EPA Finalizes TSCA CDR Rule

On March 17, 2020, the U.S. Environmental Protection Agency (EPA) released a prepublication copy of its final rule amending the Toxic Substances Control Act (TSCA) (15 U.S.C. § 2601 et seq.) section 8(a) Chemical Data Reporting (CDR) rule appearing at 40 C.F.R. Part 711. This rule requires U.S. manufacturers and importers of certain substances listed on the TSCA Chemical Substance Inventory (Inventory) to report every four years, using EPA's e-CDRweb reporting tool, certain information pertaining to the manufacture, import, process, and use of those substances.

The CDR submission period is scheduled to begin June 1, 2020. To allow the regulated community to familiarize itself with the amended requirements, however, in a separate prepublication notice EPA announced the extension of the deadline for submitting 2020 CDR reports until November 30, 2020. EPA expects that approximately 5,660 sites will report for the 2020 CDR.

EPA amended the rule for three primary reasons: to align CDR reporting with the 2016 amendments to TSCA under the Frank R. Launenberg Chemical Safety for the 21st Century Act; to improve collected data to support TSCA implementation; and to reduce burdens for certain reporters. The final rule largely mirrors the proposed rule, but certain changes were made from the proposal.

The final rule:

- Modifies the requirements for making confidential business information (CBI) claims, updates the applicable CBI substantiation questions, and identifies data elements that cannot be claimed CBI. Notably, while EPA is exempting certain production volume data elements from upfront CBI substantiation requirements, this does not include volume used on-site or volume directly exported.

- Replaces certain of the required existing processing and use codes (industrial function and commercial/consumer product use) by phasing in function codes based on the Organization for Economic Cooperation and Development's (OECD) functional use and product and article use codes and requires OECD-based codes for consumer and commercial use information. This will greatly increase the number of potential codes for consideration.

- For the 2020 CDR submission period, OECD-based codes will be required for substances designated by EPA on December 30, 2019 as “high priority” substances; OECD codes will be required for all substances for the 2024 CDR submission.

- Adds a requirement to report the 6-digit North American Industry Classification System (NAICS) code for the site of manufacture that best describes the manufacturing activities conducted at the reporting site.

- Amends the requirement to indicate whether a reported substance is removed from a waste stream and recycled, remanufactured, reprocessed, or reused, by changing the requirement to indicate whether a substance
is removed from such a stream and recycled.

- Allows reporters to voluntarily identify the percent total production volumes (in ranges) of substances that are “byproducts.”

- Mandates that a secondary submitter of a joint submission (typically a foreign supplier) report the specific function of the reported substance along with the percentage of the substance in the imported product.

- Changes certain provisions pertaining to “parent companies” - the rule requires use of a specified naming convention, requires identification of a foreign parent company (when the ultimate parent company is located outside of the U.S.), and codifies reporting scenarios for the “highest-level parent company.”

- Provides two options for reporting by co-manufacturers (viz., “toll” manufacturers).

  - **Option 1:** the contracting company initiates a co-manufacturer report and sends a notification to the producing company - each company completes its portion of the CDR report and has no access to the other company’s portion

  - **Option 2:** the contracting and producing company agree in writing to work together - the producing company initiates and completes the report (both parties are responsible for the report)

- Adds exemptions for specifically identified byproducts recycled in site-limited, enclosed systems, as well as for byproducts produced as part of non-integral pollution control and boiler equipment.

- Seeks to clarify existing regulatory text by removing outdated text and making other improvements.

In the proposed rule (84 Fed. Reg. 17,692, Apr. 25, 2019), the Agency had sought to update the TSCA section 8(a) size standards definition for small manufacturers and importers, but these amendments will appear in a separate final rule that was submitted to the Office of Management and Budget (OMB) on March 6. EPA is also not finalizing proposed changes pertaining to the inclusion of a public contact, reporting within metal compound categories for inorganic byproducts, and consolidation of byproduct exemption regulations.

EPA has reportedly made various enhancement to the e-CDRweb reporting tool to facilitate reporting. EPA anticipates holding a webinar to introduce the revised e-CDRweb reporting tool to the regulated community in the next several weeks and will provide a small group of interested parties with an opportunity to test and comment on the updated e-CDRweb reporting tool prior to the 2020 submission period.

Importantly, CDR, as well as Toxic Release Inventory (TRI) reporting, are key data sources being used by EPA for chemical prioritization and risk evaluations under TSCA. Submitting complete and accurate data and keeping in mind the “known to or reasonably ascertainable by” due diligence standard required of reporters are critical. With substantial monetary penalties for non-compliance and aggressive EPA enforcement, companies would be well advised to understand the subtleties of the amended rule and strictly comply with its requirements.

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