

ALERT

EPA Regulation Will Impact Many Companies That Have Used PFAS in Their Products

August 25, 2021

Comment Period Extended to September 27, 2021.

If you have been a manufacturer (including importer) of perfluoroalkyl and polyfluoroalkyl substances (PFAS)—commonly referred to as “forever chemicals”—since January 1, 2011, keep reading. You will need to pay close attention to a proposed rule that will require these manufacturers and importers to submit a myriad of data to the Environmental Protection Agency (EPA).

Compliance with this reporting requirement is a question of when, not if—EPA is required by the 2020 National Defense Authorization Act (NDAA) to issue a final rule no later than January 2023. EPA’s Spring Regulatory Agenda indicates the Agency’s intent to finalize the rule by July 2022. Now is the time, however, to shape (1) what companies will need to provide information in response to these new requirements and (2) the kinds of information these companies will have to give to the government.

Should you care? Most likely, yes, regardless of the size of your company. The amendments to the Toxic Substances Control Act (TSCA) that the 2020 NDAA made precluded EPA from providing a complete exemption in this rule for small entities. Therefore, small entities—even those importing articles—are included in the extensive reporting requirements.

As proposed, this rule will impact an extensive number of companies by applying TSCA regulatory reporting requirements to at least 1,364 PFAS chemical substances and mixtures, as long as they have been manufactured or imported in any year since January 1, 2011. Again, EPA is proposing to apply these requirements to companies that

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import products that have PFAS ingredients in them, even if the PFAS is inaccessible and can't be released. An example of this kind of product is one that contains PFAS as part of a surface or interior coating. These kinds of products also are referred to as "articles" under TSCA. EPA also plans to require companies to report if their products contain PFAS as part of a formulated mixture, or in any amount as either a byproduct or impurity.

It is crucial to weigh in now on the impact this rule would have on your business. As proposed, even companies that are unlikely to have data on PFAS will have to invest significant time and resources to search their files and communicate with upstream suppliers to comply with this rule. While EPA needs to include small entities to comply with the NDAA, small entities may want to consider whether there are less burdensome regulatory reporting options that EPA could incorporate into a final rule. These requirements are being included without a full understanding of the economic impact the proposed rule will have on small entities. EPA's proposal notes that they lacked information on the number of small importers of articles subject to the rule, and the agency is specifically seeking to learn more from this group of potentially affected companies.

Industries that will need to look closely at their products and articles include those engaged in manufacturing, importing, and distributing the following: chemicals, unlaminated plastic film/sheets, abrasive products, electronics, electrical components, appliances, containers, automobiles, wood products, navigation equipment, and surface and performance coatings for industrial and consumer products. Examples of potentially affected consumer product companies include importers and manufacturers of sports and recreational equipment, water resistant clothing, and carpets. In addition, waste management and disposal businesses will want to understand how this potential rule may apply to them.

The rule collects a wide range of information related to chemical identity and structure, production, use, exposure, disposal, and health and environmental effects. In the event that the manufacturer does not have actual data to report (e.g., monitoring data), EPA is proposing to require manufacturers and importers to make "reasonable estimates" of such information. The proposed reporting is for 'maximums' (e.g., maximum duration of exposure for any worker)—the ability to provide an average estimate would not be allowed under EPA's proposal. Examples of information proposed for submission include:

- Chemical name, molecular structure, physical form, function, and use;
- Consumer and commercial uses, maximum concentrations used in any product, and information for use in products intended for children;
- Worker exposure information, including maximum exposure for any work for each worker activity;
- Descriptions of disposal processes; and
- All existing environmental and health effects information on the substance or mixture, not limited to studies conducted or published since 2011.

Wiley recently announced the arrival of Charlotte Bertrand, a distinguished senior management executive with 24 years of experience at EPA and a deep understanding of the agency's PFAS Action Plan. For a consultation with Charlotte, Erik Baptist, or Martha Marrapese to explore how we can support your development of public

comments on this proposal, interested parties should reach out to mmarrapese@wiley.law.