

PFAS Update: EPA Releases New Final Reporting Rule Requiring 2011–2022 Data from Companies that Have Manufactured or Imported Products Containing PFAS

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Overview

On October 11, 2023, the Environmental Protection Agency (“EPA”) promulgated a final rule under the Toxic Substances Control Act (“TSCA”) in the Federal Register, effective on November 13, 2023, requiring industry submittal of significant back-reporting of data under the Reporting and Recordkeeping Requirement for Perfluoroalkyl and Polyfluoroalkyl Substances (“PFAS”) (the Reporting Rule). The Reporting Rule, long-awaited and issued nearly nine months after the statutory deadline, requires persons who manufactured (or imported) any of a defined list of PFAS chemicals for commercial purposes during any period from January 1, 2011, through the end of 2022 to report information on those chemicals to EPA. The Reporting Rule’s publication in the Federal Register starts a 60-day clock for litigation challenges and imposes deadlines for reporting in May and November 2025.

This *Alert* provides background information on the Reporting Rule, summarizes certain of its requirements and outlines potential implications for industry. We previously analyzed EPA’s proposed hazardous substance designation for certain PFAS ([Alert](#)), proposed drinking water regulations for PFAS ([Alert](#)), proposed PFAS restrictions in the European Union ([Alert](#)) and the Biden Administration’s roadmap for regulating PFAS ([Alert](#)).

Background

In 2019, the National Defense Authorization Act for fiscal year 2020 amended TSCA section 8(a)(7) and mandated that EPA promulgate a rule to require reporting by manufacturers (or importers) of PFAS. EPA's stated goal is to create a more comprehensive database of previously manufactured PFAS. Until now, manufacturers and importers of PFAS generally only had to report PFAS in annual excess amounts of 25,000 pounds at any site. The Reporting Rule applies to manufacturers who have manufactured PFAS for a commercial purpose – including those who manufacture PFAS, those who coincidentally produce PFAS during the manufacture, processing, use or disposal of another chemical substance or mixture, or those who import PFAS (including in wastes). This definition includes chemicals used for test marketing, as an intermediate, or for research and development. The rule also extends to article importers, where an "article" is defined as any manufactured item that is either formed to a specific shape or design during manufacture or has end use functions that partially or fully rely on its shape or design.

The Reporting Rule was first proposed on June 28, 2021, and received more than 150 comments from a variety of actors, including industry groups and environmental organizations. Certain commenters advocated for exemptions for articles, arguing that their inclusion would unduly burden importers who will struggle to obtain the information required by the EPA given the lack of historical reporting requirements. Others noted that the supply chains are too large and complicated such that the rule would result in unnecessary and duplicative reporting. More broadly, groups on both sides of the issue have debated the precise definition of PFAS as being either too broad or too narrow.

Rule Requirements

Applicability and Scope

The Reporting Rule requires reports from all persons who have manufactured PFAS chemicals that meet the Rule's definition during any period from January 1, 2011, through the end of 2022. Unlike EPA's regulation on Chemical Data Reporting, there is no exception for article importers; however, EPA is "finalizing a reporting option for article importers to provide data to EPA on a streamlined form, if they do not know or cannot reasonably ascertain information requested on the longer standard form." Additionally, the Reporting Rule applies to PFAS chemicals that are created

coincidental to manufacturing, namely byproducts and impurities. The Reporting Rule also applies to small manufacturers on an extended timeline. EPA has created an exception to this rule that does not require reporting for persons who imported municipal solid waste for the purpose of disposal or destruction.

Timing Considerations

Publication of the Reporting Rule in the Federal Register starts the clock on a one-year information collection period following the November 13, 2023, effective date of the Reporting Rule. Most companies will then have a six-month reporting period of November 12, 2024, through May 8, 2025, with small manufacturers having an additional six months to report, for the period November 12, 2024, through November 10, 2025. This timeline marks an increased reporting period as compared to the proposed rule, which gave only six months to collect information. Further, under the final rule, small article importers' reporting forms will be due 24 months following the rule's effective date.

Defining PFAS

The Reporting Rule requires entities to provide EPA reports for chemical substances that fall into the structural definition of PFAS to be codified at 40 CFR 705.3. As recognized in public comments, the definition for PFAS is different than those used by other federal agencies, international organizations and by the EPA in other areas of its regulatory power. EPA emphasizes that different rules justify different definitions of PFAS in order to achieve a particular purpose, and EPA believes this structural definition is most apt for collecting information on PFAS manufacturing. The definition in the Reporting Rule has been somewhat expanded from the proposed rule, from approximately 1,364 chemical substances to 1,462 chemical substances. The Reporting Rule also includes fluoropolymers that meet the rule's definition of PFAS. Additionally, the Reporting Rule requires reporting on each chemical substance that is a PFAS, including those that are components of a mixture. Manufacturers of research and development substances that were manufactured in volumes under 10 kilograms per year will also still need to report, but EPA will provide a streamlined reporting option. EPA is compiling a non-exhaustive list of substances falling under the structural definition for purposes of this rule, available at <https://comptox.epa.gov/dashboard>.

Due Diligence Standard for Reporting

EPA is requiring the submission of “all existing information concerning the environmental and health effects” of the chemical substances. EPA noted that this requirement is intended to be interpreted broadly and includes toxicity information, ecological effects, and human and environmental exposure assessment among others. However, the reporting standard is “information known to or reasonably ascertainable by the manufacturer.” This standard is defined to include “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.” Submitters need to conduct a reasonable inquiry within their organization and can not only use information known to managerial or supervisory employees. EPA has noted that information like “[f]iles maintained by the manufacturer, such as marketing studies, sales reports or customer surveys” will fall within this reporting standard. For this Reporting Rule, EPA will allow manufacturers to indicate for certain data elements that information is “not known or reasonably ascertainable” if manufacturers cannot reasonably make estimates for those data elements. All information must be submitted electronically through EPA’s Central Data Exchange.

Confidentiality

Manufacturers may, subject to approval by EPA on a case-by-case basis, claim certain portions of their reporting as confidential business information (‘CBI’), including their company identifier, production volumes and specific chemical identities not listed on the public Inventory – generic chemical names cannot be protected as CBI. Any confidentiality claims must be made through this rule’s PFAS reporting tools; otherwise, any information provided will be subject to public disclosure. To report a CBI claim for a specific chemical identity, all entities, except article importers, must substantiate the claim with a chemical identifier such as a CAS name, CASRN, Accession number or LVE number. If an entity is unaware of such an identifier, they must initiate a joint submission with their supplier or another entity who can provide such information; however, the rule carves out an exception for those entities who can no longer reach their secondary suppliers. Comparatively, article importers must report chemical identities, to the extent they are known or reasonably ascertainable, using the article importer streamlined form.

Potential Implications

EPA has stated that it hopes the new reporting requirements will increase knowledge of PFAS production and importation in the U.S. Trade groups have argued throughout the comment process that the reporting requirements will unduly burden industry, especially with the inclusion of PFAS in articles. In response, EPA has asserted that the Reporting Rule is not a testing requirement, but rather that it asks manufacturers to share information that they already possess or can reasonably ascertain. Issues like these may well become the subject of litigation about the new Reporting Rule. We will continue to monitor legal challenges to the Reporting Rule, and our *Alert* authors or a member of Kirkland's PFAS Task Force can assist with additional guidance.

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- 31 October 2023 - 01 November 2023 Sponsored Event PEI's Impact Investor Summit North America
- 25 October 2023 Press Release Kirkland Advises Gemspring Capital and Portfolio Company Amplix on InflowCX Acquisition

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