The Texas Lawbook

Free Speech, Due Process and Trial by Jury

EPA Proposes Landmark PFAS Reporting Rule Affecting Article Importers, Small Businesses

October 26, 2021 | BY BRYAN J. MOORE

Texas companies – both big and small – may soon face landmark reporting and recordkeeping requirements for Per- and Polyfluoroalkyl Substances (PFAS). Under the Toxic Substances Control Act, the U.S. Environmental Protection Agency has proposed a rule that would require companies that have manufactured (including imported) PFAS at any time, in any quantity and for any purpose since 2011 to report information regarding PFAS uses, production volumes, byproducts, exposures, disposal and health and environmental effects. Any company subject to the reporting requirement would also be required to maintain its PFAS reporting records for five years.

Notably, the proposed rule would include articles containing PFAS, whether manufactured in the U.S. or imported, and would not include any of the traditional TSCA exemptions for small manufacturers, byproducts, impurities or research and development. Accordingly, the potential reach of the rule is immense, extending to a dozen or more industrial sectors and to companies, including small businesses, that previously may never have had any TSCA reporting obligations.

Companies may be subject to the proposed rule if they currently manufacture or have previously manufactured (defined to include import/imported) a chemical substance that is a PFAS between Jan. 1, 2011, and the effective date of the final rule. The public comment period on the proposed rule has closed, and EPA is under a statutory obligation to publish a final rule on or before Jan. 1, 2023. The reporting period will commence six months after publication of the final rule, and once the reporting period commences companies will have a six-month window in which to report their PFAS data.

What are PFAS?

PFAS are man-made, synthetic organic compounds that "contain an alkyl carbon on which the hydrogen atoms have been partially or completely replaced by fluorine atoms," according to the proposed rule. Since the 1940s, PFAS have been used to make fluoropolymer coatings and products that resist heat, oil, stains, grease and water. Fluoropolymer coatings can be found in a wide variety of consumer, commercial and industrial products, including clothing, furniture, adhesives, food packaging (e.g., fast food containers/wrappers, microwave popcorn bags, pizza boxes, candy wrappers), personal care products (e.g., shampoo, dental floss), cosmetics (e.g., nail polish, eye makeup), heat-resistant nonstick cooking surfaces and cookware, electrical wire insulation, stain repellants, stain- and water-resistant fabrics and carpet, cleaning products, fire-fighting foams, and paints, varnishes and sealants.

For purposes of the proposed rule, EPA is using the following structural definition for PFAS: R-(CF2)-C(F)(R')R". "Both the CF2 and CF moieties are saturated carbons and none of the R groups (R, R' or R") can be hydrogen." Applying this definition, EPA has identified at least 1,364 chemical substances and mixtures that are PFAS and would be potentially subject to reporting under the final rule, if they have been manufactured (including imported) in any year since Jan. 1, 2011. Of the 1,364 PFAS that EPA has identified with this definition, 669 are considered "active" – i.e., known to be in commerce after June 2006.

In the proposed rule, EPA includes a nonexhaustive list of example PFAS that would be covered by the agency's structural definition, as well as structural diagrams to capture additional PFAS subject to the rule. However, EPA cautions that "[t]he

PFAS included in the list and identified by the structural diagrams are examples of substances that meet this rule's definition of PFAS; it is not a comprehensive list of all substances within this rule's scope." Thus, a chemical substance or mixture that is not specifically listed in the rule may still be subject to reporting under the rule if it meets EPA's structural definition of PFAS.

What PFAS information would companies have to report?

EPA is proposing a one-time obligation to report the information listed in TSCA § 8(a)(2)(A)-(G) for any PFAS that a company has manufactured (including imported) at any time since Jan. 1, 2011. The proposed rule identifies 22 categories of information required to be reported, most of which include multiple sub-categories. The reportable information includes specific chemical identity, categories of use, production volumes, byproducts, worker exposure data, disposal processes and volumes, and "all existing information related to health and environmental effects."

Who would be subject to the proposed rule?

Companies may be subject to the rule if it currently manufactures PFAS or previously manufactured PFAS in 2011 or any year thereafter. Importantly, for purposes of the rule, "manufacture" includes manufacturing and importing articles containing PFAS, such that manufacturers and importers of articles containing PFAS are potentially subject to the rule.

In the proposed rule, EPA lists 12 North American Industrial Classification System code categories that, collectively, include most of the companies that may be required to report their PFAS information. But here again, this list is not exhaustive; in the proposed rule, EPA "has not attempted to describe all of the specific entities that may be interested in or affected by this action."

What is the reporting standard?

EPA is proposing that PFAS manufacturers must report the required information "to the extent that the information is known to or reasonably ascertainable by the manufacturer." The "known to or reasonably ascertainable by" standard is derived from TSCA § 8(a)(2) and defined in 40 C.F.R. § 704.3 as follows: "Known to or reasonably ascertainable by means 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."

In the preamble to the proposed rule, EPA discusses what this reporting standard would require of companies that are subject to the rule:

This reporting standard would require reporting entities to evaluate their current level of knowledge of their manufactured products (including imports), as well as evaluate whether there is additional information that a reasonable person, similarly situated, would be expected to know, possess, or control. This standard carries with it an exercise of due diligence, and the information-gathering activities that may be necessary for manufacturers to achieve this reporting standard may vary from case-to-case.

This standard would require that submitters conduct a reasonable inquiry within the full scope of their organization (not just the information known to managerial or supervisory employees). This standard may also entail inquiries outside the organization to fill gaps in the submitter's knowledge. Such activities may, though not necessarily, include phone calls or email 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 the PFAS. Examples of types of information that are considered to be in a manufacturer's possession or control, or that a reasonable person similarly situated might be expected to possess, control, or know include: Files maintained by the manufacturer such as marketing studies, sales reports, or customer surveys; information contained in standard references showing use information or concentrations of chemical substances in mixtures, such as a Safety Data Sheet or a supplier notification; and information from the Chemical Abstracts Service (CAS) or from Dun & Bradstreet (D-U-N-S). This information may also include knowledge gained through discussions, conferences, and technical publications.

The EPA also acknowledges in the proposed rule preamble "that it is possible that an importer, particularly an importer of articles containing PFAS, may not have knowledge that they have imported PFAS and thus not report under this rule, even after they have conducted their due diligence under this reporting standard." In such circumstances, the "importer should document its activities to support any claims it might need to make related to due diligence." Additionally, if a PFAS manufacturer does not have actual data to report, then the manufacturer would be required to make "reasonable estimates" of the required information using, for example, mass balance calculations, emissions factors or best engineering judgment.

Are any companies exempt from the proposed rule?

EPA does not provide any exemptions from the proposed rule beyond the substances that are excluded from the statutory definition of "chemical substances" in TSCA § 3(2)(B) (e.g., pesticides; food, food additives, drugs, cosmetics or devices as defined by the Federal Food, Drug, and Cosmetic Act; tobacco and tobacco products).

The proposed rule does not offer any exemption for articles, impurities, byproducts or research and development. The proposed rule also "does not exempt small manufacturers from reporting and recordkeeping requirements."

What are the estimated costs of compliance?

"Under the proposed rule, EPA estimates a total industry burden of approximately 122,104 hours, with a cost of approximately $9.8 million." With respect to small PFAS manufacturers, EPA estimates that "[t]he affected small businesses subject to the proposed rule are expected to incur $1,788,506 in costs for this one-time reporting, with per-firm costs estimated to range from $16,864 to $92,390."

What is the expected timeline for the proposed rule?

EPA is obligated by statute (TSCA § 8(a)(7)) to publish the final rule by Jan. 1, 2023. The Biden administration's Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions forecasts a final rule by July 2022, although the prevailing expectation is that EPA will publish the final rule closer to the end of 2022. If the proposed reporting period is maintained as-is in the final rule, the reporting period would commence six months after the effective date of the final rule, and the reporting window would be open for six months. That would position the reporting period in the second half of 2023, with the final reporting deadline falling in the fourth quarter of the year.

Bryan Moore *helps industrial, commercial, and oil and gas industry clients navigate and resolve contested environmental permitting proceedings, compliance audits, enforcement actions, and litigation so they can construct, operate, and expand their facilities. Bryan's practice focuses on solid waste regulation, environmental litigation, and contaminated property assessment and remediation.*