed PFAS Reporting Rule for Manufactured and Imported Goods

Is This a “PBT 2.0” Scenario in the Making?

On June 10, 2021, the U.S. Environmental Protection Agency announced a proposed rule for collecting information about manufactured and imported goods containing any chemical substances that is a per- or polyfluoroalkyl substance (PFAS). In the FY2020 National Defense Authorization Act, Congress directed EPA to issue a rule “requiring each person who has manufactured a chemical substance that is a [PFAS] in any year since January 1, 2011,” to provide for each PFAS information on identity, structure, categories of use, quantities manufactured (including imported) or processed for each category of use, byproducts, environmental and health effects studies and data, numbers of individuals exposed, and disposal.¹ The proposed rule is in many respects a hybrid of the Chemical Data Report (CDR) and the 2018 Active-Inactive Rule, but there are aspects of the proposal that could make the rule substantially more burdensome. Given the similarities in complexity to the recent rules for persistent, bioaccumulative and toxic (PBT) substances, it is no challenge to see a parallel potential for supply chain disruption on several levels.

All Manufacturers and Importers Must Report – No Quantity Thresholds

The proposed rule contains no minimum thresholds for reporting. Manufacturers and importers who were not required to report PFAS in the recent CDR cycles because their quantities did not exceed the applicable thresholds would have to report under the proposed rule.

Proposed Rule Includes PFAS in Manufactured and Imported Articles

Although EPA requests comment on the extent to which articles should be “in scope,” the proposed rule does not have an imported articles exception that excused many importers from reporting PFAS in the recent CDR cycles. Given the limited supply chain transparency for chemical



content in articles, inquiries to satisfy the reporting requirement will be time-consuming and inefficient for many companies. Previous TSCA rules concerning PFAS contained exemptions for certain articles, such as PFOA and its salts in automotive articles, and other PFAS constituents in electronics and apparel. Companies whose goods were covered by those exemptions will have to collect and report information on a wider range of goods.

Industries Likely to be Subject to the Reporting Requirement

The proposed rule identifies several industries that may manufacture PFAS in their processes and some industries that may import PFAS-containing goods. The proposed rule cautions that EPA's list is not inclusive. Indeed, it does not include many of the industries identified in previous PFAS rulemakings, such as apparel, electronics, appliances, wholesale durable goods, furniture and furnishings, building materials, other consumer products, and retail.

Ambiguity Concerning Which PFAS are Covered

When EPA issued the significant new use rule for long-chain PFAS, stakeholders expressed concern that defining the scope of the rule by a chemical structure/formula approach failed to provide needed clarity and certainty. Unfortunately, the proposed reporting rule follows the same approach, and although an extensive list of covered PFAS is included, EPA clearly states that reporters cannot consider the list to be comprehensive.

Expansion of Inquiry Required to Meet Knowledge Standard

EPA proposes to use the "known to or reasonably ascertainable" knowledge standard to determine whether a reporter's information-gathering is sufficient. Unlike the CDR guidance for this standard, which does not require customer surveys, the proposal suggests the need for inquiries to other entities:

This standard may also entail inquiries outside the organization to fill gaps in the submitter's knowledge. Such activities may, though not necessarily, include phone calls or email inquiries to upstream suppliers or downstream users or employees or other agents of the manufacturer, including persons involved in the research and development, import or production, or marketing of the PFAS. Examples of types of information that are considered to be in a manufacturer's possession or control, or that a reasonable person similarly situated might be expected to possess, control, or know include: files maintained by the manufacturer such as marketing studies, sales reports, or customer surveys; information contained in standard references showing use information or concentrations of chemical substances in mixtures, such as a Safety Data Sheet or a supplier notification; and information from the Chemical Abstracts Service (CAS) or from Dun & Bradstreet (D-U-N-S). This information may also include knowledge gained through discussions, conferences, and technical publications.

EPA also advised importers who do not obtain knowledge of PFAS presence in the goods they import to document due diligence efforts. Based on the description above, those efforts will likely be significant.

PFAS Formed as Byproducts Not Excluded

Unlike other TSCA reporting rules that exempt certain byproducts, the proposed rule contains no such exemption.

Sufficiency of Timeline Unclear

The proposed rule would give reporters six months after the effective date of the final rule to finish their inquiries and then six months to complete their one-time reports in CDX. However, the requests of stakeholders under the PBT rules for years (not months) to complete supply chain inquiries for substances in articles suggests that a substantially longer timeline may be more realistic.



EPA will accept comments on the proposed rule for 60 days after it is published in the *Federal Register*. EPA specially requested comments on:

- Whether imported articles should be in scope
- Concerns regarding duplicative reporting
- Specific substances that may not be in scope
- Whether reporters can provide generic information when they cannot identify specific PFAS
- Whether EPA should make the reported data available to the public

King & Spalding's national Environmental, Health & Safety practice includes attorneys experienced with TSCA and its requirements, particularly as TSCA impacts importers and articles. If you have questions about EPA's proposed rule and its potential impacts on your company and industry, please contact our team.

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¹ 15 U.S.C. § 2607(a)(7).