

## **EPA'S NEW CADMIUM IN CONSUMER PRODUCTS REPORTING RULE**

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To close out 2012, the U.S. Environmental Protection Agency (EPA) issued and subsequently announced the withdrawal of a final rule under the Toxic Substances Control Act (TSCA) section 8(d). Notwithstanding the false start, the action demonstrates EPA's continued willingness to use TSCA to regulate consumer products based on their chemical composition. *See* original publication at 77 Fed. Reg. 71,561 (Dec. 3, 2012) and notice of withdrawal at 77 Fed. Reg. 76,419 (Dec. 28, 2012). The withdrawn rule would have required manufacturers of cadmium or cadmium compounds, or companies that import consumer products containing cadmium compounds, to report certain unpublished health and safety studies to EPA. EPA's rulemaking is notable not only because it would have affected the chemicals industry, but also because it demonstrates EPA's continued willingness to regulate consumer products on the basis of chemical content.

If established, the new reporting requirements would have applied to manufacturers or importers of cadmium or cadmium compounds (defined as chemicals that contain any cadmium in their chemical structure) when the compounds have been or are reasonably likely to be incorporated into consumer products. Further, the reporting requirements also would have applied to entities manufacturing or importing "articles" (i.e., products) that contain cadmium compounds, as long as those articles have been or are reasonably likely to be incorporated into consumer products. EPA provided several examples of companies that could be affected by the final rule, including entities such as manufacturers of basic organic chemicals, manufacturers and importers of inorganic dyes and pigments, producers or refiners of nonferrous metals (except copper and aluminum), wholesalers of toy and hobby goods, discount department stores, and warehouse clubs and

supercenters. EPA also announced its intent to propose to extend the rule to processors and distributors of cadmium and cadmium compounds and articles containing those compounds. The notice of withdrawal did not indicate that EPA is backing away from such a future action.

The withdrawn rule would have required manufacturers and importers to report unpublished studies related to human and environmental effects of cadmium and cadmium compounds. Entities would have had to submit studies on a variety of topics relating to human health effects, ecological and environmental effects, human and environmental exposure, and monitoring data. Relevant studies also would include those involving "measurable content of cadmium or cadmium compounds in consumer products." Section 8(d) rules do not obligate companies to initiate new studies, but do require reporting any initiated or completed studies that fall within this scope.

The origin of EPA's rulemaking dates to 2010, when EPA announced that it would issue a proposed TSCA reporting rule in response to a petition by the Sierra Club and other groups. *See* <http://www.cpsc.gov/library/foia/foia10/petition/cadmiumdenial.pdf>. In the petition, these groups sought several actions by EPA and the Consumer Product Safety Commission (CPSC) to regulate more strictly cadmium compounds in children's products. EPA had indicated that it would likely review information received pursuant to the section 8(d) rule before pursuing further restrictive actions concerning cadmium under TSCA section 6. CPSC recently announced that a new and revised ASTM standard will adequately address the risks of cadmium; thus, it appears that the commission will not likely pursue additional rules at this time.

The agency withdrew the section 8(d) rule based on comments and questions it received raising concerns about the scope and interpretation of the immediate final rule. Citing "significant confusion and uncertainty about the final rule in certain industrial sectors," EPA concluded there was "good cause" to withdraw the

rule. The section 8(d) rule had a very broad scope and would have affected many companies within industry sectors not typically subject to TSCA section 8(d) reporting requirements.

EPA's path forward is unclear. The agency is expected to review the questions and comments it has received, but did not specifically commit to issuing an updated section 8(d) rule. EPA plans to continue to collaborate with CPSC to address safety concerns related to cadmium in consumer products.

One potential implication of the cadmium section 8(d) reporting rule was the possibility that EPA could allege that violations of TSCA section 8(e) had occurred in the past. TSCA section 8(e) requires manufacturers, processors, and distributors of a chemical substance or mixture to "immediately" report information to EPA that reasonably supports the conclusion that the substance or mixture presents a substantial risk of injury to health or the environment. The reporting rule, therefore, would have created a risk for entities that might submit copies of unpublished health and safety studies if the agency were to interpret those studies also to have been reportable pursuant to TSCA section 8(e).

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