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**PRODUCT LIABILITY &
ENVIRONMENTAL UPDATE****EPA Proposes New Rule That Will Substantially Increase Data That Chemical Manufacturers Must Report****OVERVIEW**

On August 11, the Environmental Protection Agency (EPA) proposed a new rule that will increase substantially the type and amount of information that chemical manufacturers have to provide in accordance with the Toxic Substances Control Act's (TSCA) Inventory Update Reporting (IUR). 40 C.F.R. §§ 704, 710, 711. Companies that manufacture chemical substances listed on the TSCA Inventory in volumes of 25,000 lbs. or more during the calendar year 2010—and even some companies with smaller production volumes—may be affected by this proposed expansion of the IUR. Impacted businesses include, among others, chemical manufacturers and importers (NAICS codes 325 and 324110, e.g., chemical manufacturing and processing and petroleum refineries) and chemical users and processors that may manufacture a byproduct chemical substance (NAICS codes 22, 322, 331 and 3344, e.g., utilities and paper manufacturing).

Since chemical inventory reporting obligations under TSCA were first established in the late 1970s, the rules governing this periodic reporting mandate have been revised on various occasions. This proposed rule represents a notable expansion of IUR mandates that is likely to increase the compliance burden on regulated businesses. The EPA points to a number of its TSCA goals to justify the proposed rule modification: better alignment of the information collected with the EPA's overall needs; increasing the public's access to information; obtaining new and updated information regarding potential exposures to a subset of the chemical substances in the TSCA Inventory; and improving the usefulness of the information reported by chemical manufacturers. In pursuit of those goals, the EPA has proposed various changes to the IUR.

First, the rule requires the reporting of more data more frequently. It returns the frequency of reporting to once every four years, as opposed to once every five years under the current rule. The proposal also requires the reporting of production volumes for all years since the last principal reporting year (which was 2005), instead of only for the principal reporting year. After 2011, manufacturers will have to report the production volume of any chemical substance at or above the 25,000 lb. threshold in any calendar year since the principal reporting period.

Second, the EPA's proposed rule contains a significant expansion of "process and use" reporting. Manufacturers will have to report all processing and use data that is "known to or reasonably ascertainable" by them rather than the current mandate to report only "readily obtainable" data. In addition, the proposal requires the reporting of chemical processing and



use data for all chemicals manufactured at or above 25,000 lbs., substantially lowering the current threshold of 300,000 lbs.

Third, the proposal expands the scope of the reporting requirements to cover certain types of smaller volume chemicals. Currently, the EPA requires IUR submissions only for chemicals made in volumes at or above 25,000 lbs. The proposed rule eliminates the 25,000 lb. threshold for certain chemicals that are the subject of certain TSCA rules or orders.

Fourth, the proposal increases the amount of data required from the manufacturers. For example, manufacturers will have to report whether an imported chemical substance is physically at their reporting site, the volume of the chemical substance that is directly exported and not domestically processed or used, and whether a manufactured chemical—such as a byproduct—is being recycled, remanufactured, reprocessed, reused or reworked.

Finally, the proposed rule changes the manner and method of IUR reporting. It requires manufacturers to submit IUR information electronically, helping the EPA make the data public more quickly. In order to increase the public's access to information, the proposed rule requires upfront substantiation of certain data elements when the information reported is claimed as confidential business information.

The EPA also is considering other reporting requirements not in the current proposal. These additional requirements include requiring information about each specific activity in which workers could be exposed to a chemical, the duration and frequency of worker exposure and whether monitoring data is available.

The EPA is seeking public comment on these proposed changes with the goal of issuing a final rule in the spring of 2011, in time for the next reporting period, scheduled for June 1 – September 30, 2011. To submit public comments on the proposed rule changes and the guidance document, visit www.regulations.gov and access docket EPA-HQ-OPPT-2009-0187.

LITIGATION CONCERNS

The EPA's proposed rule raises several concerns in future toxic tort litigation. Most importantly, the proposal requires the reporting of additional information and creates heightened scrutiny of claims of confidential business information. The public availability of greater amounts of information may increase the likelihood of warning and workplace intentional tort claims. This additional information may also affect how a jury analyzes causation issues, particularly if the EPA adds the reporting requirements regarding worker exposure and monitoring. Additionally, any mistakes in the expanded reporting may lead to potential regulatory action by the EPA and provide easy targets for plaintiff's counsel at trial. These and other issues could have a significant impact on future toxic tort litigation.



FOR MORE INFORMATION

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