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News Alert

Importers of Mercury-Containing Articles Face Reporting Requirements

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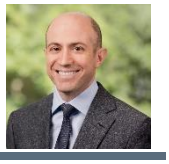

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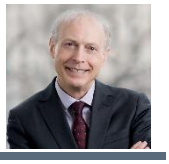

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More than four years after finalizing reporting requirements for the manufacture, import, export, processing, and distribution in commerce of elemental mercury and mercury-added products, EPA has eliminated an exemption for certain importers. This response to a 2020 court decision broadens the scope of companies required to report to include importers of articles qualifying as a mercury-added products. 86 Fed. Reg. 61708 (Nov. 8, 2021); 40 C.F.R. § 713.7(b)(2).

The amendment to the mercury reporting rule eliminates an existing exemption for companies that manufacture (including import) a mercury-added product where that company is "engaged only in the import of a product that contains a component that is a mercury-added product." Now, importers of a pre-assembled product that contains a component that is a mercury-added product will be subject to reporting requirements under TSCA section 8(b)(10).

EPA explained in the preamble to the original mercury reporting rule that "the manufacture (other than import) of a mercury-added product is the 'intentional addition of mercury where mercury remains present in the final product for a particular purpose'." 83 Fed. Reg. 30061 (June 27, 2018). EPA's amendment essentially eliminates the parenthetical so that imports of mercury-added products, including assembled products, are subject to reporting requirements. Per EPA's Compliance Guide for the mercury reporting rule, an "assembled product" is a product that is "manufactured with the inclusion of a component that is a mercury-added product. An example is a

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vehicle containing a mercury-added fluorescent light bulb." In turn, a "component" refers to a "mercury-added product that is installed as part of the manufacture of an assembled product."

Importers of mercury-added products subject to the amended rule will be required to report as follows:

- General requirements:
  - Amount of mercury in manufactured products;
  - Amount of mercury in imported products;
  - Amount of mercury in exported products; and
  - Amount of mercury in products distributed in commerce (only for non-IMERC reporters);
- Contextual requirements:
  - Countries of origin for imported products;
  - Countries of destination for exported products; and
  - NAICS codes for products distributed in commerce; and
- Specific requirements: the company should specify in reporting, as applicable, the specific categories or the subcategories of mercury-added products.

The amended rule includes examples of dozens of entities that may be potentially affected by the rule and are consistent with those listed in the original rule, ranging from those engaged in photographic film, paper, plate, and chemical manufacturing to game, toy, and children's vehicle manufacturing. EPA has estimated that more than 750 sites would be potentially subject to the amended rule, of which more than 650 would submit reports due to the revised requirements.

The amendment does not eliminate existing exemptions for either (1) a company that does not manufacture (including import) a mercury-added product with the purpose of obtaining an immediate or eventual commercial advantage; or (2) a company engaged only in the manufacture (other than import) of a product that contains a component that is a mercury-added product who did not first manufacture (including import) the component that is a mercury-added product.

The original mercury reporting rule required initial reporting by July 1, 2019, with subsequent reporting at three-year intervals. Companies are next required to report by July 1, 2022 data from January 1 to December 31, 2021.

Background

The amendment is a change to EPA's June 2018 final rule, which requires manufacturers and importers of mercury or mercury-added products, or companies that otherwise intentionally use mercury in a manufacturing process, to report certain activities under section 8(b). Section 8(b)(10) was added by Congress to TSCA as part of the Frank R. Lautenberg Chemical Safety for the 21st Century Act (LCSA). It mandated EPA to "carry out and publish in the Federal Register an inventory of mercury supply, use, and trade in the United States." The 2018 final rule established new regulations covering the manufacture,

import, distribution in commerce, and export of elemental mercury, mercury compounds, or mercury-added products. 40 C.F.R. Part 713.

The 2018 final rule exempted three groups of entities from reporting:

1. A person who does not manufacture (including import) a mercury-added product with the purpose of obtaining an immediate or eventual commercial advantage;
2. A person engaged only in the import of a product that contains a component that is a mercury-added product; or
3. A person engaged only in the manufacture (other than import) of a product that contains a component that is a mercury-added product who did not first manufacture (including import) the component that is a mercury-added product[.]

40 C.F.R. § 713.7(a).

Almost immediately after publication, the rule was challenged in the Second Circuit by the Natural Resources Defense Council and several state attorneys general. Petitioners argued that the three exemptions found at 40 C.F.R. § 713.7 violated the statutory mandate that Congress had enacted at TSCA section 8(b)(10). EPA argued that the exemptions were lawful because they minimized duplicative reporting or added burden per existing EPA or other mercury-related reporting requirements. EPA argued that duplicative or overly burdensome reporting requirements are prohibited under TSCA section 8(a)(5). Ultimately, the Second Circuit vacated the exemption at 40 C.F.R. § 713.7(b)(2) for companies that import pre-assembled products that contain a mercury-added component, but did not order EPA to change the other exemptions. *Natural Resources Defense Council, Inc. v.* EPA, 961 F.3d 160 (2d. Cir. 2020).

Since EPA is carrying out the Second Circuit's order vacating the reporting exemption, it has not provided notice or opportunity to comment on the amendment. The final rule is effective **December 8, 2021.**

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