

EPA Updates the TSCA Inventory: Impact on chemical importers

On February 19, 2019, the U.S. Environmental Protection Agency (EPA) released a much anticipated “updated” Toxic Substances Control Act (TSCA) Inventory. The updated TSCA Inventory now lists chemicals that are “active” versus “inactive” in commerce in the U.S. This development has important legal and transactional implications for foreign companies importing chemicals into the U.S. This column explains why.

Background

When Congress amended TSCA in 2016, a key goal was to “update” the TSCA Inventory. Recall all industrial chemicals not otherwise exempt must be listed on the TSCA Inventory as a predicate to commercial production, distribution, and use. In other words, if a chemical is not listed on the TSCA Inventory and not otherwise exempt from TSCA notification, EPA would be of the view that this chemical substance cannot be made or distributed in commerce for a commercial purpose.

It was widely thought for years before 2016 that only a subsection of the 86,228 chemicals listed on the TSCA Inventory were in fact “in commerce.” Under new TSCA, EPA was required to initiate a rulemaking to “reset” the TSCA Inventory by requiring that listed chemicals be designated as “active” or “inactive.” After EPA completes the TSCA Inventory reset process, companies that intend to manufacture or process chemicals identified as inactive must notify EPA prior to their manufacture or processing.

The February notice truth tested what was widely believed to be the case, namely that less than half of the total number of chemicals listed on the current TSCA Inventory (47 percent or 40,655) are currently in commerce. More than 80 percent (32,898) of the chemicals in commerce have identities that are not Confidential Business Information (CBI), increasing public access to additional information about them. Readers will appreciate that EPA is developing a rule outlining how it will review and substantiate CBI claims seeking to protect the chemical identities of substances listed on the confidential portion of the TSCA Inventory.

Why is this important to European entities?

The reset TSCA Inventory has important implications for domestic and foreign chemical stakeholders. Most importantly for present purposes, the term “manufacture” is defined under TSCA to include “import into” the U.S. Under the final TSCA Inventory notification rule, a substance is not officially designated as an “inactive

substance” until 90 days after EPA publishes the initial version of the Inventory with all listings identified as active or inactive, or in this case by 20 May 2019. If a substance is listed as “inactive” that is currently being manufactured or processed, entities have 90 days (or until May 20) to file a Notice of Activity (NOA) Form B so that they can continue their current activity. Manufacturers and processors that intend to manufacture or process an “inactive” substance after May 20 must submit an NOA Form B before they start their commercial activity.

So the take-home message is this: chemical stakeholders need to understand that after 20 May 2019, it will be impermissible to manufacture, import, or process a substance that is designated as “inactive” on the TSCA Inventory without first submitting an NOA Form B to EPA. If entities are now engaged in commercial activities regarding chemicals designated as “inactive” on the TSCA Inventory, now would be a good time to submit an NOA Form B to continue the commercial activity.

Discussion

The recent notice from EPA tells us several things. First, the updated TSCA Inventory confirms that less than half of the over 86,000 chemicals listed on the TSCA Inventory are currently active in commerce. This represents a profound shift over the past 40 years, as it is clear that many of the approximately 62,000 chemicals on the original TSCA Inventory and the over 30,000 commenced new chemicals were commercially bypassed as technological, commercial, policy, and regulatory drivers emerged and produced significant changes in the global chemical economy.

Second, the notice adds a temporal element to the significance of a chemical being identified as “inactive” on the TSCA Inventory. In short, after May 20, entities wishing to manufacture, including import, a chemical substance identified as “inactive” on the TSCA Inventory must first submit an NOA Form B to EPA. European-based entities that import non-exempt chemicals should be aware of the reset TSCA Inventory, be mindful of the implications of any “inactive” designation, and take steps now to ensure commercial transactions remain uninterrupted. Failure to understand the consequences of the reset TSCA Inventory could prove commercially disruptive.

The public version of the February 2019 update of the TSCA Inventory, which includes information on active and inactive chemicals, is available on EPA’s TSCA Chemical Substance Inventory web page, as well as general information about the TSCA Inventory, tips on how to access the Inventory, and policy and guidance materials.

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