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TSCA Cost Sharing Consortias Are Broken Due to EPA Rule – Can They Be Fixed?

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Under the EPA fee rule for TSCA (40 C.F.R. § 700.45), manufacturers (including importers) of chemicals undergoing risk evaluation are subject to the TSCA fee of $1.35 million. Following publication of a preliminary list of fee payers in January 2020, companies who make or import the next 20 chemicals to undergo risk evaluation in any quantity were required to identify themselves to EPA. Initially there were no exemptions from this requirement, so companies who imported the next 20 chemicals in any quantity, even as impurities and in articles and de minimis amounts in mixtures, had to sign up to pay the fee. EPA subsequently offered enforcement discretion to companies who import these chemicals in articles, or when they are present as impurities and byproducts.

The deadline for self-identifying to EPA was May 27th. On September 4th, EPA issued the final list of fee payers, as well as the final scopes for the 20 chemicals. Fee payments are now due within 120 days of publishing the final scope of an EPA-initiated risk evaluation (by January 2021). Until November 4, industry can notify EPA of the formation of consortiums. Companies that do not join consortia will be invoiced by EPA for their per capita (equal) share separately. The agency plans to begin invoicing for the fees after this 60 day period; due to the public health emergency, EPA is reportedly exploring options for payment flexibility.

As downstream customers who happen to import these chemicals are fast learning, the major manufacturers and importers of the next 20 chemicals have no incentive to enter into consortia agreements that apportion the fee payment based on market share. Companies are

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expected under EPA's rule to pay no more than equal amounts of the total fee split among all of the participating companies. This means that a company who imports 6 pounds of a chemical is on the hook for the same amount as a company who manufactures 60 million pounds. Right now, these companies are facing fee payments on the order of $50,000 to $115,000.

It is important to note that companies could not choose to stop making or importing these chemicals in May to avoid these fees. By rule, the cutoff date is when EPA *commences prioritization* for the chemical, which happened for the next 20 chemicals in March 2019. 40 C.F.R. § 700.45(b)(5)(ii) and (b)(6)(i). EPA did not publish a preliminary list of manufacturers and importers subject to the risk evaluation fees until January 2020. Since EPA does not announce which chemicals it plans to prioritize in advance, the current rule does not provide a reasoned opportunity for importers of small amounts of these chemicals to avoid these fees by finding a substitute. In fact, the rule encourages just the opposite and locks companies into continuing to use these chemicals over the next 5 years to the greatest extent possible, to justify having to pay the fee. EPA was concerned about companies gaming the system by leaving the market and then re-joining after it's too late to be charged a fee. Several commenters during the rulemaking expressed the same concern, and directed EPA to look at the process for reimbursement that already exists in section 4 of TSCA and adopt a similar procedure. EPA declined, and in so doing created a process that offers no immediate incentive to find a substitute, and puts an undue and costly regulatory burden on downstream users.

It doesn't make sense for companies to join coalitions under these terms if it would only result in paying more based on having a larger share of the market. As a result, for the importer of 6 pounds of one of these chemicals in a mixture, there is no realistic alternative right now to having to pay a per capita share of the fee to EPA.

EPA plans to issue a proposed rule to amend the fee rule and eliminate fees in certain cases, such when they are used strictly for R&D, and when present in imported articles and as impurities or byproducts. In other words, the proposal is reportedly slated to include the traditional suite of exemptions found in 40 C.F.R. § 720.30. We expect to see the proposal before the end of the year. It's worth noting that there are no quantity limits associated with being excused from fees if you qualify in one of these categories, and that these conditions of use are still within the scope of the risk assessments.

However, it's not clear that EPA plans to include an exemption for de minimis quantities in mixtures. We don't think the suppliers of chemicals that undergo risk evaluation are likely to advocate for a de minimis exemption for imported mixtures, due to concerns about shrinking the fee base. EPA may share this same concern. It is likely that the major manufacturers and importers will put more emphasis on advocating for greater flexibility in fee sharing.

Historically, it was common practice for the manufacturers of chemicals that have undergone testing or evaluation by EPA have agreed to share costs amongst themselves according to production volume without involving the customer base directly. Through the leadership exercised by these consortia, the customer base was traditionally released from payment obligations of TSCA, as in the case of testing programs conducted under section 4. As we already noted, the EPA rule is disincentivizing suppliers from following this example.

The way EPA has structured the rule, anyone who wants to manufacture/import a chemical undergoing risk evaluation is most likely going to wind up paying a per capita share. U.S. antitrust law contemplates that each competitor will try to minimize its own costs and no company is required to accept a higher cost in order to provide a benefit to a competitor. There is no incentive in the EPA rule for companies to do other than achieve that result (with a break for small businesses). As a result, the rule works against forming consortia that allow alternative arrangements based on production volume, since taking a per capita share will cost less for the companies with larger volumes than anything the consortium can otherwise devise. Some commenters tried to alert EPA that the ability to pay a smaller fee could affect consortia decision-making by relatively large producers. A per capita fee consortium is the natural effect of the regulations, and companies are acting in their own best interest under the rule.

Since the cut-off date for not having to pay these fees has passed, and no exemptions are currently available for de minimis quantities in imported mixtures, the incentive or benefit associated with engaging with the consortium remains primarily in the technical expertise they offer to engage with EPA during the risk evaluation. However, it's not clear what additional cost beyond the initial fee that would involve. Is there any incentive for companies to apportion those costs on anything other than a pro capita basis either?

In short, companies are left with having to try and predict what chemicals EPA will commence for prioritization in the future, which is virtually impossible to do. Alternatively, these companies could plan to strongly advocate for an exemption for de minimis quantities in mixtures. In general, it may prove difficult to apply any changes to the rule retroactively. Even so, there is still a chance to change things for the better in the future to make the system fair.

There is a general sense inside the Beltway that a number of importers have inadvertently or intentionally failed to report on these first 20 chemicals, and there are many companies who are facing large invoices from the government disproportionate to their use. This promises to be an active area during the upcoming rulemaking process.