

Regulatory Developments: EPA Releases Updated TSCA Inventory

Friday, February 22, 2019

The U.S. Environmental Protection Agency (EPA) released on February 19, 2019, an update of the Toxic Substances Control Act (TSCA) Chemical Inventory (TSCA Inventory), which lists chemicals that are “active” versus “inactive” in commerce in the U.S. EPA’s [News Release](#) states that a “key result of the update is that less than half of the total number of chemicals on the current TSCA Inventory (47 percent or 40,655 of the 86,228 chemicals) are currently in commerce.” According to EPA, 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. For the less than 20 percent of the chemicals in commerce that have confidential identities, EPA is developing a rule outlining how it will review and substantiate all CBI claims seeking to protect the specific chemical identities of substances on the confidential portion of the TSCA Inventory.

As reported in our June 26, 2017, memorandum, “[EPA Issues Final TSCA Framework Rules](#),” the [final TSCA Inventory notification \(active-inactive\) rule](#) (82 Fed. Reg. 37520 (Aug. 11, 2017)) established a retrospective electronic notification of chemical substances on the TSCA Inventory that were manufactured (including imported) for nonexempt commercial purposes during the ten-year time period ending on June 21, 2016, with provision to also allow notification by processors. From August 11, 2017, through October 5, 2018, chemical manufacturers and processors provided information on which chemicals were manufactured, imported, or processed in the U.S. over the past ten years. EPA states that it received more than 90,000 responses, representing “a significant reporting effort by manufacturers, importers and processors.”

The updated TSCA Inventory includes an updated commercial activity status field designating which chemical substances are “active” in U.S. commerce, based on reporting to or in any of the following:

- 2012 and 2016 Chemical Data Reporting (CDR) cycles;
- Notices of Commencement (NOC) received since June 21, 2006; and
- Notice of Activity (NOA) Form A’s received through October 5, 2018, per the final TSCA Inventory notification (active-inactive) rule.

All substances not reported as “active” are identified as “inactive.”

Next Steps

On **March 13, 2019**, EPA will host a webinar to assist manufacturers (including importers) and processors with future reporting requirements. Under the final TSCA Inventory notification (active-inactive) rule, a substance is not



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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. EPA states that manufacturers and processors should be aware that if there is a substance that is listed as “inactive” that is currently being manufactured or processed, they have 90 days to file a NOA Form B so that they can continue their current activity. Manufacturers and processors that intend to manufacture or process an “inactive” substance in the future must submit an NOA Form B before they start their activity. The webinar is scheduled for **1:00 p.m. - 4:00 p.m. (EDT) on Wednesday, March 13, 2019**. The webinar will include an overview of filing a NOA Form B, a demonstration of the electronic reporting application, and time for questions and answers. Registration for the webinar is not required.

EPA will soon issue a “signed action” that the final rule stated would accompany the first version of the active/inactive Inventory. According to the final rule preamble, EPA intends to publish this signed action in a web posting on EPA’s Inventory web page (82 Fed. Reg. 37533). Ninety days from publication of the action, it will be impermissible to manufacture, import, or process a substance that is inactive without first submitting a NOA Form B. The ninety-day period is an opportunity for notification by submitters who have commenced activity on a substance that was not identified as active on one of the interim lists (e.g., if activity started after June 22, 2016).

As noted above, EPA is developing a rule outlining how it will review and substantiate all CBI claims seeking to protect the specific chemical identities of substances on the confidential portion of the TSCA Inventory.

Commentary

We commend EPA on the release of the first version of the Inventory with the identification of all active/inactive chemical listings. This has been a complex undertaking that EPA and affected industry have now brought to a timely conclusion pending the release on EPA’s Inventory web page of the “signed action” as discussed above.

The requirement in TSCA Section 8(b)(4) that EPA designate TSCA Inventory chemicals as active/inactive represents one of the important legal and policy developments to come out of the Frank R. Lautenberg Chemical Safety for the 21st Century Act. The question of how many and which of the over 80,000 Inventory chemicals were active in commerce has been of considerable policy interest for many years. This interest sprang from the recognition that the Inventory, comprised of the chemicals in commerce as of the late 1970s as well as commenced new chemicals that were added to the Inventory since 1979, probably did not provide a good understanding of the chemicals that were actually in commerce given the passage of so much time and the development of new technologies. Readers may recall EPA’s recognition of this issue in its efforts to consider implementing an “Inventory reset” during the George W. Bush Administration. This was followed, during the Obama Administration, by years of legislative debate in Congress concerning various approaches to realizing a clear understanding of the chemicals in commerce. This effort culminated in the active/inactive Inventory requirement in amended TSCA that has now provided an answer to the longstanding question.

As indicated in EPA’s reporting on the “key result” of the updated Inventory, less than half (47 percent or 40,655) of the over 86,000 chemicals 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 Inventory and the over 30,000 commenced new chemicals were commercially bypassed as the years went by and as technologic, commercial, policy, and regulatory drivers emerged and produced significant changes in the U.S. chemical economy. Examples of these drivers include increased energy efficiency, regulatory requirements under other statutes (such as the Clean Air Act’s (CAA) regulations on volatile organic compounds (VOC), fully halogenated chlorofluorocarbons (CFC), and others), concepts such as pollution prevention and green chemistry, and the emergence of biobased products and new technologies (e.g., biotechnology and nanotechnology).

The other interesting result is the fact that only about 8,000 of the 40,000 chemicals on the active Inventory have CBI identities. While relatively few of the approximately 62,000 chemicals listed on the original Inventory had CBI identities, such claims were made on about 90 percent of the notified new chemicals, of which approximately 24,000 were commenced and added to the Inventory. Taken together, these points could indicate that former new chemicals represent only a fraction (say 8,000-10,000) of the active chemicals. Or it might indicate something else if, for example, CBI claims have been withdrawn over time from former new chemicals notified over the years.

These observations raise interesting questions such as the following:

- How many of the active chemicals come from the original Inventory versus commencement of new chemicals?
- How has the chemical makeup (e.g., Class 1, Class 2, and polymers) of the active Inventory changed relative to that in the original Inventory?
- For active new chemicals, when were they notified and introduced into commerce and what might this say

generally about the commercial life of new chemicals (*i.e.*, how many have been in commerce for decades versus the past ten years?)

We recognize that EPA is already busy implementing the changes and requirements in amended TSCA and that undertaking “optional” work presents an additional burden. We, however, believe that a basic comparative analysis of aspects such as the preceding suggestions would be of value to stakeholders and the public. We note that EPA’s release of the CDR reporting includes a basic analysis of the information and we hope that EPA will consider performing such a comparative analysis as it proceeds to implement new TSCA.

Resources

The public version of the February 2019 update of the TSCA Inventory, which includes information on active/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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