

# WASHINGTON WATCH

## TSCA Risk Evaluation Fees: Who Is on the Hook?

By Lynn L. Bergeson

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? It may well be. This is a hot topic these days, given EPA's *Federal Register* notice published on 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. Until March 27, 2020, stakeholders are required to "self-identify" as manufacturers of a high-priority substance irrespective of whether they are included on the preliminary lists identified by EPA (yes, you must submit a form to EPA even if your company name is already identified by EPA). The preliminary lists are available in Docket EPA-HQ-OPPT-2019-0677 and on EPA's website at <http://www.epa.gov/TSCA-fees>. This article explains the notice and suggests way to respond to it.

### 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 chemicals consist of seven chlorinated solvents, six phthalates, four flame retardants, formaldehyde, a fragrance additive, and a polymer precursor, and include:

Chemical Name	Docket Number
p-Dichlorobenzene	EPA-HQ-OPPT-2018-0446
1,2-Dichloroethane	EPA-HQ-OPPT-2018-0427
trans-1,2-Dichloroethylene	EPA-HQ-OPPT-2018-0465
o-Dichlorobenzene	EPA-HQ-OPPT-2018-0444
1,1,2-Trichloroethane	EPA-HQ-OPPT-2018-0421

1,2-Dichloropropane	EPA-HQ-OPPT-2018-0428
1,1-Dichloroethane	EPA-HQ-OPPT-2018-0426
Dibutyl phthalate (DBP) (1,2-Benzenedicarboxylic acid, 1,2-dibutyl ester)	EPA-HQ-OPPT-2018-0503
Butyl benzyl phthalate (BBP) (1,2-Benzenedicarboxylic acid, 1-butyl 2-(phenylmethyl) ester)	EPA-HQ-OPPT-2018-0501
Di-ethylhexyl phthalate (DEHP) (1,2-Benzenedicarboxylic acid, 1,2-bis(2-ethylhexyl) ester)	EPA-HQ-OPPT-2018-0433
Di-isobutyl phthalate (DIBP) (1,2-Benzenedicarboxylic acid, 1,2-bis(2-methylpropyl) ester)	EPA-HQ-OPPT-2018-0434
Dicyclohexyl phthalate	EPA-HQ-OPPT-2018-0504
4,4'-(1-Methylethylidene)bis[2,6-dibromophenol] (TBBPA)	EPA-HQ-OPPT-2018-0462
Tris(2-chloroethyl) phosphate (TCEP)	EPA-HQ-OPPT-2018-0476
Phosphoric acid, triphenyl ester (TPP)	EPA-HQ-OPPT-2018-0458
Ethylene dibromide	EPA-HQ-OPPT-2018-0488
1,3-Butadiene	EPA-HQ-OPPT-2018-0451
1,3,4,6,7,8-Hexahydro-4,6,6,7,8,8-hexamethylcyclopenta [g]-2-benzopyran (HHCB)	EPA-HQ-OPPT-2018-0430
Formaldehyde	EPA-HQ-OPPT-2018-0438
Phthalic anhydride	EPA-HQ-OPPT-2018-0459

Entities may avoid or reduce fee obligations by making certain certifications consistent with the final rule on fees for the administration of TSCA issued by EPA in October 2018. The comment period also provides stakeholders an opportunity to correct errors or provide comments on these preliminary lists. EPA expects to publish final lists of manufacturers (including importers) subject to fees no later than concurrently with the publication of the final scope document for risk evaluations of the 20 high-priority substances, or around June 2020. Manufacturers, including importers,

identified on the final lists will be subject to applicable fees, which EPA expects responsible parties to pay no later than October 18, 2020.

EPA developed each preliminary list “using the most up-to-date information available, including information submitted to the Agency (*e.g.*, information submitted under TSCA section 8(a) (including the Chemical Data Reporting (CDR) Rule) and section 8(b), and to the Toxics Release Inventory (TRI)).” EPA reportedly considered using other sources of information, such as publicly available information or information submitted to other agencies to which EPA has access, but EPA “concluded that data quality limitations would create more false positives than appropriate additions to the lists.” Additionally, EPA notes that it believes the self-identification process, established by 40 C.F.R. Section 700.45(b)(5), will be sufficient to identify additional manufacturers (including importers), as appropriate. To include the two most recent CDR reporting cycle data (collected every four years) and to account for annual or other typical fluctuations in manufacturing (including import), EPA states that it used six years of data submitted or available to it under CDR and TRI to create the preliminary lists (2012-2018).

### **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 can elect to exit the market and not pay a fee. 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, are very much on the hook, however, and cannot avoid the fee obligations, at least not based on currently available information.

Companies are obligated to pay a portion of the fee even if the manufactured or imported chemical is considered an impurity or byproduct, and even if it is found in exceedingly trace amounts. There is no *de minimis* threshold exemption. Similarly, if an article is imported and contains any of the 20 high-priority substances, then the importer is subject to the fee obligation. Interestingly, this is true even if the substance or mixture is not intended to be removed from the article and has no end use or commercial purpose separate from the article of which it is a part.

The final fee rule does not require late market entrants to submit a notice to EPA or to pay fees for a risk evaluation. Companies that commence manufacture or import after January 27, 2020, thus curiously are not subject to risk evaluation fee obligations.

Fee discounts are available to small businesses. The final use fee rule extends an 80% discount in the fee amount for small businesses. Entities must certify to EPA that they are small business concerns based on the employee-based thresholds set out in 40 C.F.R. Section 700.43.

EPA anticipates that chemical consortia will form and provide the operational mechanism to collect and pay the fees. EPA states that following issuance of the final lists of manufacturers some time this June, companies will have 60 days to notify EPA of their intent to form a consortium and a second 60-day period within which to remit the payment. EPA anticipates that the consortia will develop rules of engagement as to how the fee amount will be apportioned among consortia members. According to EPA, only all-small business concerns may elect to avail themselves of the small business discount.

In the event no consortia form, EPA will tally up the total number of companies subject to the fee obligation and divide the total fee amount by the total number of entities.

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?**

It should be clear by now why the TSCA stakeholder community is concerned and a bit confused. 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 a share of the TSCA fee obligation. While any one share may not be much, that EPA is emphasizing that the obligation is an enforceable TSCA obligation reflects EPA's focus on the issue.

Similarly, 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. This approach, of course, is inconsistent with other TSCA provisions pertinent to articles and is a source of confusion and concern among stakeholders.

## **What to Do?**

Time is short, so manufacturers, including importers, should carefully review the preliminary lists in EPA's docket immediately. Even if your company's name or the name of an affiliated company does not appear on these lists, and of course even if your company's name does appear on a list, if the entity 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 the company to self-identify by March 27, 2020.

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