

Insights

TSCA FEES RULE: YOUR COMPANY MAY OWE EPA MONEY

Feb 20, 2020

EPA recently designated more than 20 chemicals as “high priority” chemicals warranting further risk assessments. These include chemicals frequently found in plastics, building materials, cleaners, and flame retardants. Your company may have an obligation to report to EPA by May 27, 2020 if you manufacture or import any of these chemicals in any quantity and in any manner. Those companies that manufacture or import these chemicals will be subject to a fee expected to be assessed in August 2020.

What Is It?

The Environmental Protection Agency (“EPA”) has announced 20 high-priority substances for EPA-initiated risk assessments under the Toxic Substances Control Act (“TSCA Fees Rule”). These chemicals include compounds in formaldehyde, flame retardants, plasticizers, and chlorinated solvents.

If your company **manufactures or imports** one of the numerous chemicals recently identified by EPA as “high-priority,” you may have an obligation to provide certification by May 27, 2020 and be subject to fees. EPA is authorized to pursue significant penalties against companies who do not certify and/or fail to pay the fee.

Does My Company Need to Comply?

For each of the 20 chemicals, EPA has published a preliminary list of companies who may manufacture or import such chemical.¹ **If your company is listed**, you are required to submit a certification as to whether (or not) your company manufactures or imports such chemical. **If your company is not listed**, you should evaluate whether your company manufactures or imports any of these chemicals and, if so, submit a positive certification.² Certifications are due by May 27, 2020.

Significantly, EPA has not included any of the exclusions applicable under other TSCA rules, such as exceptions for byproducts, chemicals contained in articles (i.e., manufactured items), and impurities. Numerous commenters have encouraged EPA to exclude certain manufacturers from fee obligations, including those who manufacture solely for export, small quantity generators,

importers with a negative certification, and those involved solely in research and development.³ EPA has not accepted any of these exclusions.

What are the 20 High-Priority Chemicals?

The following 20 chemicals are subject to risk assessment and therefore the certification and fee requirements:

- 1) Formaldehyde (commonly used in building products, pressed wood products, fabrics, insulation materials, paper product coatings, and as a preservative);
- 2 – 6) BBP, DBP, DEHP, DIBP, and DCHP (phthalates or plasticizers in products such as roofing membranes, children's toys such as rubber ducks, food packaging, cosmetics, and medical devices);
- 7) Phthalic anhydride (a chemical used to make phthalates);
- 8 – 10) TBBPA, TPP, and TCEP (halogenated flame retardants);
- 11) Ethylene dibromide (additive in leaded gasoline, insect extermination, nonflammable solvent for dyes, resins, gums, and waxes);
- 12) HHCB, also known as Galaxolide (additive in perfumes, cosmetics, detergents and fabric softeners, air fresheners);
- 13 – 19) Certain chlorinated solvents⁴(used in plastic and vinyl products, degreasers, insecticide sprays, cleaning solutions, paint thinners, and glues); and
- 20) 1,3-Butadiene (used in synthetic rubber/ plastics and acrylics).

How much Money is at issue?

A \$1,350,000 fee will be incurred for each chemical-specific EPA risk evaluation. The fee will be divided among companies that have manufactured and/or imported the chemical on a pro rata basis. The only exception is for small businesses, defined by headcount, which are eligible for an 80% reduction of the fee. Companies subject to the fee may elect to form consortiums and pay the fee according to the consortium's elected allocation.

What if I Fail to Certify?

EPA has not formally adopted an Enforcement Response Policy. However, EPA is authorized by statute to pursue a maximum per day penalty of \$40,576 for failure to submit a self-certification and/or pay the applicable fee. EPA has discretion to count each continuing day of the violation as a separate violation. We would expect EPA to apply its enforcement discretion and seek higher penalties to the extent the violation is deliberate.

What Actions May be Taken?

All manufacturers and importers of the high-priority chemicals must self-identify themselves to EPA by March 27, 2020. Importantly, this is an opportunity to advocate for circumstances that may lead to a reduced fee through the “small business concern.”

A company that is listed on the preliminary lists can effectively “certify out” under two circumstances, if the company has (1) ceased manufacturing and/or importing any of the 20 high-priority chemicals prior to March 20, 2019, and it will not manufacture and/or import the chemical for five years; or (2) not manufactured the chemical in the five-year period preceding publication of the preliminary lists (i.e., has not manufactured the chemical since January 27, 2015).

EPA anticipates that it will publish the final list of companies subject to the fees on **June 20, 2020**. EPA intends to send fee invoices around **August 2020**, with payment to be submitted 120 days from that date.

More Information

For more information on the TSCA Fees Rule and whether your company may be responsible for certification or fees, please contact Dale Guariglia, Erin Brooks or Kami Jones at Bryan Cave Leighton Paisner LLP. The Notice is available at Federal Register 2020-01320 (EPA-HQ-OPPT-2019-0677).⁵ More information can be found on the EPA website.⁶

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1. The lists are available on the Federal Regulations website, <https://www.regulations.gov/docket?D=EPA-HQ-OPPT-2019-0677>.
 2. <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/chemical-substances-undergoing-prioritization-high>
 3. 1,1-Dichloroethane; 1,2-Dichloroethane; 1,2-Dichloropropane; *o*-Dichlorobenzene; *p*-Dichlorobenzene; *trans*-1,2-Dichloroethylene; and 1,1,2-Trichloroethane
 4. <https://www.federalregister.gov/documents/2020/01/27/2020-01320/preliminary-lists-identifying-manufacturers-subject-to-fee-obligations-for-epa-initiated-risk>
 5. <https://www.regulations.gov/docket?D=EPA-HQ-OPPT-2019-0677>

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MEET THE TEAM



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