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Hazardous Waste

Reverse Distribution Chains

Handling potentially hazardous waste from returned products can pose unique challenges for retailers under the Resource Conservation and Recovery Act. In this Bloomberg BNA Insights, Wiley Rein's Joseph S. Kakesh and P. Nicholas Peterson examine the EPA's guidance on handling potentially hazardous wastes and trends in the agency's use of its RCRA enforcement powers.

RCRA and Retailers: The Perils of Hazardous Waste in Reverse Distribution Chains

BY JOSEPH S. KAKESH AND P. NICHOLAS PETERSON

The Resource Conservation and Recovery Act presents special challenges for retailers such as Wal-Mart who accept damaged, defective or otherwise unwanted product returns from their customers. Rather than simply throw these products away, retailers may instead send them to consolidated ''reverse distribution'' centers to determine whether they may be resold, recycled or donated. Many of these products potentially contain ingredients that the Environmental Protection Agency or a state agency deems to be hazardous wastes, and they must be managed accordingly. In light of their product return and reverse distribution practices, however, many retailers have had difficulty determining *whether* a product is a hazardous waste, *at what point* a hazardous waste determination must be made and *when* a returned product must be handled as a hazardous waste.

The problem is most acute at retail store locations, where staff may not have been trained to even identify whether a hazardous waste determination must be made, let alone to undertake the testing needed to make an accurate determination. In addition, staff may not know at the time whether the returned or damaged products in their store will ultimately be disposed of as

a waste, sold to a third party for value or repaired or refurbished in such a way that they can be resold by the company.

Further complicating this issue is that the range of products that may potentially be viewed as hazardous waste upon disposal is vast and, often, counterintuitive. For example, many electronic products contain lead and other metals that may meet a RCRA listing or contain other hazardous waste characteristics. Similarly, many over-the-counter drugs and vitamins contain minerals and other ingredients that, even though they are ingested for their health benefits, could nevertheless be deemed hazardous waste upon disposal.

This confusion can create serious problems for retailers. Delaying the determination of a returned product's hazardous waste status may subject a retailer to significant penalties if the EPA or a state agency determines that the product was a hazardous waste all along. In some cases, a retailer may even be exposed to criminal liability. On the other hand, presumptively treating every unwanted product as a hazardous waste at the time it is returned to a store could result in enormous and unjustified costs to store, transport and dispose of such products, in addition to significant waste of products that could otherwise have been reused, resold or donated to third parties.

The EPA has begun to address these issues, and it is expected to provide more detailed guidance to retailers in the coming year. In the interim, however, retailers should be on their guard to protect against potential enforcement actions by federal or state agencies. In what follows, we provide a short summary of RCRA requirements for retail reverse distribution and explain why the requirements pose such difficult challenges for retailers. We also examine the potential civil and criminal liability retailers face if they fail to comply with RCRA requirements and examine recent enforcement trends. Finally, we provide a few suggestions for how retailers might want to manage their product returns process to limit potential exposure.

RCRA Background. RCRA is intended to provide ''cradle-to-grave'' regulation of hazardous waste. Originally written with a focus on industrial waste, the statute is intended to provide guidance regarding: (1) when, if at all, a material is subject to regulation as a solid or hazardous waste, and how to make that determination; and (2) standards for handling those materials once a waste determination has been made.

The first type of guidance describes the *point of generation* of a waste, that is, the point at which a material is ''abandoned,'' ''recycled'' or ''considered inherently waste-like,'' and thus becomes subject to RCRA waste handling rules (40 C.F.R. § 261.2(a)). The generator of a solid waste is required to determine whether its waste is also a hazardous waste (Id. § 261.3). A generator is the person or entity by whose action a material becomes a solid waste, or, in other words, the person or entity who first abandons or recycles the material (Id.§ 260.10). RCRA imposes significant obligations on generators to handle, transport and keep records of hazardous waste in ways more complicated, burdensome and expensive than for ordinary solid waste.

Usually, a solid waste is deemed hazardous under RCRA in one of two ways. First, it may include materials that are listed by the EPA as hazardous. Second, a material may instead have a characteristic, such as ignitability, corrosivity or toxicity, that qualifies it as hazardous. Materials that do not meet a listing may need to undergo special testing following procedures and test methods specified by the EPA to determine whether they meet a characteristic. As mentioned above, RCRA puts the burden on the generator—whoever and wherever that person may be—to make the hazardous waste determination and, if necessary, perform the required testing and analyses once the determination is made that a material is a solid waste.

RCRA and Retail Reverse Distribution. Aware of the challenges retailers have been facing, the EPA issued a Notice of Data Availability (NODA) in February 2014 and sought information regarding how RCRA should be applied in the retail sector (79 Fed. Reg. 8,926). The EPA stated that it wanted to get comments on ''recurring themes. . .in retail enforcement actions'' for RCRA violations, including ''where and when a hazardous waste determination must be made, episodic generation, reverse logistics and hazardous waste management programs'' with an eye toward helping the EPA ''make informed decisions about possible next steps to improve the RCRA hazardous waste policies, guidances or regulations for retail operations'' (Id. at 8,930). The comment period closed May 30, 2014, and the EPA provided no timeline by which it would provide a response to the comments it received. Two years on, the EPA has issued a couple of Federal Register notices proposing new rules for managing certain aspects of the hazardous waste challenges facing retailers, but it has still not provided a clear, direct guide to retailers seeking to comply with RCRA requirements that arise during the reverse distribution process.

The comments received by the EPA in response to the NODA make clear that, given their reverse distribution processes and the need to retain value for products that may not have an ultimate waste determination when returned to stores, retailers generally want to either: (1) *delay* waste determinations—and thus delay the attendant obligations that may arise from such determinations—to some point after receipt of a returned product at a store; and/or (2) take advantage of an *exclusion* from hazardous waste regulation similar to the household hazardous waste exclusion already provided to consumers who dispose of waste from their homes that would otherwise be deemed hazardous. Commenters argued that it is often too difficult and costly to require every retail store to potentially become a RCRA generator site, and, as a result, to require their retail staff to become experts at hazardous waste determinations. At a minimum, many retailers want the ability to make waste determinations after the returned product is sent on from the store for processing to a reverse distribution center so that they can: (1) make waste determinations in a more cost-efficient manner; (2) donate or recover potentially saleable products for repackaging or reuse and reintroduction for sale in the marketplace; or (3) accurately calculate credits that may be due to the retail site location.

For its part, the EPA is concerned that allowing the suspension of waste characterization—or allowing an outright exclusion similar to that for hazardous household waste—creates unsafe conditions in which materials that should be considered hazardous wastes when they are returned to a store are not being properly and

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safely handled and transported at one or more points in the reverse distribution process. Recognizing that existing requirements are sometimes excessively burdensome in light of the risks posed, however, the EPA proposed Sept. 15, 2015, a number of changes to the hazardous waste generator regulations (80 Fed. Reg. 57,918). One of these changes would allow those who generate very small quantities of hazardous waste at a site to send their waste to a larger hazardous waste generation site without handling it as a hazardous waste, as long as the consolidation site is owned by the same person and a number of other conditions are met (Id. at 57,995, proposing new 40 C.F.R. § 262.14). This change may provide some relief to larger retailers who rely on centralized reverse distribution processing centers. (A similar change was proposed in a separate rulemaking for facilities, including retail stores, that have ''creditable'' over-the-counter or prescription drugs intended for shipment to a pharmaceutical reverse distributor (Management Standards for Hazardous Waste Pharmaceuticals, 80 Fed. Reg. 58,014; 9/25/2015). Another change would provide more detail in the regulations for how a generator should evaluate its waste to determine if it is hazardous (80 Fed. Reg at 57,992, proposing revisions to 40 C.F.R. § 262.11). This change may allow retailers to provide more detailed guidance to their retail store staff and allow them to make more accurate waste determinations earlier in the reverse distribution process.

Despite the efforts the EPA has been making in the past couple of years to ease RCRA regulatory burdens on retailers and others, confusion will likely remain until the new regulations are finalized and more fully incorporated into regulated entities' practices. In the meantime, the consequences of that confusion can be serious as retailers may face civil and criminal liability for mishandling hazardous waste.

Civil Liability. Under RCRA, the EPA can impose fines of up to $37,500 per day per violation (42 U.S.C. § 6928). The EPA has wide discretion in determining the amount of civil penalties under RCRA and has adopted a Penalty Policy for RCRA enforcement cases. Under this policy, the EPA bases the amount of a civil penalty on a number of factors, including the potential for harm and the extent of any deviation from regulatory requirements. The EPA also considers the duration of any violation and the economic benefit the violator may have received through non-compliance. For violations lasting a long period of time or for violations that are particularly extensive, this can result in extremely high civil penalties. For example, Wal-Mart recently settled a number of alleged violations under RCRA and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) related to mishandling returned products through its consolidated returns distribution center. The EPA alleged that Wal-Mart failed to handle returned products as hazardous wastes at the right time and did not apply the correct standards. Wal-Mart was required to pay $82 million as part of the settlement.

Criminal Liability. In addition to civil enforcement, retailers are potentially subject to criminal enforcement actions under Section 3008 of RCRA if they knowingly fail to store or treat material deemed hazardous waste without a permit or without meeting permit conditions, either at their retail sites, distribution centers, or product return consolidation centers (42 U.S.C. § 6928(d)). When the EPA discovers potential criminal violations, it refers the matter to the Justice Department, which weighs whether to bring criminal charges. Criminal penalties under RCRA can be as high as five years in prison, fines of up to $50,000 for each day of violation, or both. Knowing endangerment violations, where a person knowingly violates RCRA and knows that such acts put another person in imminent danger of death or serious injury, are even more severe and can result in fines of up to $250,000 (or $1,000,000 for organizations), 15 years in prison, or both. RCRA also extends criminal liability to knowingly omitting material information or making a material false statement in any document filed pursuant to RCRA's hazardous waste regulations (42 U.S.C. § 6928(d)(3)).

Failures to adequately characterize, store and treat hazardous waste may subject parties to criminal penalties under other statutes as well. For example, as part of the enforcement action described above, Wal-Mart had to pay criminal penalties under the Clean Water Act for negligently disposing of hazardous wastes and was subject to criminal penalties under FIFRA for failing to properly handle returned pesticide products.

In addition to the various criminal penalties a retailer may face for violating environmental statutes, it could also be subject to criminal penalties for committing certain non-environmental offenses. The Justice Department's U.S. Attorneys' Manual states, ''[e]xperience has shown that cases involving violations of federal environmental laws. . .also may involve violations of certain other federal statutes'' (USAM § 5-11.102). Indeed, the Justice Department is ''empowered to investigate and prosecute violations of additional criminal statutes when such violations arise within the context of environmental crimes.'' Examples of non-environmental offenses often arising along with an environmental offense include false statements, mail and wire fraud and obstruction of justice. As is often the case, individuals and companies can end up dramatically increasing their criminal exposure by attempting to cover up environmental violations.

Enforcement Trends. Over the past few years, the EPA and analogous state environmental enforcement authorities have participated in a number of very large enforcement matters against name-brand retailers over their failure to properly characterize their waste early enough in the reverse distribution process. Such state and federal enforcement has resulted in very significant penalties. The Wal-Mart case is particularly noteworthy due to the size of the penalties and the oversight conditions imposed on the retailer. California has been particularly active in taking action against violators. In addition to the Wal-Mart case, several other large retailers, including Target, Rite-Aid and Safeway, have been subject to significant enforcement actions and penalties in the state. While it is a safe bet that the EPA and the states will continue to focus their attention on name-brand retailers, it may only be a matter of time before the EPA and the states turn to the hazardous waste practices of smaller retailers as well.

The Justice Department has also recently increased the stakes for executives, directors and employees who may have some involvement in a company's violation of environmental laws. In September 2015, the Justice Department issued the Yates Memo, which described a new policy that emphasized holding individuals ac-

countable for corporate wrongdoing. The Yates Memo directs the Justice Department to ''fully leverage its resources to identify culpable individuals at all levels in corporate cases'' and to use its ''best efforts to hold to account the individuals responsible for illegal corporate conduct.'' Among other things, the Yates Memo heightens the scrutiny of individuals by requiring companies to fully cooperate in the Justice Department's investigation of individuals in order to receive cooperation credit. While the full ramifications of the Yates Memo are still playing out, it is clear that executives, directors and employees will be closely scrutinized in the event any environmental violation is unearthed.

What to Do in the Interim? Despite the fact that the household hazardous waste exclusion covers potentially far larger volumes of materials than would be covered by an exclusion for retail products, we expect that the EPA will not provide for a broad exclusion for retailers similar to the household hazardous waste exclusion. On the other hand, given the obvious impracticality of requiring every retail store to bear the costs and responsibilities of being a RCRA generator site, we expect the EPA to make some kind of accommodation that respects the reality of retailers' reverse distribution processes while at the same time imposing standards to ensure some level of safety when handling and transporting returned products from stores to reverse distribution centers and, ultimately, disposal sites. The EPA has already proposed some changes in its Hazardous Waste Generator Improvements proposed rule. These changes do not go far enough, however, to provide retailers with a clear path for determining whether and how to characterize returned, damaged and otherwise defective products that show up at their door.

In the meantime, retailers should develop, if they haven't already, a comprehensive product return management program and make broad determinations for classes of products that are more likely than not to be deemed hazardous upon disposal, and modify their practices accordingly. One option, which Wal-Mart has pursued, might be to develop a database with information provided by suppliers so retail store staff can, at least roughly, determine a returned product's waste classification and handle it accordingly.

Retailers should also ensure that relevant employees fully understand any product return management program (and any other compliance policies). Retailers may also consider conveying to such individuals the existence of the Yates Memo and that individuals truly have ''skin in the game'' and could be held accountable for any misconduct. Retailers should also take this opportunity to analyze their current procedures regarding internal investigations to ensure they are best positioned to secure cooperation credit in the event the EPA or the Justice Department conduct an investigation into their operations.

Conclusion. Even the largest retailers can be caught off guard in a RCRA enforcement action if they do not have comprehensive plans in place for managing product returns and responding to government investigations. In this fluid regulatory environment, which we expect to continue for the next few years, such plans can help clarify ambiguities regarding retailers' waste management obligations, provide retail store staff with guidance for sensibly managing returned products in a cost-effective, safe, and efficient manner and allow retailers to effectively respond to any related government investigation.

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