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EPA Relaxes TSCA Fee Self-Identification Requirement

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On March 24, 2020, Susan Parker Bodine, Assistant Administrator of the U.S. Environmental Protection Agency's (EPA) Office of Enforcement and Compliance Assurance (OECA), issued a No Action Assurance memorandum related to the Toxic Substances Control Act (TSCA) (15 U.S.C. § 2601 *et seq*.) section 6 risk evaluation fee self-identification requirement. The memorandum explains that that EPA will exercise its enforcement discretion for three specified categories of manufacturers and importers of 20 designated "high-priority" substances as a bridge to planned revisions to the Agency's 2018 TSCA fee rule. The no action assurance will remain in place until September 30, 2021 or the effective date of a final rule amending the fees regulations, whichever occurs first.

The three categories are:

1. importers of "articles" containing one of the 20 high priority substances;
2. domestic producers of one of the 20 substances as a "byproduct"; and
3. domestic producers or importers of one of the 20 substances as an "impurity"

These manufacturers and importers will not need to self-identify (as otherwise required by May 27, 2020) and will not be subject to otherwise applicable risk evaluation fees. Significantly, EPA's assurance applies to activities that meet the definitions of these terms appearing at 40 C.F.R. § 720.3 and, as such, provides a **broader exemption** for byproducts than exist under the current TSCA section 5 exemptions appearing at 40 C.F.R. §§ 720.30(g) and 720.30(h)(2). Notably absent from the No Action Assurance, however, is an exemption for manufacturers of one of the 20 high-priority substances as a "**non-isolated intermediate**."

EPA's action was not unexpected. During recent public EPA fee rule presentations, the Agency

indicated that numerous entities in the regulated community had made the Agency intensely aware of the substantial adverse impacts of the absence of meaningful exemptions from the self-identification and fee sharing requirements for these 20 chemicals, and that the Agency understood and appreciated these adverse impacts.

While EPA's action is laudable and does address many of the issues raised by industry, issues remain. For example, it is likely that many manufacturers and importers will have to self-identify based on *de minimis* manufacture/import quantities and/or *de minimis* concentrations of substances in imported mixtures. EPA also has yet to specify the required diligence standard – *viz*., whether a prospective reporter must base its report based on information that it “knows” or can “reasonably ascertain,” whether the information must simply be “readily obtainable,” or whether some other standard or type of diligence is required. Questions related to the scope of “small business entity,” consortia, and procedural issues also remain unaddressed.

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