

# Client Alert

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## EPA Reportedly Expecting Manufacturers and Importers of Products Containing 20 Common Chemicals to Self-Report and Share in Costs of Chemical Risk Evaluations

Companies that manufacture or import products containing one or more of 20 common chemicals may soon be required to disclose those activities and pay fees to offset the United States Environmental Protection Agency's (EPA) review of those chemicals under the Toxic Substances Control Act (TSCA). In December 2019, EPA finalized its list of 20 high-priority chemicals for risk evaluation and potential regulation under TSCA:

- Formaldehyde, a chemical commonly used in building products and as a preservative;
- Five phthalates used as plasticizers in products like plastic pipes, toys, food packaging, cosmetics and medical/dental products (BBP, DBP, DEHP, DIBP and DCHP) and one chemical used to make phthalates (phthalic anhydride);
- Three flame retardants (TBBPA, TCEP and TPP) and a chemical sometimes used in the manufacture of flame retardants and fire extinguishers (ethylene dibromide);
- A fragrance additive found in perfumes, cosmetics and other consumer products (HHCB, also known as galaxolide);
- Seven chlorinated solvents found in products like cleaning solutions, paint thinners and glues (1,1-dichloroethane, 1,2-dichloroethane, 1,2-dichloropropane, o-dichlorobenzene, p-dichlorobenzene, trans-1,2-dichloroethylene and 1,1,2-trichloroethane); and
- A chemical used to manufacture synthetic rubber (1,3-butadiene).

EPA has announced that, in January 2020, it will publish preliminary lists of the companies it expects to contribute to the \$1.35 million fee for each of these 20 risk evaluations. Importantly, EPA has indicated that companies that manufacture or import products containing any of the 20 chemicals—even if those chemicals are merely byproducts or impurities—must share in the costs of the risk evaluations.

EPA's preliminary lists will be drawn primarily from the data EPA collects under its various TSCA reporting rules and information otherwise in the public domain. EPA collects extensive data from chemical manufacturers and importers under its Chemical Data Reporting (CDR) Rule and will use that data as a starting point for its lists. Under TSCA, however, companies manufacturing or importing "articles"—which, under TSCA, broadly means "products"—are generally exempt from CDR reporting requirements. As a result, EPA has acknowledged that its preliminary lists will be "underinclusive" and it expects companies that are not included, but should be, to self-report to EPA within 60 days of the lists' publication. Failure to self-report could expose a company to penalties under TSCA Section 16. Following the 60-day self-reporting and comment period, EPA will publish final lists in June, and fees will be due in October 2020.

While many companies may have to self-report for the majority of the 20 chemicals, those that manufacture or import products containing composite wood may find themselves actually named on EPA's preliminary list of companies expected to share in the cost of the formaldehyde risk evaluation. EPA's rule implementing the Formaldehyde Standards for Composite Wood Products Act (Formaldehyde Final Rule), which amended TSCA to add Title VI, is an exception to EPA's general rule exempting importers of articles from reporting requirements. The Formaldehyde Final Rule has required companies to provide import certifications under TSCA Section 13 since March 2019, meaning that EPA will have data on companies that have imported composite wood products over the last year and may use that data to build its preliminary cost-share list for formaldehyde.

How EPA ultimately plans to administer its fees rule and allocate costs among companies is still unclear. This set of risk evaluations marks the first time that EPA will collect fees under TSCA, which was amended in 2016 to give EPA new powers to review and regulate chemicals. Industry groups are already challenging EPA's fees rule as unworkable, given that EPA does not have comprehensive data on the manufacture and import of products containing the affected chemicals and will therefore need to rely almost exclusively on companies' self-reporting if fees are to be allocated fairly. If EPA does not change course, it may face challenges from those who claim that EPA's process does not equitably allocate fees among all companies that should share in them.

We recommend that companies take steps now to review their products lines to determine if they manufacture or import any products containing the 20 chemicals EPA has designated as high priority. If EPA maintains its position that even manufacturers and importers of products containing the chemicals must share in the costs, companies will have to move quickly to self-report to EPA or risk penalties for late or non-disclosure.

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