



TSCA inventory reset notification requirements

By Timothy Ramsey

On August 11, 2017, the U.S. Environmental Protection Agency (USEPA) published final regulations in the *Federal Register* that implement the chemical inventory “reset” provisions under Section 8 of the Toxic Substances Control Act¹ (“TSCA”). These new notification requirements under TSCA Section 8 (which are included in 40 C.F.R. Part 710) are separate from, and in addition to, the pre-manufacture notification (PMN) requirements for new chemical substances under TSCA Section 5. Under these new regulations, information in retrospective notifications filed with USEPA regarding chemical manufacturing (including importation) and processing over a ten-year period ending on June 21, 2016, will be used by USEPA to designate chemical substances on the TSCA inventory of chemical substances (the “TSCA Inventory”) as either “active” or “inactive” chemical substances, and the TSCA Inventory will be “reset” with these designations. This will in turn enable USEPA to prioritize its TSCA program activities (such as classification of chemicals as either “high priority” or “low priority” pursuant to TSCA Section 6) more efficiently by allowing USEPA to address active chemical substances first before inactive chemical substances.

Following USEPA’s issuance of the TSCA Inventory as reset, parties will be prohibited from manufacturing or processing any inactive chemical substance without first filing a forward-looking notification with USEPA of the anticipated manufacture or processing of the inactive chemical substance so as to allow USEPA to change the designation of the chemical substance from “inactive” to “active.” Statutory maximum penalties for violation of these TSCA requirements are substantial. These TSCA Inventory reset requirements will have practical effects on operations of chemical substance manufacturers and processors and will be an important addition to environmental matters to be addressed in merger and acquisition transactions.

Retrospective notification requirements

Under the new TSCA regulations, the retrospective notification provisions are mandatory for manufacturers (which includes importers) and are permissive for chemical processors.

¹ 15 U.S.C. § 1501 *et seq.* This “reset” requirement was added by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, which was enacted by Congress as P.L. 114-182 and signed into law by President Obama on June 22, 2016.

- **Manufacturers.** Manufacturers of chemical substances on the TSCA Inventory are required to notify USEPA on or before *February 7, 2018*, of all chemical substances on the TSCA Inventory that they manufactured (including importation) for non-exempt commercial purposes during the ten-year “look-back” period ending on June 21, 2016 (the “look-back period”). The notification must be submitted electronically to USEPA on a Notice of Activity Form A (“NOA Form A”) via USEPA’s designated electronic (CDX) portal and software.
- **Processors.** Processors of chemical substances (e.g., parties that prepare a chemical substance, after its manufacture, in the same or a different form or physical state, or as part of a mixture or article) are *permitted* to provide retrospective notifications (NOA Form A) to USEPA on or before *October 5, 2018*, concerning chemicals on the TSCA Inventory that they processed during the ten-year look-back period. Processors are not *required* to submit the retrospective notifications to USEPA. However, if a processor fails to submit a retrospective notification to USEPA by October 5, 2018, and, as a result, a particular chemical substance is designated by USEPA as inactive, the processor will be prohibited from processing that chemical substance until the substance is re-designated as active pursuant to the forward-looking notification provisions of the regulations.

After the notification deadline for manufacturers, USEPA will initially release a draft of the TSCA Inventory with active and inactive designations and subsequently will issue the final TSCA Inventory as reset with these designations following the processors’ notifications.

Forward-looking notification requirements

Ninety days after the effective date of the TSCA Inventory reset (with active and inactive designations), parties will be prohibited from manufacturing (including importing) or processing any inactive chemical substance for non-exempt purposes without the manufacturer or processor submitting a forward-looking notification to USEPA for such inactive chemical substance using Notice of Activity Form B (“NOA Form B”). Manufacturers and processors have the option to submit the NOA Form B before the effective date of the TSCA Inventory reset, and if they do so they will not be required to do so again after the effective reset date. The NOA Form B must be submitted to USEPA electronically before (but not more than 90 days before) the person manufactures or processes the inactive chemical substance. However, manufacturers and processors are not required to submit the NOA Form B with respect to any inactive chemical substance on the confidential portion of the TSCA Inventory and whose presence on the confidential portion of the TSCA Inventory is not known to or reasonably ascertainable by that manufacturer or processor.

Exemptions from notification requirements

There are numerous exemptions from the retrospective and forward-looking notification requirements that are worth examining closely if you have any doubts about the regulatory status of your chemical substances. It is noteworthy that USEPA provided exemptions from the TSCA Inventory reset notification requirements only for some (but not all) of the substances and activities that are exempt from the PMN requirements under TSCA Section 5. Thus, exemptions similar to those under the PMN requirements are included for research and development, export, articles and chemical substances exempted under 40 C.F.R. 730.30(g) and (h). However, USEPA declined to include exemptions for certain other substances and activities that are exempt from the PMN requirements such as the exemptions for polymers, low volume and low releases/low

exposures. Thus, if chemical substances are on the TSCA Inventory despite their eligibility for PMN exemptions for polymers, low volume and low releases/low exposures, those chemical substances are not exempt from the TSCA Inventory reset notification requirements.

Practical steps to compliance

TSCA, as amended by Congress in 2016, is a much more robust environmental statute, with much greater practical significance, than it was previously. The new TSCA Inventory reset notification requirement is one (but certainly not the only) important example of that. Companies that are not already in the process of complying with the retrospective notification requirements, including identification of relevant chemical substances subject to the notification requirements and establishment of the appropriate CDX account with USEPA, should be starting that process now, in view of the rapidly approaching notification deadlines.

For more information on the content of this alert and to discuss points of practical importance, please contact your Nixon Peabody attorney or:

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