

October PFAS Regulatory Update

In October 2023, the United States Environmental Protection Agency (EPA) finalized two separate but analogous rulemakings – one under the Toxic Substances Control Act (TSCA), and one under the Emergency Planning and Community Right to Know Act (EPCRA). Both rulemakings pertain to per- and polyfluoroalkyl substances (“PFAS”), commonly referred to as “forever chemicals.” PFAS are manmade chemicals that have been widely used in industry and consumer products since their inception in the late 1930s. PFAS are most known for their resistance to tricky substances such as grease, water, and oil and have been commonly used in a variety of products like cleaning products, water and stain resistant fabrics, nonstick cookware, medical devices, firefighting foam, beauty products, and even things like microwave popcorn bags and pizza boxes.

These rulemakings are significant because they place broad recordkeeping and reporting requirements on facilities that may not have previous experience with either environmental statute. Under the new TSCA rule, any entity that manufactures or has manufactured (including import or previously imported) PFAS or PFAS-containing articles in any year since January 1, 2011, must now report certain information to EPA. Additionally, under the new EPCRA rule, facilities that use more than 100 pounds of PFAS annually must comply with Toxics Release Inventory (“TRI”) reporting obligations and provide downstream businesses with notifications that products may contain PFAS.

Broad PFAS Reporting under TSCA

Considered one of the most significant rulemakings of the year, on October 11, 2023, EPA finalized a rule under TSCA Section 8(a)(7) requiring any person that manufactures (including import) or has manufactured (including imported) PFAS or PFAS-containing articles in any year since January 1, 2011, to electronically report information regarding “PFAS uses, production volumes, byproducts, disposal, exposures, and existing information on environmental or health effects” through EPA’s agency-wide Chemical Data Exchange (“CDX”) portal. The new rule, effective November 13, 2023, triggers specific reporting dates and deadlines depending on the entity’s size and previous and/or current usage of PFAS.

The first of the reporting dates under the new rule applies to **any entity, including small entities**, that have manufactured and/or currently manufacture (including imported or currently

import) PFAS in any year since January 1, 2011. These entities will have **18 months** from the effective date of the rule to report PFAS data to the EPA. The second reporting date applies to “small manufacturers” as defined under 40 CFR 704.3 whose reporting obligations are exclusively from article imports. Entities meeting this definition will have **24 months** from the effective date of the rule to report PFAS data to EPA. These dates are estimated to fall in May 2025 and November 2025, respectively.

This rule is likely most applicable to those in the electronics, food packaging, and automotive industries, but will also likely ripple to many other types of industries, including those that manufacture and/or import items such as textiles, circuit boards, wires, cables, and pharmaceuticals.

If you believe you may be impacted by this new rule, we recommend developing a strategy immediately to determine whether your company has manufactured or imported PFAS since January 1, 2011. Additionally, if your company has acquired another company since January 1, 2011, we also recommend reviewing that company’s documentation to determine whether there may be any additional reporting requirements triggered.

PFAS Reporting to the Toxics Release Inventory under EPCRA

On October 20, 2023, just a week after the TSCA PFAS rulemaking was finalized, EPA finalized a second PFAS rulemaking under EPCRA. This rule revised the TRI program to impose two new sets of reporting obligations related to **189 specified PFAS**. Scheduled to go into effect on November 30, 2023 (and for annual reporting purposes beginning January 1, 2024), the new rule now requires:

1. An annual reporting obligation to EPA for facilities that use more than 100 pounds of PFAS annually, and
2. A requirement for business-to-business downstream notifications of the presence of PFAS in certain products

These new requirements are significant because the previously applicable *de minimis* exception that exempted products containing less than 1% of PFAS (or 0.1% for PFAS qualifying as carcinogens, such as PFOA) from being considered for either reporting or notification purposes, is now removed. Now, under this new rule, **any quantity of the 189 specified PFAS** counts towards the 100-pound threshold and triggers the downstream notification obligation. While the new rule only applies to 189 specified PFAS, EPA retains the authority to add additional PFAS in the future.

This rule is significant as it could result in *numerous* products being newly identified as containing PFAS throughout the supply chain. Companies that manufacture, process, or otherwise use PFAS in their operations should immediately develop a strategy to better understand this new rulemaking and determine whether the TRI reporting requirements may be triggered. Additionally, companies that supply PFAS-containing products to downstream business purchasers should evaluate whether additional notifications of the presence of PFAS in the products they supply may be required.

Conclusion

These rulemakings are complex and will have significant impacts on those in the industrial and manufacturing industries. These rules are also likely just the beginning of the PFAS regulatory iceberg.

If you believe your company may be impacted by one or both rulemakings, we recommend contacting a member of Polsinelli's Environmental and Natural Resources Group who will guide you through the various processes of determining whether these rules may be applicable to your operations. The Polsinelli Environmental and Natural Resources Group will continue to monitor the development of PFAS-related rulemakings and provide updates as necessary.