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PFAS UPDATE: EPA ELIMINATES TRI REPORTING DE MINIMIS EXEMPTION

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On October 18, 2023, the United States Environmental Protection Agency (“EPA”) issued a rule to modify the reporting requirements for PFAS under the [Toxics Release Inventory \(“TRI”\)](#) program. Specifically, the EPA is reclassifying the listed PFAS compounds as “chemicals of special concern” and eliminating the use of the *de minimis* exemption. As a result, much broader chemical reporting obligations will apply to companies that manufacture, process, or use listed PFAS (including those who manufacture PFAS substances or mixtures as suppliers). The purpose of the change is to broadly track information relating to environmental releases and other waste management for the listed PFAS compounds.

EPA originally released a draft version of the rule in October 2022, and EPA’s docket from December of 2022 may provide some helpful information, including the relevant public comments. A pre-publication notice of the [rule](#) is available, and on October 20, 2023, EPA released a [press release](#) regarding this action.

BACKGROUND

This rule is designed to “[result in a more complete picture](#)” for PFAS substances. Many businesses that may previously have been exempt under the *de minimis* exemption will now be required to monitor, quantify, and report PFAS substances with respect to release requirements and waste management.

The TRI program generally requires businesses that manufacture, process, or use listed chemicals to report the use if the total poundage exceeds the reporting threshold. The *de minimis* exemption allows facilities subject to TRI reporting to effectively exclude from reporting any small concentrations of certain TRI chemicals that are used at the facility, with exceptions to the exemption. One of the exceptions to the *de minimis* exemption are any “chemicals of special concern” as listed in [40 CFR 372.28](#).

Certain PFAS substances were initially added to the TRI list in 2019, and additional PFAS substances have been added annually. All 189 PFAS compounds that have been added to the TRI list have an individual reporting threshold of 100 pounds; however, until this time, the *de minimis*

exemption has applied to exclude PFAS in certain small quantities. The exemption as it applies to PFAS is now being rescinded because, as EPA explained, “[even small quantities of PFAS may result in elevated concentrations in the environment.](#)” (pg. 15). This action underscores the recent efforts of EPA to dramatically increase reporting requirements for PFAS substances. See [BCLP’s client alert](#) regarding the extensive TSCA reporting rule that EPA published in the federal register on October 11, 2023, which is applicable to PFAS manufacturers and importers (including importers of articles containing PFAS).

Familiarizing yourself with the specific PFAS substances that are subject to reporting may assist your business to determine whether reporting is required, especially since the list includes PFAS compounds like PFOA and PFOS, and many of the shorter chain PFAS compounds that were introduced to replace them.

SPECIFIC PROVISIONS

In the rule, EPA is formally designating TRI listed PFAS substances as “[chemicals of special concern,](#)” which will result in the following:

- Eliminates use of the *de minimis* exemption;
- Prohibits the use of Form A for reporting (a simplified form that gives companies an option to certify they do not exceed 500 pounds for total reportable amount); and
- Restricts the use of range reporting, or reporting by assessing whether PFAS substances fall within a certain weight range such as 1–10 pounds or 11–499 pounds annually, rather than reporting the specific weight.

Accordingly, EPA anticipates additional Form R reporting due to [removal of the *de minimis* exemption](#) (pgs. 4 and 6). In short, Form R is a more robust form than Form A. The collective impact from these changes is that these burden-reduction reporting options will no longer be available for listed PFAS substances, which will make reporting more difficult, time-consuming, and expensive. The reporting year will begin on **January 1, 2024**, and the first TRI report subject to these changes is due on **July 1, 2025**.

Notably, there are no changes to the [article exemption rule](#) (pg. 5), which provides that if a toxic chemical is present in an article at a covered facility, “[that facility is not required to consider the amount of the toxic chemical\(s\) contained in the article when calculating reportable quantities of TRI-listed chemicals.](#)” This is one of the most frequently used exemptions in TRI reporting, and is utilized a great deal in the metal machinery industry (copper, or carbon and stainless steel). However, the articles exemption only applies to the quantity of the toxic chemical present in the article.

HOW DOES THIS AFFECT MY BUSINESS?

Your business may be subject to these updated reporting requirements if you manufacture, process, or use one or more of the PFAS substances that are subject to TRI reporting requirements. Many PFAS substances are present in products and product components at low concentrations, and now those low concentrations must be added to a business' total poundage of PFAS usage for reporting purposes. As a result, any purchasers of mixtures or trade name products should request the disclosure of all listed PFAS substances and their concentration(s) from suppliers to help support the purchaser's ability to make necessary TRI reporting.

In addition, Form R requires regulated entities to report releases and other waste management of the listed chemicals. Specifically, regulated entities are required to report:

- The quantity of the listed chemical entering each environmental medium (e.g., soil, groundwater, air) on site;
- Transfers of the chemical in wastes to off-site locations;
- On-site waste treatment methods and their efficiency; and
- Source reduction and recycling activities.

While these reporting requirements impose obvious up-front challenges and costs, the disclosure of releases of PFAS to environmental media could trigger site investigation and remediation actions under CERCLA or state equivalents, and could have implications for facility permitting. As a result, businesses that use PFAS should evaluate the potential for releases and consider addressing those releases as soon as possible in anticipation of TRI reporting.

The Supplier Notification requirements pursuant to 40 CFR §372.45, which generally require that manufacturers of chemicals or mixtures provide notices as to toxic chemicals, have also changed as they relate to the elimination the *de minimis* exemption. EPA has explained that the intent is to ensure that purchasers are informed of the presence of PFAS in products they purchase. This will create additional burdens on chemical and mixture manufacturers while, in turn, creating additional information for purchasers.

CONCLUSION

BCLP encourages businesses in every industry, but particularly any manufacturing or industrial businesses, to prepare for the new requirements of the TRI rule. By eliminating the use of the *de minimis* exemption, companies that manufacture, process, or use PFAS substances may be required to report new or additional information.

RELATED PRACTICE AREAS

- PFAS Team
- Environment

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