

New Recordkeeping and Reporting Requirements for PFAS Manufacturers – Comment Period Extended

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If you have been a manufacturer (including importer) of perfluoroalkyl and polyfluoroalkyl substances (PFAS) since January 1, 2011, keep reading – you'll want to pay close attention to a new data call from the Environmental Protection Agency (EPA).

Using section 8(a) of the Toxic Substance Control Act (TSCA), as amended by the 2020 National Defense Authorization Act (NDAA), EPA is proposing a significant one-time reporting requirement for all manufacturers of PFAS.

Should you care? Most likely, yes. As proposed, this rule will impact an **extensive** number of entities by applying TSCA regulatory reporting requirements over a ten-year horizon to over 1000 PFAS compounds. This group includes companies that import articles and small entities unless EPA is persuaded to add exemptions or allowances for these and other groups during the rulemaking process. The proposed reporting requirement also applies to any level of PFAS, even if found as an impurity in your products.

Industries that will need to look closely at their products and articles include those engaged in manufacturing, importing, and distributing the following: chemicals, unlaminated plastic film/sheets, abrasive products, electronics, containers, automobiles, navigation equipment, medical equipment, and surface and performance coatings for industrial and consumer products. Examples of potentially affected consumer product companies include importers and manufacturers of

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sports and recreational equipment, water resistant clothing, and carpets. In addition, waste management and disposal businesses will want to understand how this potential rule may apply to them.

Scope and Timing.

At least 1,364 PFAS chemical substances and mixtures are the proposed subject of reporting if they have been manufactured in any year since January 1, 2011. EPA’s proposal broadly applies to articles (including articles containing PFAS as part of a surface coating), mixtures, byproducts, and impurities containing **any** amount of the PFAS substance. The amendments to TSCA made by the 2020 NDAA precluded EPA from providing an exemption in this rule for small entities, therefore small entities, even those importing articles, are included in the extensive reporting requirements.

The rule collects a wide range of information related to chemical identify and structure, production, use, exposure, disposal, and health and environmental effects. In the event that the manufacturer does not have actual data to report to EPA (e.g., monitoring data), the EPA is proposing to require the manufacturer to make “reasonable estimates” of such information.

Examples of information required for submission include:

- Chemical name, molecular structure, physical form, function, and use.
- Consumer and commercial uses, maximum concentrations used in any product, and information for use in products intended for children.
- Worker exposure information, including maximum exposure for any work for each worker activity.
- Descriptions of disposal processes.
- All existing environmental and health effects information on the substance or mixture, not limited to studies conducted or published since 2011.

The type of data EPA is proposing to collect may signal the Agency’s intent to use worst case scenarios to predict risk from PFAS exposure. The proposed reporting is for ‘maximums’ (e.g., maximum duration of exposure for any worker) and other data, such as averages or central tendency estimates, are not being sought.

It is also worth noting that compliance with the reporting requirements of this proposal maybe particularly challenging for small entities unaccustomed to keeping these types of records. While EPA needs to include small entities to comply with the NDAA, small entities may want to consider whether there are less burdensome regulatory reporting options that could be finalized. These requirements are being included without a full understanding of the economic impact the proposed rule will have on small entities. EPA’s proposal notes that they lacked information on the number of small importers of articles subject to the rule. Any final rule could benefit from information that helps EPA determine the actual economic impact to small entities.

EPA is required by the 2020 NDAA to promulgate the rule no later than January, 2023. EPA's Spring Regulatory Agenda indicates the Agency's intent to finalize the rule by July, 2022.

EPA is proposing a six month reporting period that would commence six months after the effective date of the final rule. If EPA finalizes the rule in July of 2022 as intended, reporting requirements would likely commence in early 2023.

How to Comment.

On August 3, 2021, EPA published a notice announcing an extension of the public comment period from August 27, 2021, to **September 27, 2021**.

Any company that believes it is included in this reporting needs weigh in during this comment period and, if appropriate, request exemptions. If comments are not included in the docket for the proposed rule, EPA's final rule may have an unexpected impact on companies. While EPA has utilized no action assurance when companies have been taken by surprise by their past rulemakings, this is not a mechanism that any company should count on. Companies may not be able to seek relief from EPA because of the opportunity to comment on this proposal.

If you have any questions regarding the applicability of the rule to your company's products, Wiley can help. Please contact us for more information.