



Everything Everywhere All at Once: EPA Reporting Rule Presents Major Challenges for Companies with PFAS-Containing Products

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So-called “forever chemicals,” per- and polyfluoroalkyl substances (“PFAS”) were barely on the regulatory radar screen a decade ago. Now, much like the most recent Best Picture award winner, PFAS are seemingly “Everything Everywhere All at Once.” That is a fairly good, if perhaps slightly exaggerated, summation of the [new widely anticipated PFAS reporting rule](#) published last week by the U.S. Environmental Protection Agency (“EPA”).

The scope of potentially affected companies and products is immense: The reporting obligation extends not only to companies that manufacture or import PFAS chemicals but also to the much wider array of companies that have imported PFAS-containing “articles” in any year since January 1, 2011. A large number of companies will be required to file reports for many consumer products they import for sale that historically often contained PFAS for their heat-, stain-, and water-resistance, non-stick, and other qualities. The scope of potential products in which PFAS have been used is vast and varied, including food packaging, carpets and upholstery, water-resistant clothing and footwear, cookware, cleaning products, dental floss, cosmetics, and paints, among many others.

[The rule] will provide EPA, its partners, and the public with the largest-ever dataset of per- and polyfluoroalkyl substances (PFAS) manufactured and used in the United States.

- EPA Press Release

Companies that have imported such products (“articles”) into the United States now will be required to electronically report information to EPA regarding PFAS uses, production volumes, disposal, exposures, and hazards.

EPA’s definition of covered PFAS is very broad - and confusing: EPA has identified at least 1,462 PFAS that may be covered by the reporting rule. This broad coverage is due to the agency’s decision to define PFAS by chemical structure, rather than issuing a discrete list of chemical names and CAS numbers. For the reporting rule, PFAS include chemicals that have at least one of these three structures:

- $R-(CF_2)-CF(R')R''$, where both the CF_2 and CF moieties are saturated carbons;
- $R-CF_2OCF_2-R'$, where R and R' can either be F , O , or saturated carbons; and

- CF3C(CF3)R'R'', where R' and R'' can either be F or saturated carbons

I am a lawyer and not going to pretend to know whether a given chemical qualifies without first consulting a chemical expert. Needless to say this poses a significant challenge to businesses, even those that are accustomed to tracking the inventory of chemicals in their products by name and CAS number.

How do you know if you have to report? Section 8 of the Toxic Substances Control Act (“TSCA”) requires businesses to report information that is “known to or reasonably ascertainable by” them – that is, “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.” This is the same standard as under EPA’s Chemical Data Reporting (“CDR”) and other Section 8 rules.

In short, EPA emphasizes that meeting the standard requires a careful exercise of “due diligence” and that the extent of expected information-gathering activities will “vary from case-to-case.” EPA expects that, at minimum, companies will “conduct a reasonable inquiry within the full scope of their organization (not just the information known to managerial or supervisory employees).” In practice, this means that you must consult with sales and marketing personnel, researchers and scientists, as well as any others in your organization that are likely to have information on a given product and/or its chemical composition. For example, companies will be expected to have inquired about and reviewed information in marketing studies, sales reports, or customer surveys, as well as information contained in standard references, such as a Safety Data Sheet (“SDS”) or a supplier notification, and knowledge gained through conferences and technical publications.

Moreover, EPA anticipates that inquiries outside of the company may be needed to fill gaps in their knowledge. This may include contacting 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-containing product.

EPA specifies that no new customer surveys would be needed to meet the reporting standard. Generally, no new data need to be generated to satisfy the reporting inquiry, which is to be based only on existing information and knowledge that the company would be expected to know about the product. This applies to whether a product contains a PFAS chemical, as well as the other information requested by the agency on uses, exposures, hazards, and production volume.

Here is where I can tell you as a lawyer that it is imperative that you document your information-gathering efforts and responses you receive both from outside and within your organization – even (and perhaps especially) for companies that ultimately determine that reporting is not required or that particular information requested by EPA is not available.

By when must reports be submitted? The final rule takes effect on November 10, 2023, and establishes a “one-year information collection period” for companies to gather their PFAS data since 2011. After this year, companies have a six-month window to submit the information (by May 10, 2025), though “small businesses” that are only subject to the rule because they import PFAS-containing articles have an additional six months to comply (by November 10, 2025).

While 2025 may seem like a long way off, given the extent of the required data collection effort, companies will need every bit of the time provided to conduct and document their due diligence.

Ultimately, countless businesses that previously have never had to file a TSCA report are now facing a complicated data collection and reporting effort. Indeed, the reporting requirements implicate not

only companies in the chemical manufacturing industry, but innumerable other consumer product sectors. Though the reporting does not capture domestically produced articles, all product manufacturers should be aware of any PFAS ingredients imported or generated incidentally in the production process.

More information can be found at EPA's *TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances* website [here](#). The *Federal Register* entry for the final rule can be found [here](#).