

ARTICLE

PFAS – New Rules and Reporting Requirements

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This month the Environmental Protection Agency (EPA) will publish two significant regulations in the Federal Register to tighten controls on long-chain perfluoroalkyl and polyfluoroalkyl substances (PFAS). These rules affect the ability of companies to continue to make or use certain long chain PFAS and will require facilities to report the on-site presence of 172 of these chemicals at 100 pounds or more to EPA beginning next year.

PFAS is a broad term that refers to the family of man-made, perfluoroalkyl and polyfluoroalkyl substances. The media refers to them as "forever chemicals" due to the longevity that long chain PFAS exhibit in the environment and the human body (persistence and bioaccumulation) as a result of their strong carbon-fluorine bonds. Two of the most well-studied long chain PFAS chemicals are perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS).

EPA has achieved a major accomplishment to restrict anyone's ability to make or use these chemicals by finalizing a significant new use rule (SNUR) to ban new or discontinued uses of many long-chain PFAS chemicals listed on the Toxic Substances Control Act (TSCA) Inventory. The rule applies to two specific lists of long chain PFAS chemicals (26 specific chemicals, including PFOA) that are identified by Chemical Abstracts Service Registry Number (CASRN) and chemical name. However, all PFOA salts also are regulated by the rule, as are a number of other long-chain PFAS chemicals that meet a specific chemical definition. The definition is extremely broad – it folds in most chemical substances with perfluorinated carbon chain lengths equal to or greater than seven carbons and less than or equal to 20

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carbons, including their salts and precursor chemicals. This SNUR is unique in that EPA does not allow an exemption for importing articles that are surface coated with the long-chain PFAS chemicals listed in the rule - or any PFOA salt. It is the responsibility of manufacturers and importers to make these complex determinations concerning whether products will be banned in U.S. commerce by this SNUR. Decisions concerning whether a product that meets TSCA's definition of an article is exempted by this SNUR should be approached carefully and with expert advice, in particular.

As part of issuing the SNUR, EPA concluded that companies have discontinued most of the uses of the long chain PFAS captured by the SNUR. A discontinued use allows EPA to use its SNUR authority under TSCA to make a finding that to commercialize such a use again would be a "new" use. By requiring that manufacturers notify EPA before they can begin a new use or reintroduce an old one, EPA would then have to decide if the use would likely present unreasonable risk. If the use would likely present an unreasonable risk, EPA could prevent it. There is only a small list of uses that still exist for these chemicals that EPA has exempted from the SNUR because companies notified EPA about them during the public comment period for this rule, which was first proposed in 2015. Even though this SNUR had been in development since 2015, there still may be companies, including downstream users of these chemicals, that are learning about the rule for the first time. Since the rule will be effective 60 days after publication in the Federal Register, it is important to find out now if your products are affected because they contain these long-chain PFAS chemicals.

The second significant action EPA is taking is to closely monitor 172 long chain PFAS chemicals by requiring Toxic Release Inventory (TRI) reporting for these listed chemicals. EPA was directed to impose more monitoring on PFAS chemicals through a provision (Section 7321) that was added to the National Defense Authorization Act for Fiscal Year 2020 (NDAA), which was signed into law in December 2019. Section 7321 added certain PFAS to the TRI list of reportable chemicals effective as of January 1, 2020. The NDAA identifies 14 chemicals by name and/or Chemical Abstract Service Registry Number (CASRN) in Section 7321(b) and identifies additional PFAS based on the following criteria: "(i) listed as an active chemical substance in the February 2019 update to the TSCA Inventory under section 8(b)(1) and (ii) on the date of enactment of this Act, subject to the provisions of— (I) section 721.9582 of title 40, Code of Federal Regulations; or (II) section 721.10536 of title 40, Code of Federal Regulations." Per 40 C.F.R. § 372.5, the "owners and operators" of a facility that manufactures (including imports), process, or otherwise use listed toxic chemicals listed in excess of an applicable threshold quantity are responsible for completing TRI reporting. The threshold for reporting is normally 25,000 pounds of the chemical manufactured or processed for the year, or 10,000 pounds otherwise used. However, in the case of the PFAS chemicals, there is a much lower reporting threshold of only 100 pounds total on-site, which includes distribution warehouses. Beginning this year, companies need to keep track of the information needed to report for these chemicals. TRI reports will need to be filed for the first time for these chemicals next year, on July 1, 2021. The 2020 Chemical Data Reporting (CDR) information that EPA will receive later this year (by November 30th) will update manufacture, processing, use and exposure information on long-chain PFAS chemicals.

A Wiley webinar with Erik C. Baptist and Martha E. Marrapese, partners in the firm's Environment & Product Regulation Practice, and Richard W. Smith, co-chair of the Litigation Practice, was featured in a June 22 *Inside*

TSCA article on the likelihood of increased liability lawsuits under the Toxic Substances Control Act, the Comprehensive Environmental Response, Compensation and Liability Act, and other laws. The Wiley program – “Legal and Business Considerations Every Company Should Know About PFAS Under TSCA and Beyond” – was part of Wiley’s 2020 TSCA Webinar Series. Our panel addressed the legal and business considerations that companies should be aware of regarding PFAS chemicals. We advised auditing company operations for PFAS risks and liabilities and discussed legislation and recent plaintiff victories as causes for potential increased litigation, including the potential for Superfund clean-up requirements in the future. To read the *Inside TSCA* article, [click here](#) (*subscription required*). To listen to the Wiley webinar, [click here](#).

Is Your Business Affected by The New PFAS Rules?

Your company may be affected if you have long chain PFAS ingredients in a consumer product. PFAS manufacturing, processing, and places that use firefighting foams with PFAS may also be impacted by these rules. These and other sectors as potentially affected by the new rules:

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Manufacturers of surgical and medical instruments (NAICS 339112).

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Fiber, yarn, and thread mills (NAICS code 31311).

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Carpet and rug mills (NAICS code 314110).

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Home furnishing merchant wholesalers (NAICS code 423220).

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Manufacturers of computer and other electronic products, appliances, and components

Merchant wholesalers (NAICS codes 423 and 424), Stores and retailers (NAICS codes 442, 442, 444, 448, 451, 454), and providers of other support services (NAICS code 561990) may also be affected to the extent that they store or import products containing these chemicals.

