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TSCA's Information Grab – Manufacturers and Importers Subject to Proposed Expansive Ten-Year "Look Back" PFAS Reporting Requirement

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Did you manufacture or import a water repellant t-shirt or a nonstick cooking pan or high performance mountain wear in the past ten years? If so, you could be required to provide ten years of past data and details regarding Per- and Polyfluoroalkyl Substances (PFAS) in the product, regardless of the quantity of the PFAS and regardless of the size of your company. On June 28, 2021, EPA proposed a new Part 705 to the Toxic Substances Control Act (TSCA) regulations entitled "Reporting and Recordkeeping Requirements for Certain Per- and Polyfluoroalkyl Substances." (Proposed Rule). The Proposed Rule seeks to impose a one-time reporting requirement on all manufacturers and importers of PFAS or finished products containing PFAS to provide a wide variety of information regarding the PFAS dating back to January 1, 2011. Comments are due September 27, 2021. This Proposed Rule, which must be finalized by January 1, 2023, is unprecedented in its scope and potentially affected parties would be well-advised to consider voicing their concerns to EPA before the public comment period closes.

Does EPA really have authority for this ten-year reporting requirement? What is the basis for the Proposed Rule?

Yes, EPA has the statutory authority for the Proposed Rule. The PFAS Act of 2019, which was part of the omnibus National Defense Authorization Act for Fiscal Year 2020, added section 8(a)(7) to TSCA providing:

> *PFAS Data. Not later than January 1, 2023, the Administrator shall promulgate a rule in accordance with this subsection requiring each person who has manufactured a chemical substance that is a perfluoroalkyl or polyfluoroalkyl substance in any year since January 1, 2011, to submit to the Administrator a report that includes, for each year since January 1, 2011, the information described in subparagraphs (A) through (G) of paragraph (2).*

EPA states that the purpose of the Proposed Rule is to help EPA better understand the sources and quantities of PFAS manufactured or imported in the Unites States and support its research, monitoring and regulatory efforts. It is expected that EPA will use the information generated to support new regulatory activities under the Safe Drinking Water Act, the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation and Liability Act.

My small company just imports water repellant running shirts – we don't manufacture chemicals! Does the Proposed Rule really apply to my company?

Yes, in its currently drafted form, the Proposed Rule applies to manufacturers or importers of PFAS, including manufacturers and importers of articles (i.e., finished products) containing PFAS.[1] This is vastly different from TSCA's Chemical Data Reporting (CDR) requirements, which excludes chemical substances that are part of an article (i.e., the chemical substance is not intended to be removed from the article and has no end use or commercial purpose separate from the article).[2] In addition, contrary from other TSCA reporting requirements, the Proposed Rule applies to all manufacturers and importers – big and small - and all articles (i.e., finished products) containing PFAS – no matter the quantity, even if it is an impurity or byproduct. Further, although EPA identifies the categories from which it expects the majority of PFAS information to emanate, it is not limited to these categories. Research has found PFAS present in a vast array of products, ranging from nonstick cookware to stain resistant carpet to waterproof high performance technical gear to water repellant exercise clothing to fishing lines and more.[3] As a result, all of these combine such that the Proposed Rule could reach a huge universe

of potential reporters, many of which have not been subject to TSCA requirements previously.

Which PFAS are subject to the reporting requirements?

Practically all PFAS are included. The Proposed Rule includes five extensive lists of PFAS, but it states that the lists are not comprehensive and the list may grow. Further, EPA explains that the lists serve to provide "examples" of the categories of PFAS covered by the Proposed Rule, not a limitation on the covered PFAS.

Wow. So what comes next? What information would we be required to report?

The Proposed Rule would require manufacturers and importers to report detailed PFAS information for a ten-year period, dating back to 2011. This information, which is dictated by the underlying legislation, includes:

- Chemical identity;
- Categories of use;
- Volumes manufactured or processed;
- Byproducts;
- Environmental and health effects;
- Workplace exposure; and
- Disposal methods.

Ten years of this information? My company doesn't keep records on this! Are we still expected to report?

Maybe. Although the preamble to the Proposed Rule recognizes that not all manufacturers and importers of articles may have this extensive information on hand, the Proposed Rule would require some reasonable effort or "due diligence" to obtain the information. The Proposed Rule requires reporting of information "known to or reasonably ascertainable by" the manufacturer or importer. This requirement means "all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control or know." EPA explains that this "reasonably ascertainable" standard requires manufacturers and importers to conduct a reasonable inquiry within the full scope of their organization – not just information known to managerial or supervisory employees. In addition, EPA notes that inquiries outside of the organization may be required to fill data gaps, including phone calls or email inquiries to upstream suppliers or downstream users or employees or other agents of the manufacturer, including persons involved in the research and development, import or production or marketing of the PFAS. In the end, it is likely that importers will not identify any concrete data regarding PFAS and that such report will fall into a large category of "unknowns."

What comes next?

The public comment period on the Proposed Rule is scheduled to close on September 27, 2021. Potentially impacted parties should consider submitting public comments to let their concerns be heard. Comments should be designed to persuade EPA that the burdens presented by the wide scope of the Proposed Rule is not commensurate with the potential "benefits" the Proposed Rule is designed to obtain – the risks presented to PFAS in the form of usable data to inform EPA's other regulatory programs. Specifically, the broad brush of the Proposed Rule, sweeping up byproducts, impurities and de minimus quantities of PFAS, is likely to create a potentially huge dataset of information that does no more than tell EPA what everyone already knows--PFAS are everywhere.

It is possible that EPA may decide to reduce the scope of the Proposed Rule to allow some exemptions and create a threshold quantity for PFAS similar to the CDR and other TSCA reporting requirements. As a result, input regarding the Proposed Rule may be critical at this stage to assist EPA in proper tailoring of the reporting requirement

A few closing thoughts.

- It is noteworthy that this reporting requirement was not part of the Frank R. Lautenberg Chemical Safety for the 21st Century, which significantly amended TSCA in 2016. Rather this reporting requirement is mandated under a standalone provision in omnibus defense legislation. In addition, the legislation creating this reporting mandate is unusual in that it places limitations on EPA's discretionary authority regarding the scope and timing of the reporting requirements, including specific identification of data to be reported, the retrospective ten-year reporting period and the firm deadline of January 1, 2023 for the final rule to be issued.

- The Proposed Rule does not contain any of the standard exemptions found under other TSCA reporting rules.[4] There is no exclusion for articles

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containing chemical substances. There is no exemption for small businesses. There is no minimum quantity threshold. There is no exemption for byproducts. There is no exemption for impurities. There is no research and development exemption.

- It is unclear that EPA really understands what it is asking for. Some fallacies in EPA's approach: First, the data generated from this huge field of potential reporters is likely to produce a cumbersome and unwieldy set of information that will be difficult to manipulate to understand true PFAS risks. Second, PFAS data on consumer goods and manufactured products may only be available in percent quantities whereas EPA seeks to measure PFAS concentration in the field and for regulatory considerations in the parts per trillion. Thus, the data obtained on articles might overlook some PFAS sources or it may overstate some sources. Third, EPA should consider the fate and transport of PFAS when tailoring these reporting requirements – how do PFAS enter the environment in a way that would present risks? For example, PFAS constituents in fire-fighting foam that is intentionally dispersed into the environment presents entirely different and elevated concerns as compared to PFAS constituents in water repellent clothes when washed or disposed.

- EPA recognizes that it is possible (and, in reality, it is probable) that an importer of articles may not have knowledge that they have imported PFAS despite their exercise of due diligence. It will be difficult, if not impossible for most importers to have any relevant data to report. In such case, EPA states that the importer should document its efforts to make a claim that it used due diligence. For example, an importer should document that its supply chain records were reviewed even if nothing responsive was identified. In addition, companies should be cautious about stating that products contained PFAS without direct evidence. It is anticipated that PFAS will be designated Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) "hazardous substances" at some point in the near future and PFAS are likely to be present at many CERCLA sites (some long closed). Any report of the presence of PFAS could be deemed liability admissions at worst or, at best, grounds for issuance of a Section 104(e) inquiry in the future by EPA or some Potentially Responsible Party (PRP) Group.

- Further, in the same vein regarding reporting of PFAS in articles, EPA's purported "due diligence" standard for a reasonable inquiry is too vague and unlikely to pass muster if EPA is seeking to combine it with any enforcement authority they might want to use.

- Final conclusion – Overreach often causes the ladder to collapse first before the intended result can be achieved and that certainly may be the case with the Proposed Rule. EPA's initial attempts to generate good data may fail due to overbroad approach.

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[1] The only manufacturers and importers of articles that are excluded are those manufactured and imported products and articles for food, medical and cosmetic uses that are regulated by other federal statutes.

[2] 40 C.F.R. 711,10(b), See also EPA's Guidance on the CDR's exclusion of articles containing chemical substances.

[3] See Environmental Science: Processes & Impacts (2020) for an overview of the vast array of uses of and products containing PFAS.

[4] Food, drugs and cosmetics regulated by the Food and Drug Administration are excluded from TSCA's reporting coverage.