

Chemical importers are on the hook for TSCA risk evaluation fees

Is your company potentially liable for a share of the U.S. Environmental Protection Agency (EPA) \$1,350,000 fee for developing a Toxic Substances Control Act (TSCA) risk evaluation? This is a hot topic these days, given EPA's notice dated January 27, 2020, identifying the "preliminary lists" of manufacturers, including importers, of the 20 chemical substances that EPA has designated as "high-priority" substances for risk evaluation and for which fees will be charged. Stakeholders are required by March 27, 2020, to "self-identify" as manufacturers of a high-priority substance irrespective of whether they are included on the preliminary lists identified by EPA.

Background

EPA published on December 20, 2019, the final list of 20 high-priority chemicals. These chemicals will be the next chemicals to undergo risk evaluation under TSCA Section 6. The 20 chemical substances consist of seven chlorinated solvents, six phthalates, four flame retardants, formaldehyde, a fragrance additive, and a polymer precursor.

EPA developed each preliminary list based on data submitted to EPA, including information submitted under TSCA's Chemical Data Reporting (CDR) Rule and the Toxics Release Inventory.

Requirements under the Fee Rule

Companies that have manufactured or imported any of the 20 high-priority chemical substances in the past five years before January 27, 2020, must submit a notice to EPA of that fact. This is true even if a company appears or does not appear on any EPA preliminary list, hence the "self-identification" requirement.

Companies may certify to EPA that they have not manufactured the chemical in the five-year period preceding January 27, 2020, or certify that the company has ceased producing or importing the substance prior to March 19, 2019, the day before EPA initiated TSCA prioritization for the substances, and certify that they will not do so again in the five years following the publication of the preliminary list, or until January 27, 2025. Companies that have manufactured or imported

any of the 20 high-priority substances on or after March 20, 2019, cannot avoid the fee obligations.

Companies are obligated to pay a portion of the fee even if the manufactured or imported chemical is considered an impurity or byproduct, even if it is found in trace amounts. There is no de minimis threshold exemption. Similarly, if an article is imported and contains any of the 20 high-priority substances, the importer is subject to the fee obligation.

Fee discounts are available to small businesses. The final use fee rule extends an 80% discount in the fee amount for small businesses.

In the event an entity otherwise subject to the fee obligation neglects or declines to be identified as a potentially responsible entity, EPA reserves the right to seek enforcement of TSCA and views each day of failed payment as a separate actionable event subject to penalty. The maximum statutory amount per day for a penalty is \$40,576.

Why the Fuss?

Companies that import products that are mixtures, consumer products, for example, paint formulations, or manufactured goods like furniture (since formaldehyde is among the 20 high-priority chemicals), all are on the hook for the TSCA fee obligation. Manufacturers of articles containing any of the 20 high-priority chemical substances are on the hook, regardless of whether the chemical is incapable of being released or whether the chemical has no end use or commercial purpose separate from the article of which it is a part.

What to Do?

Time is short, so manufacturers, including importers, should review immediately the preliminary lists in EPA's docket. If your company's name is listed and even if it does not appear on these lists, if your company has manufactured or imported any of the 20 high-priority chemicals since January 27, 2015, as a neat chemical or as an impurity, byproduct, or in an article, EPA expects you to self-identify by March 27, 2020.

Chemical stakeholders must remain vigilant of their TSCA obligations and which chemicals are identified by EPA as high priority (as this process will play out for decades). Importers must be aware of their suppliers' product content. TSCA compliance has never been more important, and the risks of non-compliance have never been more consequential.

By Lynn L. Bergeson - <http://actagroup.com/>