

Reinstated Superfund Excise Tax Imposed on Certain Chemical Substances

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On November 15, 2021, President Biden signed into law the [Infrastructure Investment and Jobs Act \(IIJA\)](#), [Public Law 117-58](#), [135 Stat. 429](#). Section 80201 of the IIJA reinstates the Superfund excise tax on certain chemical substances under Sections [4661](#) and [4671](#) of the Internal Revenue Code (Tax Code), effective **July 1, 2022**. Section 80201(c)(1) of the IIJA modified the method for determining whether a substance is a taxable substance by lowering the required percentage of taxable chemicals used to produce the substance from 50 percent to 20 percent of the weight (or the value) of the materials used to produce such substance. Since its reinstatement, the excise tax has raised many questions and caused significant industry consternation. This memorandum explains why.

Background

Prior to their expiration in 1995, the Superfund excise taxes were used to fund the [Hazardous Substance Superfund](#), established by the [Comprehensive Environmental Response, Compensation, and Liability Act of 1980 \(CERCLA\)](#). Since the Superfund excise tax expired almost three decades ago, the industrial chemical community's familiarity with their application is attenuated at best. The U.S. Environmental Protection Agency (EPA) administered the expenditures and used the funds to clean up hazardous waste sites around the United States. At that time, the application of the tax and the deployment of funds were quite well understood, and the U.S. Internal Revenue Service (IRS) developed a relatively robust series of guidance documents to explain how the tax operated and who was subject to the tax.

Taxable Chemicals

Fast forward to today. Many in the industrial chemical community are unfamiliar with the Superfund excise tax legacy, and the IRS is seemingly unprepared for the learning curve challenge the reactivation of the tax has created. As reinstated, the Superfund excise tax will apply to a list of taxable chemicals and taxable substances, as of **July 1, 2022**, through **December 31, 2031**, if not extended. The excise tax applies to companies that manufacture, produce, or import any of the 42 specific chemicals listed in [Section 4661](#) of the Tax Code, most of them common in consumer products, including ammonia, butane, benzene, and mercury. Manufacturers, producers, or importers that sell or use any of these chemicals must pay a tax of \$0.22 to \$4.87 per ton, depending on the

chemical. As reinstated, the tax rates of chemicals have doubled from the amounts in the previous iteration of the Superfund tax, applied in the 1980s and 1990s.

Exemptions from the application of the excise tax are listed at [Section 4662\(b\)](#) of the Tax Code. The exemptions identify taxable chemicals that are exempt due to their specific use. For example, methane or butane used as a fuel, or nitric acid, sulfuric acid, ammonia, or methane used in production of fertilizer are exempt. Ethylene and propylene may also be exempt, but only when used in the production of fuel (motor fuel, diesel fuel, aviation fuel, or jet fuel). Section 4662(c)(2) provides an additional exemption from tax liability where a company imports a taxable chemical and exchanges that chemical as part of an inventory exchange with another person. In these cases, the other person would be liable for paying the excise tax, not the initial importer.

Taxable Substances

The IIJA also reinstated the Superfund excise tax on the import for sale or use of any taxable substance under [Section 4671](#) of the Tax Code. Taxable substances are defined in [Section 4672](#) as any substance that, at the time of sale or use by the importer, is listed as a taxable substance. Specifically, taxable substances include the 50 substances on the initial list of taxable substances in Section 4672(a)(3) and 101 taxable substances added by the IRS in December 2021, through [IRS Notice 2021-66](#). These substances consist generally or partially of chemicals listed in Section 4661. Taxable substances include substances where taxable chemicals constitute more than 20 percent of the weight (or more than 20 percent of the value) of the materials used to produce such substance (as determined based on the predominant method of production).

Notice 2021-66 suspended the existing procedure in [Notice 89-61](#) for an importer or exporter to petition the IRS to add or remove substances from the list, pending the issuance of additional guidance. The Treasury Department and the IRS reportedly intend to update Notice 89-61 to reflect the changes made to Section 4672(a)(2) by the IIJA and to make other changes that may be necessary. No such update has been issued to date, however.

Notice 2021-66 does not specify the tax rate for each taxable substance. Instead, Section 4671(b) provides that the amount of tax imposed with respect to any taxable substance is equal to the amount of tax that would have been imposed by Section 4661 on the taxable chemicals used as materials in the manufacture of the taxable substance, if such taxable chemicals had been sold in the United States for use in the manufacture or production of the taxable substance. Pending further guidance, the previously published tax rates, adjusted for the IIJA increases, and the examples outlined in Notice 89-61 could be helpful in calculating the tax on taxable substances and the potential tax exposure if a substance is subsequently added to the list. The IRS is expected to issue guidance prior to the **July 1, 2022**, effective date of the Superfund excise taxes.

Applicable IRS Forms

The Superfund excise taxes are part of Subtitle D, Chapter 38 of the Tax Code. Accordingly, the procedural rules in [26 C.F.R. Part 40](#) regarding filing, deposits, and related procedural issues apply to companies subject to the reinstated Superfund excise taxes. Companies must report the reinstated Superfund excise taxes on [Form 6627](#), Environmental Taxes, attached to [Form 720](#), Quarterly Federal Excise Tax Return.

Relief Regarding Failure to Deposit Penalties

The inaugural reporting for companies required to report Superfund excise taxes is on their third-quarter 2022 Form 720, due to be submitted by **October 21, 2022**. This would be for the period **July 1-September 30, 2022**. Semi-monthly deposits are required, however. This would make the first tax deposit covering the **first half of July 2022** due by **July 29, 2022**. Under the rules, a late fee of 5% may be applied on the amount due for each month the form remains delinquent up to a total penalty of 25%.

In response to pointed public comment, on April 15, 2022, the IRS released an advance version of [Notice 2022-15](#), providing relief for the **third and fourth calendar quarters of 2022**, and the first calendar quarter of **2023**, regarding the failure to deposit penalties imposed by [Section 6656](#) of the Tax Code, as those penalties relate to the Superfund excise taxes. The Notice essentially allows taxpayers until **October 31, 2022**, to determine whether a Superfund excise tax applies and to calculate how much tax is owed. Some deposit amount is still required by July 29 to satisfy the relief provisions set out in Notice 2022-15. During the first, second, and third calendar quarters of **2023**, the IRS will not withdraw a taxpayer's right to use the deposit safe harbor rules of the Excise Tax Procedural Regulations at 26 C.F.R. Section 40.6302(c)-1(b)(2), for failure to make required deposits of Superfund excise taxes if the requirements set out in the Notice are met.

Commentary

Companies are likely to be caught off guard by this reinstated tax. It has been almost 30 years since the Superfund excise tax was in effect. Some companies did not yet exist when the previous excise tax applied and have no experience with the old tax and thus no internal processes for determining their liability for the Superfund excise tax. Even companies that have been on the market for decades may not have many employees who were around when the previous excise tax applied. It is important for companies to be aware of the existence of this tax, and to evaluate the chemicals and substances they import, to establish whether they owe any excise taxes. Otherwise, companies risk finding out about this tax when they are audited and risk becoming liable for penalties.

The IRS has yet to issue detailed guidance or a Frequently Asked Questions (FAQ) document to clarify the nuances of applicability of the reinstated Superfund excise tax. Many entities are struggling with its application. It is unclear whether and how the statute means to differentiate a "substance" from an "article," and if so, whether the IRS would apply the definition of "article" under the Toxic Substances Control Act (TSCA). As defined, the "taxable substances" appear to stop short of what would be defined as an "article" according to [40 C.F.R. Section 704.3](#).

Nothing in the statute or in Notice 2021-66, for example, references manufactured items in the context of taxable substances. Inferences, however, can be made from the absence of any mention in the law. [Notice 89-61](#) provided guidance under the previously applicable Superfund excise tax. It states that it was Congress' intent that taxable substances only include chemicals that are intended for further chemical conversion. The term "substance," therefore, excluded fabricated products that are molded, formed, woven, or otherwise finished into end-use products. The relevance of this guidance to the new tax is unclear.

Notice 2021-66 suspended the procedure in Notice 89-61 because the IRS plans to issue a more current guidance on this matter. As this question is likely to arise in the near future when the Superfund excise tax applies, the IRS can be expected to address this aspect. Until then, companies may take the IRS' previous position as an indication of how it is likely to view "articles" and "fabricated products" under the current Superfund excise tax. To obtain certainty prior to IRS issuing

guidance on this matter, companies that import taxable substances as part of articles can seek clarification from the IRS. Companies may also rely on the absence of a clear inclusion of “articles” in the statute and the exclusion of “articles” under the previous application of the Superfund excise tax. Companies opting for the latter run the risk, however, of incurring penalties, should the IRS adopt a different view.

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