Chemical Data Reporting Rule: 2019 is the Principal Reporting Year

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Every four years, domestic manufacturers and importers of chemicals must report to the Environmental Protection Agency under the Chemical Data Reporting rule (CDR). The next reports are due in 2020, with 2019 as the principal reporting year. CDR reporting can be time-consuming and complex, involving different parties within a manufacturer’s supply chain. Manufacturers who have not yet begun gathering information for their 2020 reports may wish to begin now.

Background on CDR

CDR reporting requires domestic manufacturers and importers (manufacturers) to report information regarding the production and use of the chemical substances they manufactured or imported above specified thresholds. The CDR rule is authorized under section 8(a) of the Toxic Substances Control Act (TSCA). EPA uses the information submitted to evaluate chemicals under other provisions of TSCA. EPA regulations on how to comply with CDR appear in 40 C.F.R. Part 711.

Announced Changes to CDR Regulations

The scope and thresholds of 2020 reporting requirements are not yet known. In its most recent Regulatory Agenda, EPA indicated that it expects to amend its CDR regulations:

- Before the next reporting period of 2020, the EPA intends to revise the reporting requirements to better align with new statutory requirements resulting from TSCA as amended by the Frank. R. Launtenberg Chemical Safety for the 21st Century Act, address submitters’ feedback following the 2016 submission period, and may consider reporting requirements for inorganic byproducts (RIN 2070-AK31).

In the Regulatory Agenda, EPA stated that it aimed to publish a proposed rule to amend its current CDR regulations in December 2018, with a final rule to be adopted by October 2019. EPA has not yet published a proposed rule—probably in part due to the recent government shutdown. The Office of Management and Budget website states that it is reviewing a proposed CDR rule it received from EPA on January 29, 2019. Before the next reporting period begins on June 1, 2020, EPA must finalize the revised Form U and update its CDR instructions and other guidance documents.

Changes to CDR requirements relative to 2016 may include:

- Altering the general 25,000 lb. reporting threshold. Prior to a 2003 amendment, the Inventory Update Rule (as CDR was then known) had a reporting threshold of 10,000 lbs.

- Assigning a lower reporting threshold for chemicals designated as, or candidates for designation as, high priority substances under section 6 of TSCA. EPA relies on the CDR to provide its most helpful information on use and exposure for substances under consideration for regulation under section 6.

- Adding additional processing and use reporting elements for substances in the consumer sector.
• Making processors subject to certain reporting requirements. In the last CDR rulemaking, in 2011, EPA considered making processors subject to CDR requirements, but ultimately chose not to do so.

• Limiting reporting requirements for manufacturers of inorganic byproducts when such byproducts are subsequently recycled, reused, or reprocessed. Under section 8(a)(6), EPA is required to enter into a negotiated rulemaking on this topic and publish a proposed rule on the topic by June 22, 2019, and adopt a final rule by December 22, 2019. In 2017, a Federal Advisory Committee did meet on this topic, but was unable to make a consensus recommendation.

Potential CDR Complications

There are various complexities associated with CDR that can lead to problems for reporting companies. Submitters should plan ahead, review EPA’s current reporting guidance, and seek legal help as needed during this process to ensure accurate and thorough reporting.

TSCA Inventory Compliance

Inventory issues can arise where a manufacturer identifies a particular chemical as subject to CDR reporting but realizes it is not listed on the TSCA Inventory. Where this issue arises, companies may want to consider reporting the Inventory issue under EPA’s Audit Policy.

Access to Information

Manufacturers must report information that is “known to or reasonably ascertainable by means 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.” 40 C.F.R. § 704.3. Most manufacturers have issues about access to information about use and processing by downstream customers. An importer may have additional challenges accessing reportable information, such as chemical identity, where that information is held by its foreign suppliers. In those cases, importers must ask their foreign suppliers to provide them with the information, which is typically confidential, or else ask them to submit the information directly to EPA. As this process can be time-consuming, it helps to start early.

Byproducts

A byproduct is a chemical substance produced without a separate commercial intent during the manufacture, processing, use, or disposal of another chemical substance or mixture. 40 C.F.R. § 704.3. Sometimes byproducts are recycled. EPA has identified a number of complicated scenarios as to whether those recycled byproducts are subject to CDR reporting. Those that are subject to CDR reporting may also raise the question of whether or not they are on the TSCA Inventory.

Past is Prologue: 2016 Reporting Requirements

In preparing for 2020 reporting, with 2019 as the principal reporting year that will require gathering significant data, it is worth reviewing 2016 reporting requirements as a benchmark.

Who Was Required to Report

Generally, manufacturers who manufactured domestically or imported a threshold quantity of a chemical on the TSCA Inventory at a particular site for non-exempt commercial purposes were required to submit information regarding that chemical to EPA. 40 C.F.R. § 711.8. Small manufacturers (with total annual revenue not exceeding $40 million, and who did not manufacture more than 100,000 pounds of any given chemical substance) were exempt from complying with the CDR rule in 2016. Id. § 704.3.

Reporting Thresholds

For most chemicals, the 2016 threshold for reporting was 25,000 pounds of a chemical at a particular site during the calendar year for which reporting was being made. For some chemicals, however, a lower threshold of 2,500 pounds applied. Id. § 711.8. These were chemicals for which EPA had taken action under sections 5, 6, or 7 of TSCA.

Substance of Reporting Requirements

In 2016, manufacturers were required to report the total annual production volume for each chemical for each
year at a given site since the previous principal reporting year (2011). For years 2012-2014, only the name and volume of each chemical that met the threshold was required to be reported to EPA. In contrast, a manufacturer was required to report more detailed information for chemical substances that were manufactured domestically or imported during the principal reporting year of 2015. Required information for 2015 included company and site information at each site; industrial processing and use; chemical identification; information relating to the manufacturing; as well as consumer and commercial uses for each chemical substance that met its given threshold at each site. Id. § 711.20. This is likely similar to, or the same as, the scope of information that will be required to be reported for the principal reporting year of 2019.

In 2016, EPA excluded certain substances from CDR reporting. These included polymers, microorganisms, and naturally occurring substances. Id. § 711.6. Other chemicals were excluded if they qualified as research and development substances, impurities, non-isolated intermediates, or byproducts used for non-commercial purposes. Id. § 704.5. In addition, byproducts were exempt if their only commercial purpose was for use by public or private organizations that (1) burned it as a fuel, (2) disposed of it as waste, including in a landfill or for enriching soil, or (3) extracted components chemical substances from it for commercial purposes. Id. § 720.30(g). Chemicals in imported articles were also exempt from 2016 CDR reporting.

Confidentiality

Manufacturers were permitted to request protection from public disclosure for some information if it qualified as confidential business information (CBI). However, a manufacturer that wished to claim CBI was required to meet all of the requirements in 40 C.F.R. § 2.208, as well as submit claims of substantiation, which meant that the manufacturers had to demonstrate a likelihood of competitive harm if that information was disclosed. Id. § 711.3.

Chemical data reporting is a complicated process that may involve complex legal questions and significant logistical hurdles. Companies would be wise to begin thinking about their 2020 reporting obligations now.

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