

Some Pesticide Producers Face Unique Challenges Post-OSHA SDS Deadlines

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Industry and regulators alike in several sectors are still struggling to fully implement the U.S. Occupational Health and Safety Administration's (OSHA) 2012 overhaul of its Hazard Communications Standard. That overhaul, the first in several decades, for the most part adopted the United Nation's Globally Harmonized System of Classification and Labeling of Chemicals and required all companies with regulated workplace products to redesign the Safety Data Sheets (SDSs) and, if not exempt, product labels. As of December 1, 2015, all of the deadlines have passed for manufacturers and distributors to comply with the massive overhaul of OSHA's SDS and product labeling requirements.

For the pesticide industry, because U.S. Environmental Protection Agency (EPA)-regulated pesticides are exempt from OSHA's product labeling requirements, only the SDSs have required an update for most products. But many pesticide producers have discovered that their products face unique challenges, and some have struggled to meet the SDS deadlines. In particular, producers of only end-use products and registrants of generic versions of active ingredients have struggled to compile and analyze all of the necessary health data required to properly classify each chemical.

One significant concern in the pesticide industry is that generic/me too registrants may not have access to the necessary data to generate an SDS, potentially leading to differences among SDSs for substantially identical products. This is because a generic/me too registrant may be able, under FIFRA, to rely on all of the toxicity data generated by other registrants without ever seeing that data to bring

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a new product to market. However, when it comes time to generate the SDS required by OSHA, it is the results of those very toxicity studies which would provide the information necessary to properly classify their chemicals. Absent cooperation from the data holder, a generic/me too registrant may be forced to look for toxicity data and reported toxicity classifications from other sources such as published literature, EPA reviews, and other secondary sources. In a worst-case situation, a generic/me too registrant may have to assume toxicity classifications using only the EPA label language.

These issues may lead to significant inconsistencies between SDSs generated with access to the original data and SDSs generated without such access—a situation that can only cause confusion among users, generic/me too registrants, and basic registrants. However, there may be solutions to this situation. First, generic/me too registrants who have entered into data-compensation agreements may have the right to review the data for the purpose of generating health and safety information for the SDS, even if they do not have the right to “hard copies” of the studies. Other industries facing common classification questions have chosen to work together to develop exemplar SDSs for their products in an attempt to present consistent information to customers. Registrants who have formed a chemical-specific task force may wish to similarly utilize those arrangements to coordinate, or at least discuss, recommended SDS classifications.

In addition, within a single company there are opportunities for streamlining and coordinating SDSs. Where a producer makes numerous similar products (*e.g.*, product lines that vary only by small formulation changes or label statements), that producer may be able to use a single SDS for all of those products. This may enable a consistent SDS and help prevent inadvertent inconsistencies in the future when changes are made to the SDS. But, when using a shared SDS, it is important to ensure that the differences between the products do not introduce new hazards that must be separately warned, or that would change the hazard classification.

A second issue, one that is not necessarily unique to the pesticide industry, is how downstream pesticide producers (*e.g.*, formulators, re-labelers, supplemental distributors) deal with a lack of information. For example, if an active or inert ingredient supplier provides an SDS, but withholds key information as trade-secret, the downstream formulator may again be forced to either make worst-case assumptions, attempt to locate information from secondary sources, or generate its own data. In addition, a producer may be presented with conflicting SDSs for commodity ingredients from multiple suppliers. In such instances, the formulator must make its own determination as to the appropriate classification of the ingredient as they generate their own SDSs. And, because the party whose name appears on the SDS is fully responsible for its content, these downstream pesticide producers should not take these responsibilities lightly—it is they who will face enforcement, and it is not a good defense to argue that they simply relied on another company’s SDS.

For its part, OSHA has recognized some of the challenges faced by all downstream manufacturers—not just pesticide producers—and adopted a policy which allows for some leniency for companies who have “exercised reasonable diligence and made good faith efforts” to create their new SDS, but who have been stymied by non-cooperative upstream partners. While this policy has occasionally been inaccurately described as a “deadline extension,” it is not. It is a hardship policy only available in limited circumstances. OSHA has been very clear that once a company has received the information necessary to generate an SDS, it is allowed only six months to do so. And, even if an upstream supplier will not, or cannot, provide the needed

data, each producer is under an obligation to seek the data from other sources. In short, if a company still does not have an updated SDS in distribution, OSHA expects that company to be taking significant efforts to rectify the shortcoming.

OSHA has also made it clear that it expects those efforts to be well-documented. OSHA will not extend leniency in situations where there is insufficient documentation to prove all of the steps a company has tried (and failed) to come into compliance. Companies still facing compliance struggles would be well advised to keep comprehensive files documenting their efforts if they hope to be afforded any leniency.

It is clear that both industry and OSHA have devoted significant resources over the past three years to understanding and implementing the new HazCom standards. But questions and challenges remain. OSHA continues to issue Letters of Interpretation addressing unique issues as they are brought to OSHA's attention, but the deadlines for compliance have passed. The pesticide industry's unique challenges have meant that some producers may not yet be in compliance, and those that are not need to invest the time and resources to come into compliance as soon as possible