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Concerns from Importers of Articles and Downstream Businesses Prompt EPA to Extend Deadline to Self-Identify and Comment on TSCA Fees

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EPA has extended the deadline to self-identify as a manufacturer and comment on the agency's preliminary lists of manufacturers (including importers) subject to fees for risk evaluations of 20 "high-priority" chemical substances under the Toxic Substances Control Act (TSCA). This extension represents an important first step for the agency to provide clarity to manufacturers and importers about whether they need to self-identify as manufacturers of any of the 20 high-priority chemicals.

Wiley has highlighted concerns with EPA's approach to risk evaluation fees here and here. Notably, importers of articles that may contain one of these high-priority chemicals may need to pay a portion of the $1,350,000 fee for each evaluation. EPA has also stated that companies that produce a high-priority chemical substance as a byproduct or impurity in their manufacturing process may be subject to this fee as well.

EPA's decision to extend the deadline another 60 days, specifically until May 27, 2020, implies that the agency recognizes the potential, unintended impact of the fee obligations on countless industries and companies. The agency's email notification of the deadline extension acknowledged that EPA "is actively seeking ways to address the many implementation impracticalities that have been brought to [its] attention and to reduce concerns by affected entities."

Authors

Martha E. Marrapese
Partner
202.719.7156
mmarrapese@wiley.law

Practice Areas

Environment & Product Regulation
Import and Export
Toxic Substances Control Act (TSCA)

Therefore, we strongly urge companies to develop a response strategy appropriate to their business. Such a strategy could include taking advantage of this additional time and engage EPA with constructive, realistic suggestions on how to address the concerns that have been raised with the agency. For the moment, however, our read is that EPA believes its hands are tied by the rule. The agency may be approached to consider interpreting the fee provisions consistent with the scope of the risk evaluations – something the agency seemed to signal at the time the fee rule was issued (but has subsequently backed away from). It is frankly hard to believe that anyone involved in negotiating and passing the Lautenberg Amendments would have thought it fair to allow EPA discretion in the scoping exercise without some corresponding discretion to forego imposing fees on companies whose uses of a chemical are not included in the scope of the risk evaluation.

Surprisingly, several of the 20 high-priority chemicals still do not have consortia formed – the value of forming these consortia is now acutely obvious. Negotiations with existing consortia on entry fees and TSCA fees may be needed, and a due diligence exercise in the next two months to identify these chemicals in products, similar to what is required from companies under the TSCA CDR rule, should be considered. Wiley has significant experience leading consortia of chemical manufacturers and downstream industry sectors. We recommend companies take the long view on how these TSCA risk evaluations may affect their businesses when determining whether to join consortia, as engaging EPA early in the risk evaluation process may be crucial to the agency finding no unreasonable risk for your particular use of a chemical.