

ALERT

EPA Finalizes Significantly Higher TSCA User Fees

February 27, 2024

The U.S. Environmental Protection Agency (EPA) has issued its final rule that significantly raises user fees under the Toxic Substances Control Act (TSCA). As shown below, there are large fee increases in key areas such as new chemical submissions and existing chemical reviews. These fees go into effect on **April 22, 2024**.

EPA Summary of Changes in TSCA Fees¹

TSCA Fee Category

Current Fees

As of April 22, 2024

Test order

\$11,650

\$25,000

Test rule

\$35,080

\$50,000

Enforceable Consent Agreements

\$27,110

\$50,000

Authors

Sara Beth Watson
Of Counsel
202.719.7071
swatson@wiley.law

Martha E. Marrapese
Partner
202.719.7156
mmarrapese@wiley.law

Practice Areas

Environment & Product Regulation
Toxic Substances Control Act (TSCA)

Premanufacture notice (PMN), consolidated PMN, significant new use notice (SNUN), microbial commercial activity notice (MCAN), and consolidated MCAN

\$19,020

\$37,000

Low exposure/low release exemption (LoREX), low volume exemption (LVE), test-marketing exemption (TME), Tier II exemption, TSCA experimental release application (TERA), film article

\$5,590

\$10,870

EPA-initiated risk evaluation

Two payments resulting in \$2,560,000

Two payments resulting in \$4,287,000

Manufacturer-requested risk evaluation (MRRE) on a chemical included in the TSCA Work Plan

Two payments of \$945,000, with final invoice to recover 50% of actual costs

Two payments of \$1,414,924, with final invoice to recover 50% of actual costs

MRRE on a chemical *NOT* included in the TSCA Work Plan

Two payments of \$1.89M, with final invoice to recover 100% of actual costs

Two payments of \$2,829,847, with final invoice to recover 100% of actual costs.

Companies that qualify as small businesses will receive an 80% discount on the fees listed above. In addition, EPA has decided to forgo imposing some smaller fees on businesses that were part of the proposed rule where EPA found that the costs could be borne by the final fee structure. As a result, there are no user fees for filing Bona Fide Notices or Notices of Commencement (NOC) or when EPA issues an amended test order. Finally, Tier I microbial exemptions and polymer exemption reports will continue to be exempt from fees.

How EPA Uses These Fees

TSCA user fees support EPA's administration of test orders, consent agreements, and rules under Section 4; new chemical reviews conducted under Section 5; EPA-initiated existing chemical reviews; manufacturer-requested risk evaluations (MRRE) under Section 6; and confidential business information (CBI) protection and review in Section 14 of TSCA. EPA reduced its annual cost estimate of administering TSCA from \$182 million to \$147 million in the final rule.

The bulk of EPA's estimated annual costs is assigned to Section 5 (\$40 million) and Section 6 (\$70 million). EPA may impose fees to offset up to 25% of authorized TSCA implementation costs, excluding MRREs. The agency expects that the new user fees will meet the maximum 25% contribution allowed by law, at \$36.7 million. Fees for MRREs are separately estimated to bring in \$5.7 million annually.

Important Exemptions in the Final Rule From Testing and Existing Chemical Reviews

EPA has finalized important exemptions from risk evaluation and test rule fees. However, EPA will require companies to submit a certification that they qualify as exempt in certain cases. There are six exemptions in total:

- (1) Importers of articles containing the chemical substance;
- (2) Producers of a chemical as a non-isolated intermediate as defined in 40 CFR 704.3;
- (3) Manufacturers of small quantities of a chemical substance used solely for research and development (R&D) as defined in 40 CFR 700.43;
- (4) Manufacturers of chemical substances with production volume less than 2,500 lbs. for TSCA Section 6 activities and 1,100 lbs. for TSCA Section 4 test rules;
- (5) Producers of a chemical substance as a byproduct that is not later used for commercial purposes or distributed for commercial use; and
- (6) Manufacturers of a chemical substance as an impurity as defined in 40 CFR 704.3.

Companies that qualify for the non-isolated intermediate exemption, the R&D exemption, and the 2,500 lbs. production volume exemption will have to certify that they qualify as exempt. EPA distinguished these three categories as "volume-based" exemptions that should be accounted for as exempt under a volume-based approach for allocating fees. Furthermore, while there is no express language in the final rule to reflect this, EPA is exempting manufacturers of exclusively exported chemicals from risk evaluation fees. EPA declined to exempt companies that export and then re-import existing chemicals subject to risk evaluation from user fees but appears to suggest in the final rule that no double counting of re-imported quantities is required when calculating production volumes for allocating user fees.

Other Changes

As many downstream companies have come to appreciate, TSCA increasingly requires their participation. For the latest group of 20 chemicals selected for risk evaluation, EPA is issuing test orders that call on processors to provide or generate exposure information. In this rule, EPA has finalized a provision to require that these processors share in the payment of the associated user fee.

EPA decided *not* to finalize a proposal to refund companies 20% of the user fee if a PMN is withdrawn within 10 business days. Despite all of the difficulties that have transpired with the PMN program since 2016, grounds for asking for a PMN fee to be refunded remain unclear.

In addition, EPA decided not to address free-riders and will instead monitor the need for such rules in the future. EPA is sticking with the decision to ban companies that claim an exemption from existing chemical fees from re-entering the market for five years, rather than provide an avenue for payment upon re-entry.

Why the Hike, and Future Considerations

EPA has consistently stated, in public remarks and in testimony to Congress, that it has had insufficient funding to administer TSCA's programs in a timely way. Congressional funding is the largest driver behind this rule. Although Congress gave EPA almost \$20 million in additional funds for these programs in FY 2023, the agency is facing the same or even lower funding levels in FY 2024. The House of Representatives passed a whopping 40% cut in overall EPA funding last November. It appears that the Senate's plan is to maintain the status quo of \$10 billion. Only time will tell whether the additional user fees allow TSCA implementation to take sail. The agency's fee collection estimates presume a lower number of new chemical submissions annually. Bear in mind that this rule establishes a new floor for TSCA fees – not a ceiling. Companies may face further increases in the future, as Section 26 of TSCA gives EPA discretion to continue to raise fees every three years.

On a positive note, EPA recognized the need for reasonable exemptions as part of the user fee program. While this final rule will not change the amount of fees EPA will collect, and EPA could have made it easier to show how an exemption applies, these exemptions will make the fee program easier to administer. EPA also recognized the need to extend or better align several important deadlines in this rule. For example, EPA extended the time for when user fee payments for testing and existing chemical reviews are due from four to six months. Companies will now have 90 days (instead of 60) to notify EPA of the formation of consortia associated with an existing chemical review. EPA also adopted a more equitable approach by updating its methodology for allocating existing chemical review fees from a *per capita* to a production volume-based approach, based on three years of production data, in any scenario in which a consortium is not formed.

In sum, this is a multifaceted rule that will have implications for years to come. For more information on the rule, please contact the authors listed on this alert.

¹ Fees for the Administration of the Toxic Substances Control Act (TSCA), 89 Fed. Reg. 12961, 12966 (Table 8) (Feb. 21, 2024). As noted there, current fees reflect 2022 inflation adjustments.