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Deconstructing EPA's Chemical Data Reporting Rule

Law360, New York (August 17, 2011) -- The U.S. Environmental Protection Agency announced on Aug. 2, 2011, the final Toxic Substances Control Act (TSCA) Chemical Data Reporting (CDR) Rule, previously referred to as the Inventory Update Reporting (IUR) Modifications Rule. Proposed revisions to the rule were the subject of considerable debate, which helps explain the rule's long (nearly a year and a half) gestation period and extensive review by the Office of Management and Budget. The rule was published on Aug. 16 in the Federal Register (76 Fed. Reg. 50816) and becomes effective on Sept. 15, 2011.

The final CDR Rule is only modestly changed from the proposal, although some of the changes are important and contribute to the workability and minimally reduced burden of the final requirements. In particular, the EPA has decided to delay until 2016 reporting of production volumes for each of the intervening years (this had been proposed to apply since 2005, but in the final CDR Rule it is applied for years 2012 and beyond), phase in the lower reporting threshold for processing and use information (to 100,000 pounds in 2011 and to 25,000 pounds in 2016), and specify a reporting threshold for chemicals subject to certain TSCA rules and orders starting with the 2016 reporting cycle (e.g., rules issued under TSCA Sections 4, 5 or 6) to 2,500 pounds at a site (rather than as proposed that such reporting applies regardless of the production volume).

Other reporting obligations in the final rule, including up-front substantiation of confidential business information (CBI) claims, required reporting of number of commercial workers, and reduced reporting cycle, more than make up for the reduced reporting provisions identified above.

Set forth below are some of the key components of the CDR Rule. While in general the final rule could have been significantly more problematic for industry, the final rule nonetheless poses formidable chemical reporting challenges, which affected entities must address immediately and anticipate the consequences of the release of the data.

Background

TSCA detractors have long expressed concern with the limited utility of the IUR, as the reporting rule used to be called. The reporting mechanism is the EPA's primary tool for obtaining information on chemicals in commerce. Such information is a critically important component in helping the EPA achieve TSCA's core goal of ensuring chemicals do not pose risks to human health or the environment.

Concerns with the EPA's TSCA Section 8 implementation efforts have reached a new pitch in the last several years and have been one of several drivers of TSCA legislative reform efforts. Revisions to TSCA Section 8 have figured prominently in discussions among TSCA stakeholders and congressional staff. Administrative efforts to rehabilitate TSCA no doubt have taken on renewed urgency for all TSCA stakeholders as the likelihood of TSCA legislative reform this year or even next seems remote.

The Name Change

According to the EPA, the name change from IUR to CDR reflects better the distinction between the next data collection, which includes exposure-related data and the TSCA Inventory, which only involves chemical identification information.

Entities Required to Report

Entities must report if they manufacture (including manufacture as a byproduct or import) for commercial purposes, chemical substances listed on the TSCA Inventory and produced in volumes of 25,000 pounds or more at a site during the principal reporting year (i.e., calendar year 2011). Potentially affected entities include chemical substance manufacturers and importers, chemical substance manufacturing and processing facilities, and chemical substance users and processors who may manufacture a byproduct chemical substance, e.g., utilities, paper manufacturing, primary metal manufacturing, and semiconductor and other electronic component manufacturing.

Reporting Period

The 2012 submission period, during which 2011 manufacturing, processing, and use and 2010 production volume information would be reported, is scheduled to occur Feb. 1, 2012, to June 30, 2012. Subsequent recurring submission periods will be from June 1 to Sept. 30 at four-year intervals, beginning in 2016.

Changes for 2012 Reporting

Manufacturers (including importers) are required to report if the production volume of a chemical substance meets or exceeds the 25,000-pounds threshold per site during the principal reporting year (i.e., calendar year 2011). Entities are also required to provide upfront substantiation for each processing and use data element claimed as CBI. The EPA states that submitters cannot claim those data elements as confidential when they are identified as "not known to or reasonably ascertainable by." Submitters are also required to use e-CDRweb, the EPA's electronic reporting tool, to submit all CDR information through the Internet.

Subject to the relevant reporting threshold, companies would need to report production and import volume of chemicals for calendar year 2010. In addition, the following information is required to be reported for 2011: the production volume of a chemical substance manufactured (including imported) at a reporting site; whether an imported chemical substance is physically at the reporting site; the volume of the chemical substance directly exported and not domestically processed or used; and whether a manufactured chemical substance, such as a byproduct, is being recycled, remanufactured, reprocessed or reused.

Processing and use-related information required to be reported includes for 2011: processing and use information of all reportable chemical substances manufactured at 100,000 pounds or more at a site, unless otherwise exempted; processing and use information using the reporting standard "known to or reasonably ascertainable by," instead of the "readily obtainable" standard used in 2006; industrial processing and use information using a revised list of industrial function categories and a list of 48 Industrial Sectors, which replace the five-digit North American Industrial Classification System codes; consumer and commercial product categories separately to distinguish between the use types; the number of commercial workers reasonably likely to be exposed; and consumer and commercial use information using a revised list of consumer and commercial product category codes.

Chemicals Exempt from Reporting

Certain chemicals exempt from reporting include: "naturally occurring substances,

microorganisms, polymers, certain forms of natural gas, and water unless they are subject to another TSCA rule." Certain chemicals are partially exempt, and reporting is required only to report identification and manufacturing information for those chemicals. The partially exempt chemicals are listed at 40 C.F.R. Section 711.6(b). Chemical substances that are the subject of an enforceable consent agreement are no longer exempt from reporting.

Phased-In Changes for the 2016 CDR

The EPA is delaying implementing certain requirements until the 2016 CDR. For the 2016 CDR, the determination of the need to report will be based on whether, for any calendar year since the last principal reporting year, a chemical substance was manufactured (including imported) at a site in production volumes of 25,000 pounds or greater. For any such subject chemicals, manufacturers (including importers) will be required to report the production volume for each of the years since the last principal reporting year.

The reporting threshold for processing and use information will be 25,000 pounds at a site. The reporting threshold for chemical substances that are the subject of a rule proposed or promulgated under TSCA Sections 5(a)(2), 5(b)(4) or 6, the subject of a certain TSCA order, or the subject of relief that has been granted under a civil action under TSCA Sections 5 or 7 will be 2,500 pounds per site.

Issues

2011 As Principal Reporting Year

An unexpected change from the EPA proposed rule is the inclusion of 2011 as a principal reporting year. Presumably, the EPA deemed this change necessary given the long delay in getting the final rulemaking published. What may appear as a minor adjustment, however, could prove to have a significant impact on industry.

Those companies that have dutifully collected process and use information in 2010 with the understanding that such information would be required for reporting in 2011, have essentially wasted time, resources and effort. More importantly, unless those companies continued to collect process and reporting information into 2011, they now have to expend further time, resources, and effort to review this year's files to identify and compile the process and use information for 2011.

Timing of Reporting

The EPA has actually shortened the timeframe to report more process and use information for 2011. In moving the reporting deadline to February to June, that timeframe is two to six months after the last day of data collection, whereas the original timeframe would have been June to September, six to nine months after the last day of data collection.

Byproduct Reporting

Certain changes will result from the EPA's definition of and interpretative guidance statements on the term "byproduct." The EPA states that it is providing "additional information on byproduct reporting" because "the scope of the CDR obligation to report byproducts is not well understood by industry." The EPA does not note that the reason this issue is not clear to industry is because the EPA's explanations over the years have lacked clarity and formality in that the reporting "policy" has been issued in fragmentary and informal guidance documents.

The EPA states in the CDR that "[c]hemical substances that are byproducts of the manufacture, processing, use, or disposal of another chemical substance or mixture, like any other manufactured chemical substances, are subject to CDR reporting if they are listed

on the TSCA Inventory, are not otherwise excluded from reporting, and their manufacturer is not specifically exempted from CDR reporting requirements." The EPA's guidance and interpretation of "byproducts" raises many issues, including possible Administrative Procedure Act notice and comment deficiencies.

In addition, it is by no means clear whether certain byproducts should be listed on the TSCA Inventory and/or subject to CDR reporting, and whether the EPA has interpreted the controlling TSCA provisions consistently and in a way countenanced by law. The EPA's interpretation of byproduct reporting is likely to impact most significantly metals reclamation and recycling operations.

Records Review Standard

Under the final rule, the "readily obtainable" standard that applied under prior IUR reporting has been replaced by the more rigorous "not reasonably ascertainable" standard. On the whole, this is not likely to impact significantly larger chemical producers who likely have been employing that standard all along. Less sophisticated entities may experience a change, however. Additionally, certain reporting obligations pose interesting questions. For example, it is not clear what level of effort will be required for companies in identifying the number of commercial workers reasonably exposed to a reported chemical.

Conceivably, there could be multiple sources of information that purport to provide such data, but what criteria should be applied to determine data quality or integrity? An Internet search on "jobs census, janitor, U.S." produces more than six million hits. Using information that is "reasonably ascertainable" to fulfill this reporting obligation will prove extremely time intensive.

Up-Front CBI Substantiation

Under the final rule, entities asserting CBI claims must provide up front substantiation of the claim. While this comes as no surprise that the rule is now in place is almost certain to diminish, perhaps greatly, the sheer number of CBI claims asserted in connection with chemical data reporting.

What the EPA Declined to Do

The EPA wisely chose not to proceed with a number of proposals floated in the proposed rule. These include: revising or eliminating exemptions; revising or eliminating the 25,000-pound threshold for general reporting; changes in reporting to more closely parallel the reporting required on new chemicals under TSCA Section 5 (i.e., the PMN form); and expanding the reporting universe to include processors.

Conclusion

The final CDR Rule is an important rule that will increase the EPA's understanding of the volumes, uses and exposures of chemicals, beginning with the 2012 reporting and increasing with the changes that will take place in the 2016 reporting. Whether the EPA has the resources and staff to review and evaluate the information and use them as Congress intended is unclear. The hope is the information will be critically reviewed and beneficially and prudently applied.

--By Lynn L. Bergeson (pictured), Bergeson & Campbell PC, and Kathleen M. Roberts, B&C Consortia Management LLC

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