

Manufacturers and Importers Beware: EPA's New PFAS Reporting Rule Under TSCA

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PRACTICES Chemical, Environmental Due Diligence, Environmental Litigation, Permitting, Regulatory Counseling, and Compliance, PFAS and Emerging Contaminants, Environmental, Products Liability Litigation, Retail

The Environmental Protection Agency (“EPA”) has promulgated a new, one-time reporting rule under the Toxic Substances Control Act (“TSCA”) pertaining to Per- and Polyfluoroalkyl Substances (“PFAS”) and PFAS-containing products: *Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances* (“Rule”).¹ The Rule requires reporting by manufacturers and importers who might otherwise not have a reason to interact with EPA or its regulatory programs, and is triggered not merely by information those manufacturers and importers know, but also by information they can reasonably ascertain.

To whom does the Rule apply?

The Rule applies to all manufacturers and importers of products for commercial purposes since Jan. 1, 2011 if those entities know or can reasonably ascertain² information that their products contain PFAS in any amount. The Rule applies to a far broader set of PFAS compounds (numbering in the thousands) than have been the subject of EPA and state regulations and product bans we have seen so far. And unlike many state PFAS product bans, it applies regardless of whether PFAS were intentionally added or manufactured.

Moreover, the new Rule does not include many of the typical exemptions found in other TSCA reporting requirements, including for byproducts, impurities, certain articles, or exemptions for small quantities or small manufacturers. The Rule only specifically exempts (apart from TSCA's general exemptions) imported municipal solid waste streams and non-commercial imports by federal agencies.

What information needs to be reported?

Entities subject to the Rule must provide a comprehensive array of information, including but not limited to: company and plant site information; trade names; use information, including information regarding use by children; information regarding PFAS source, form, quantity and concentration, and location at the site; byproduct and byproduct disposal information; information regarding environmental and health effects; and information about exposure and releases.

The Rule provides that where “actual data is not known [] or reasonably ascertainable. . . . reasonable estimates may be submitted.”³ Additionally, a streamlined reporting option with fewer reporting requirements is available for article importers who cannot reasonably ascertain the required information and a small subset of manufacturers.

When are reports due?

For the majority of entities, information is due at least 18 months after the Rule's effective date. The submission period begins one year following Nov. 13, 2023, and lasts for six months: from Nov. 12, 2024, through May 8, 2025.⁴ Small manufacturers and small importers have an extended deadline, with reports due 24 months from the effective date.

Due diligence obligations and other challenges

Given its unprecedented scope, the Rule is particularly troublesome for entities unfamiliar with TSCA compliance.

Due diligence. Entities are expected to report based on information that they “know” or can “reasonably ascertain.” As a result, all manufacturers and importers will need to reasonably determine if their products contain PFAS, and, if so, make a reasonable attempt to obtain all of the requested information. For example, EPA explains that what is “reasonably ascertainable” may include information obtainable through “inquiries to upstream suppliers or downstream users or employees or other agents of the manufacturer, including persons involved in the research and development, import or production, or marketing” of a product to fill gaps in the manufacturer’s knowledge.

Unascertainable information. EPA has explained that the Rule is not a testing requirement: if requested information is beyond the scope of what is “known” or “reasonably ascertainable,” the reporting entity would need to indicate that such information is not known or reasonably ascertainable to them—if such information even suggests their products contained reportable PFAS. This explanation is somewhat welcome news for those who are unaware of whether their products even contain PFAS (for example, in the case of unintentional PFAS presence due to its ubiquity in the environment). Others, however, are not so lucky. For example, companies whose products are known to contain PFAS, but have never had to deal with similar regulatory compliance issues will have a huge lift ahead of them in attempting to comply with this Rule—especially smaller companies. It is easy to see EPA’s new Rule as a trap for the unwary.

Broad temporal and chemical scope. Because the Rule targets manufactured or imported products dating back twelve years ago it is unlikely that entities will be able to provide a thorough, or detailed report including information from all of those years. This concern is exacerbated by the *vast* scope of chemicals to be reported under the Rule, which include not only what one might describe as “true” PFAS, but also certain partially fluorinated substances—substances EPA believes are likely to exhibit performance characteristics comparable to PFAS. This presents a challenging exercise for companies trying figure out what they even need to look for in the manufacturing process to report.

Penalties. TSCA penalties are reserved for willful and knowing violations—for example, an intentional refusal to report. However, these penalties make refusing to report a non-option. Even those who were unaware of their responsibilities, once informed, would be required to comply or face up to \$50,000 per day in fines.

Overlap with state reporting requirements. Another challenge the Rule poses is potential inconsistencies and requirements between state and federal reporting.

Conclusion

In sum, EPA's new Rule will create a considerable headache for many companies who—up until now—have not needed to worry themselves with TSCA compliance. Naturally, the first step to compliance is to know whether one's products contain PFAS. If so, it may be wise to investigate compliance requirements sooner rather than later to ensure adequate time for compliance.

¹ [40 CFR 705](#).

² *Known to or reasonably ascertainable by* is defined as “all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know.” [§ 704.3](#).

³ [§ 705.15](#).

⁴ [§ 705.20](#).