

# **EPA Issues Strategy to Address the Mismatch Between the Federal Hazardous Waste Rules and the Retail Sector**

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On September 12, 2016, the U.S. Environmental Protection Agency (“EPA” or the “Agency”) issued a strategy for addressing growing concerns about the application of the federal hazardous waste regulations under the Resource Conservation and Recovery Act (“RCRA”) to the retail sector. See [EPA, “Strategy for Addressing the Retail Sector under RCRA’s Regulatory Framework”](#) (hereinafter referred to as the “Retail Strategy”). EPA’s strategy aims to reconcile the decades-old hazardous waste regulatory program with the unique compliance issues facing the retail sector today. The strategy follows the Agency’s discussions with stakeholders, consideration of President Obama’s Executive Order directing agencies to evaluate regulatory effectiveness and efficiency, and review of public comments on a Notice of Data Availability (“NODA”) regarding waste management in the retail sector. EPA intends to implement the strategy through a combination of rulemakings, guidance documents, and further fact-gathering.

EPA’s Retail Strategy is unlikely to provide any meaningful relief to the retail sector in the short term, but there may be some long term benefits, especially if the Agency moves forward with certain elements, such as the reclassification of low-concentration nicotine-containing products as non-acutely hazardous wastes or non-hazardous wastes (as discussed below) and/or the establishment of streamlined “universal waste” requirements for aerosols. EPA’s plans to develop a policy on reverse logistics may also provide some certainty to the retail sector as to when products moving through reverse logistics are properly deemed to be discarded and thus solid wastes.

## **Background**

EPA’s Retail Strategy is the culmination of industry outreach, review of public comment regarding retail hazardous waste issues, and implementation of President Obama’s Executive Order requesting that agencies evaluate compliance burdens against regulatory objectives.

Beginning in 2008, EPA engaged in discussions with the retail community and state regulators to better understand the unique challenges the retail sector faces in complying with RCRA regulations.

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In the Retail Strategy, the Agency acknowledges that the RCRA regulations, developed largely for manufacturing facilities, are not necessarily appropriate for the retail industry (especially for unused consumer goods, such as returned, recalled, or expired products, that cannot be sold by the original retailer).

EPA's Retail Strategy is also intended in part to implement President Obama's Executive Order 13,563 regarding review of agency regulations. See [Exec. Order No. 13,563, 76 Fed. Reg. 3821 \(Jan. 21, 2011\)](#). Issued in January 2011, the Executive Order instructs federal agencies to develop a plan to "determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Additionally, in February 2014, EPA published a Notice of Data Availability ("NODA") for the retail sector in an effort to better understand the unique RCRA issues facing stakeholders across the retail industry. See [63 Fed. Reg. 8926 \(Feb. 14, 2014\)](#). Through the NODA, EPA requested and received comment on a number of topics related to retail waste management practices, including the handling of pharmaceutical wastes, reverse distribution processes for unsold or returned products, potential expansion of the universal waste regulations (which establish streamlined requirements for certain commonly generated wastes) to cover more consumer products, and the need for flexibility for episodic hazardous waste generators (*i.e.*, facilities that generate more than 100 kg of hazardous wastes per month only occasionally).

## **Current EPA Activities to Address Retail RCRA Issues**

The Retail Strategy cites three recently completed or ongoing rulemakings as a critical part of EPA's efforts to address RCRA issues in the retail sector. However, there are significant questions about how effective these rulemakings will be in providing meaningful regulatory relief to retailers. Each rulemaking is discussed briefly below:

- **Definition of Solid Waste Rule.** EPA significantly modified the RCRA definition of solid waste in January 2015. See [80 Fed. Reg. 1,694 \(Jan. 13, 2015\)](#). This definition plays a central role in the federal hazardous waste regulatory program, since only solid wastes can qualify as hazardous wastes subject to RCRA regulation. The 2015 rule modified or eliminated certain pre-existing exclusions from the definition of solid waste for recycled materials, and established a new exclusion for certain hazardous secondary materials sent to a "verified recycler," as long as specific conditions are satisfied. EPA states in the Retail Strategy that it anticipates retailers may utilize the verified recycler exclusion for aerosol cans and other retail items. The Agency also indicates that it is reaching out to regulated entities to facilitate the rule's implementation and monitor its effectiveness. Many retailers are skeptical, however, about the usefulness of this exclusion, especially because of the difficulty of a recycler becoming verified, and because of questions about if/how a verification issued by one state could be used for materials generated in another state. In addition, the verified recycler exclusion and other aspects of the 2015 rule are currently being challenged in the federal appeals court for the District of Columbia. See *American Petroleum Institute v. EPA*, No. 09-1038 (D.C. Cir.) (oral argument scheduled for November 3, 2016).
- **Hazardous Waste Generator Rule.** In September 2015, EPA proposed a substantial overhaul of the RCRA rules for hazardous waste generators. See [80 Fed. Reg. 57,918 \(Sept. 25, 2015\)](#). In the Retail Strategy, EPA claims that certain provisions in the proposal will provide important regulatory flexibility for retailers, such as the new provisions for episodic generators

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of hazardous waste, for consolidation of conditionally exempt small quantity generator (“CESQG”) waste at large quantity generator facilities, and for waivers from the 50-foot buffer zone requirement for ignitable/reactive wastes (which ordinarily prohibits storage of such wastes within 50 feet of the property boundary). Many retailers, however, have expressed concern that these provisions, in practice, will be of little value. Moreover, they have vigorously opposed other aspects of EPA’s proposal, such as the proposed requirement to keep detailed records of all determinations that wastes are non-hazardous, and the proposal to classify all generators in non-compliance with even minor requirements as treatment, storage, or disposal facilities (“TSDFs”) requiring a RCRA hazardous waste facility permit. EPA has announced that it plans to finalize the rule in October 2016. The White House Office of Management and Budget (“OMB”) completed its review of the final rule on September 13, 2016, suggesting that the Agency may be on target to meet this scheduled date, although it is not clear the extent to which the final rule will be different from the proposal.

- **Pharmaceutical Waste Rule.** In September 2015, EPA also proposed substantial changes to the rules for management of pharmaceutical wastes that qualify as RCRA hazardous wastes. See [80 Fed. Reg. 58,014 \(Sept. 15, 2015\)](#). The rule is designed to establish a tailored set of standards for the management of hazardous waste pharmaceuticals by retail stores selling such products, by other healthcare facilities, and by other companies involved in reverse distribution of pharmaceuticals. However, many retailers have been concerned that the proposal inappropriately covered all pharmaceuticals being handled through reverse distribution, even though many of those products (especially over-the-counter products) may still be used as intended. Retailers have generally been pleased with EPA’s openness to reclassifying low-concentration nicotine-containing products (e.g., gums, lozenges, patches, prescription inhalers, and e-cigarette products) from acutely hazardous wastes to either non-acutely hazardous wastes or non-hazardous wastes – important because these products are frequently the reason that many retail facilities are subject to full regulation as large quantity hazardous waste generators – but they are concerned that the Agency may unnecessarily limit the scope of this regulatory relief. The Pharmaceutical Waste Rule was originally scheduled to be finalized at or about the same time as the Hazardous Waste Generator Rule, but EPA has indicated informally that the Pharmaceutical Waste Rule will now likely not be issued until sometime in 2017.

## **Upcoming EPA Activities to Address Retail RCRA Issues**

While EPA’s first priorities are finalizing the Hazardous Waste Generator and Pharmaceutical Waste rules, the Retail Strategy outlines a number of other measures to further address RCRA concerns in the retail industry. For example:

- EPA is drafting a guide on the regulatory status of aerosol cans destined for recycling (e.g., for recovery of scrap metal or ignitable propellants that can be used as fuel).
- EPA is developing a proposed rule to classify and regulate aerosol cans as universal wastes. Additionally, EPA is evaluating adding other retail items, such as pesticides and electronics, to the universal waste regulations, taking into account feedback received on the NODA and experience obtained by certain states that already regulate such items under their own universal waste programs.
- EPA intends to “develop a policy that addresses the reverse distribution process for the retail

sector as a whole,” with special emphasis on when products moving through reverse logistics are properly deemed to be discarded and thus solid wastes. The Agency acknowledges in the Retail Strategy that the RCRA regulations may not be the “best fit” for the reverse distribution process used in the retail industry.

EPA hopes that its current initiatives and upcoming activities will provide a measure of flexibility for the retail industry in the management of hazardous wastes under RCRA. Retailers and their suppliers/vendors should closely follow EPA’s proposed rulemakings and other initiatives in this area.

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