FROM THE CHAIR—LOOKING FORWARD TO A NEW ABA YEAR

Charles L. Franklin

This is my last opportunity to write to the committee members as chair of the Pesticides, Chemical Regulation, and Right-to-Know (PCRRTK) Committee. In August 2012, Alex Dunn, the incoming chair of the Section of Environment, Energy, and Resources (SEER), will bring in a new leadership team, including new committee chairs with fresh ideas for serving the Section membership. Without disclosing the name of the incoming PCRRTK chair (not my prerogative), I can say the new chair will bring tremendous knowledge, experience, and thought to the position, ensuring that the committee will continue to provide unique opportunities for dialogue, scholarship, information exchange, and career development to its members. So, along with wishing my successor the best of luck in the coming American Bar Association (ABA) year, here are three broader wishes for the entire committee.

1) That the outstanding and committed attorneys and law students who participated in the leadership of the committee over the last two years will continue to dedicate their time and effort in the coming year. The people that volunteered their time as vice chairs, as planners and participants for programs and special projects, and as sounding boards and implementers for new ideas, are what make the committee a success.

2) That, with the help of ABA and SEER leadership, the committee can continue to make good on its efforts to increase the cultural, professional, and regional diversity of its membership. Pesticide and chemical control law are truly multiregional, multinational, and multisector practices, and increasing the range of viewpoints, backgrounds, and professional affiliations represented in the committee will only increase its value and relevance going forward.

3) That the committee’s mission and focus continue to evolve to reflect the changing landscape of pesticide and chemical law and policy, including the blurring line between substance and product regulatory policy and even between product and media-related policy. Over the last several years, Congress, the administration, courts, state governments, environmental advocates, and industry have all offered policy ideas that would radically reshuffle the way the United States regulates pesticides, chemicals, and the consumer, industrial, commercial, and agriculture products and services they enable. The PCRRTK Committee is the natural home to follow and debate these ideas.

In short, I hope that the PCRRTK Committee will provide to all of you the value, insight, and support it has provided to me. Best wishes for a great summer to all.

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AMERICAN CLEANING INSTITUTE®
FRIDAY FORUM

Brian Sansoni

Chemicals Office Focus: Making More Data More Available to More People, Report EPA’s Jones

Making information more available and more understandable to more people is a key priority for the U.S. Environmental Protection Agency’s (EPA) Office of Chemical Safety and Pollution Prevention (OCSPP). That is according to Acting Assistant EPA Administrator Jim Jones, who spoke about his office’s initiatives before the American Bar Association’s (ABA) Pesticides, Chemical Regulation, and Right-to-Know (PCRRTK) Committee in a June 1 appearance at the American Cleaning Institute® (ACI).

A 24-year veteran of EPA, Jones stated that OCSPP is trying to figure out how to organize information on chemical safety and make it useful for multiple audiences. The government has to have some way to give people access to this information, he said.

Jones also stated that his office is focused on using its risk assessment and risk management tools to fill data gaps on chemical safety. Use of the chemical data reporting (CDR) rule is a part of this process, Jones noted.

Jones also expressed pride in EPA’s Design for the Environment Program (DfE) and that program’s new memorandum of understanding with NASCAR to help green the sport. “We need to spend more time talking about products that we do know are safe,” Jones said. “We have to figure how to market [DfE] to consumers.”

He noted that agreements with organizations like NASCAR can help spread information about products with the DfE label, especially since there is no marketing budget within EPA to do so.

DfE’s Clive Davies Talks Up Program Improvements

EPA’s DfE program is working hard to increase transparency for its safer product labeling (SPL) initiative, DfE Chief Clive Davies told ABA’s PCRRTK Committee members and other attendees at a May 11 appearance at ACI.

Davies outlined for ABA members and guests recent upgrades in the DfE program, which is designed to “help consumers and industrial purchasers make wise choices by identifying safer and effective products,” according to the DfE Web site.

The SPL program has experienced rapid growth, Davies stated, noting that the process has become more expensive and the criteria “more stringent.” The SPL identifies products that meet EPA’s stringent sustainability criteria.

While acknowledging that DfE assesses chemicals through a hazard-based lens rather than a risk-based one, Davies noted that the program does consider exposure “quite heavily” in its assessment of product chemicals. In addition, current program capabilities are quite limited in terms of being able to perform and use life-cycle assessments so that environmental factors such as energy and water usage are taken into account in product comparison and design.

Davies acknowledged that DfE’s criteria for fragrances—designed to identify safer aroma chemicals and fragrance formulations for use in cleaning products—is perceived as tough to meet. He is hopeful that the criteria will become more useful to program participants. DfE recently extended the date for compliance with its criteria for fragrances to September 30, 2012.

The Friday breakfast forum is designed to provide ABA’s pesticides, chemical regulation, and community right-to-know legal practitioners, ACI, and other stakeholders with an informal venue to share information on topical issues. As part of these hour-long meetings, held between 8:30 and 9:30 one Friday each month, influential regulatory/policy/thought leaders in the field are asked to come to speak on a relevant topic for about 15 minutes, and to stay and chat in an informal Q&A setting for another 10–15 minutes.

The Friday forum is hosted by ACI located at 1331 L Street, NW, Suite 650, Washington, D.C. 20005.

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NRDC SUES EPA OVER CONDITIONAL PESTICIDE REGISTRATION IN FIRST NANOTECHNOLOGY-RELATED ENVIRONMENTAL CHALLENGE

Michael Novak, Eric Gotting, and Martha Marrapese
Keller and Heckman LLP

A federal appeals court is now hearing the first-ever lawsuit involving the potential human health and environmental impacts of an engineered nanomaterial. On April 16, 2012, the Natural Resources Defense Council (NRDC) filed suit in the United States Court of Appeals for the Ninth Circuit against the U.S. Environmental Protection Agency (EPA), asking the court to set aside a conditional registration granted under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for a nanosilver antimicrobial used in textiles. The suit focuses on a single pesticide known as AGS-20, which is manufactured by HeiQ Materials AG (HeiQ). The nanosilver contained in AGS-20 acts as an antimicrobial by releasing silver ions that kill bacteria. NRDC claims that EPA failed to consider various human health and environmental impacts of AGS-20 in particular, as well as nanosilver in general, when the agency determined, as is required under FIFRA, that there would not be any unreasonable adverse effect during the conditional registration period. The case is currently being briefed by the parties which, depending on the outcome, could have a significant impact on conditional registrations for nano-pesticides and other new active ingredients.

The Challenged Registration

NRDC’s challenge centers on EPA’s four-year conditional registration for AGS-20, which sets forth a two-tiered approach for additional testing of the product. HeiQ’s application began as a “me-too” registration on the basis that pesticides containing silver were already on the market. During the registration process, however, EPA’s FIFRA Scientific Advisory Panel (SAP) determined that nanoscale pesticides may have different properties and effects than larger scale molecules of the same substance. It also found that there was limited scientific data regarding the toxicity and exposure levels of nanosilver particles.

EPA and HeiQ, therefore, agreed to treat AGS-20 as a new active ingredient not contained in any currently registered pesticide that would be subject to further investigation while the product is simultaneously marketed during the conditional registration period. Specifically, HeiQ must perform route-specific toxicity tests for various exposures, as well as product characterization and stability studies to determine if nanosilver breaks away from AGS-20 or textiles treated with the pesticide. If nanosilver breaks away, HeiQ will be required to conduct additional tests to determine the pesticide’s impact on humans and the environment.

NRDC’s Lawsuit

NRDC’s lawsuit asks the Ninth Circuit to set aside the conditional registration, proceeding under FIFRA’s judicial review provision and arguing that EPA’s conclusion regarding no unreasonable adverse effect was not supported by “substantial evidence” in the record as a whole. Specifically, NRDC maintains that EPA failed to (1) consider risks posed by the antimicrobial to infants and babies; and (2) account for aggregate exposures to the consuming public from other nanosilver-based products.

With regard to infants and babies, NRDC claims that they represent a vulnerable subpopulation due to their low body weight and will have potentially higher exposures to AGS-20 through mouthing activity on treated fabrics. While EPA considered exposures to three-year-old toddlers, NRDC believes that the agency’s risk assessment would have raised significant concerns had it considered exposures to even younger children.

As for aggregate exposures, NRDC argues that consumers of all ages would not only be exposed to AGS-20, but also nanosilver contained in other commercial products. Although EPA acknowledged these additional exposures, NRDC claims that the agency did not take them into account when assessing the overall health risks of AGS-20. According to NRDC, because EPA did not consider such exposures during the risk assessment, it incorrectly concluded that there would be no unreasonable adverse effect during the conditional registration period.
Amici Brief Supporting NRDC

On April 23, 2012, several nonprofit organizations filed an amici curiae brief in support of NRDC’s suit. While the nonprofits also challenge EPA’s finding of no unreasonable adverse effect, their brief focuses more on nanotechnology in general, as well as the use of nanosilver in the marketplace and its potential risks. They argue the following:

- Nanomaterials in general represent a new technology and are fundamentally different than their bulk material counterparts in that they pose unique toxicological risks to humans and the environment;
- EPA failed to consider aggregate exposures to nanosilver from over 200 nanosilver-based products already on the market when concluding that HeiQ’s conditional registration would not result in an unreasonable adverse effect; and
- Little research has been completed on the human and environmental impacts of nanosilver and, to the extent research does exist, it shows nanosilver to be toxic.

Potential Impact of Suit

A ruling in NRDC’s favor could have significant implications for manufacturers of nano-pesticides and other new active ingredients. EPA currently has significant discretion whether to grant a conditional registration. The Ninth Circuit could issue a decision narrowing the agency’s discretion, such as by dictating the types of data (e.g., aggregate exposures) that must be considered during the risk assessment before a conditional registration may be granted. Under that scenario, existing, registered nanosilver-based products may be subject to future challenge, with EPA less likely to grant conditional registrations for new products. On the other hand, a win for EPA would confirm EPA’s existing discretion under FIFRA, even where emerging technologies, like engineered nanomaterials, are involved.

Case Status

EPA’s answering brief was submitted on June 14, 2012; HeiQ’s intervenor brief was submitted on June 28, 2012. The case is captioned as Natural Resources Defense Council, Inc. v. USEPA, Case No. 12-70268 (9th Circuit).

Michael Novak, Eric Gotting, and Martha Marrapese are members of the environmental practice group in the Washington, D.C. offices of Keller and Heckman LLP.

The Section has undertaken a five-year project with the goal of planting a million trees by 2014. ABA members are encouraged to get involved in hands-on tree planting activities in their communities. If you have participated in a tree planting project or have planted a tree on your own, please report this information as we want to count the trees you planted towards our goal of planting one million trees by 2014.

If you can’t plant a tree in person, please consider making a contribution to one of the Section’s partner tree organizations. The Section’s One Million Trees Project will get credit for one tree planted for every dollar donated through the Section website.

To report a tree planting event or to make a donation to one of our project partners, please visit www.ambar.org/EnvironTrees
THE APPLICATION OF SNURS TO ARTICLES UNDER TSCA

Lynn L. Bergeson

The U.S. Environmental Protection Agency (EPA) proposed recently to apply its significant new use rule (SNUR) authority under the Toxic Substances Control Act (TSCA) to “articles.” The proposals raise interesting policy issues and present challenges to EPA and industry alike. Lawyers practicing in this area are advised to read the proposed rules and reflect on the broader policy implications. Who knows, perhaps the Committee on Pesticides, Chemical Regulation, and Right-to-Know could play a role in assisting EPA formulate a policy position on the use of its SNUR authority as applied to articles. More is discussed below.

Background

On September 29, 2009, Administrator Jackson announced the Obama administration’s principles for TSCA reform and EPA’s plans to strengthen its chemical management program to increase the pace of its efforts to address chemical risks. Enhancements initially included the development of “chemical action plans” that outline EPA’s risk management efforts for chemicals of greatest concern. The plans outline steps to control chemical exposures of concern and utilize TSCA measures, including SNURs, chemical testing rules, and chemical restrictions/bans. Chemicals being considered for action plan development included benzidine dyes and pigments; bisphenol A; polybrominated diphenylethers (PBDE) in products; long-chain perfluorinated chemicals; phthalates; and short-chain chlorinated paraffins (SCCP).

Expanding on these efforts, EPA released in August 2011 a strategy for identifying and assessing “priority” chemicals. The strategy describes a two-step approach for assessing existing chemicals, and addressing risk assessment/reduction, data collection and screening, and public access to chemical data and information. EPA issued on August 18, 2011, a new approach for identifying priority chemicals for review and assessment under TSCA and invited public input on its Discussion Guide: Background and Discussion Questions for Identifying Priority Chemicals for Review and Assessment.

As a new component of EPA’s Enhanced Chemicals Management Program, EPA identified on March 1, 2012, a work plan of 83 chemicals for further review under TSCA, and identified seven of these chemicals for risk assessment in 2012. The seven chemicals currently being assessed are: antimony and antimony compounds; HHCB (1,3,4,6,7,8-hexahydro-4,6,6,7,8,8-hexamethylcyclopenta[g]-2-benzopyran); long-chain chlorinated paraffins; medium-chain chlorinated paraffins; methylene chloride; N-methylpyrrolidone (NMP); and trichloroethylene. On June 1, EPA announced an additional 18 chemicals scheduled for risk assessment in 2013 and 2014.

Proposed SNURs

EPA recently proposed SNURs for five groups of chemicals, each of which is included in EPA’s Enhanced Chemicals Management Program: certain PBDEs (77 Fed. Reg. 19,862 (Apr. 2, 2012)), hexabromocyclododecane (HBCD) (77 Fed. Reg. 17,386 (Mar. 26, 2012)), and benzidine-based chemical substances, a type of SCCPs, and di-n-pentyl phthalate (DnPP) (77 Fed. Reg. 18,752 (Mar. 28, 2012)). The proposed rules are noteworthy for several reasons, including the fact that EPA has proposed that significant new use include “processing” of covered PBDEs in addition to more customary manufacturing and importing activities. More importantly for purposes of this article, three of the proposed SNURs are significant because EPA has proposed to regulate both chemical substances/mixtures and “articles” containing the SNUR substances. This is unusual. Indeed, the SNUR regulations contain an exemption for persons who import or process “the substance as part of an article.” See 40 C.F.R. § 721.45(f).

Under TSCA, an “article” is defined as a manufactured item that is formed to a specific shape or design, which has end-use functions dependent in whole or in part upon its shape or design during end use, and that has either no change of chemical composition during its
application or only changes of composition that have no commercial purpose separate from that of the article. Articles include an enormous range of manufactured items, ranging from simple automobile bumpers to more elaborate electronic devices. While EPA has used its TSCA authority to regulate articles, it has done so sparingly, and in settings quite different from the circumstances at issue in the proposed rules.

Before discussing why broadly regulating articles poses challenges, a brief overview of EPA’s SNUR authority may be helpful. When EPA issues a SNUR, it is designating a use of a chemical as “new” and subjecting that use to premarket EPA review even though the use may not be “new” as the term is commonly understood. In designating a use as “new” for a chemical substance, manufacturers, importers, and/or processors of that chemical substance must submit to EPA a significant new use notice (SNUN) at least 90 days before any manufacture, import, or processing for that use. 40 C.F.R. § 721.25(a). A SNUN requires essentially the same information to be submitted to EPA as a TSCA premanufacture notice (PMN).

In reviewing a SNUN, EPA is authorized to obtain health/environmental test data, take action to protect against risks EPA believes to be unreasonable (including regulating the manufacture, processing, distribution, use, or disposal of the substance), or take action to protect against imminent hazards as provided under TSCA. TSCA §§ 5(e), 5(f), 6, and 7, 15 U.S.C. §§ 2604(e), 2604(f), 2605, and 2606. The uncertain outcome of any PMN/SNUN review is the bane of a company’s quest for commercial predictability. Reviews can take considerably longer than 90 days, and EPA’s TSCA authority can be expressed in the imposition of commercial restrictions or operating conditions, some of which may need to be communicated to downstream customers of the PMN/SNUN submitter.

The proposed PBDEs, HBCD, and benzidine-based chemical substances SNURs would each regulate persons who import or process a SNUR substance “as part of an article.” The proposed SNUR for HBCD would designate “use in consumer textiles, other than for use in motor vehicles” as a significant new use. The proposed benzidine-based chemicals SNUR would add nine benzidine-based chemical substances to the existing SNUR and would include the import or processing of the substances as part of an article. Under the SNUR for the proposed PBDEs, EPA would include the importing and processing of articles that contain any of the listed PBDEs within the scope of the SNUR.

Policy Implications/Legal Uncertainties

EPA is understandably interested in interpreting TSCA expansively to address potential risks arising from chemicals and use patterns likely not envisioned over three decades ago when TSCA was enacted. A SNUR’s inherent elasticity is an attractive tool for EPA, and it is entirely predictable that EPA is seeking to repurpose TSCA in new ways to achieve its chemical management objectives using existing authorities.

That said, the proposed SNURs raise important legal and practical questions. EPA offers little explanation regarding the scope of the SNURs or how risks from imported articles may pose the type of risk EPA’s SNUR authority was intended to address. The proposed SNURs would regulate SNUR chemicals in articles independent of whether any such article actually poses a risk. EPA notes its concern that if “PBDEs contained in articles are exempt, they could be imported without a SNUN and thereby increase the amount of PBDEs in commerce in the United States without a review by EPA.” 77 Fed. Reg. at 19,872. This observation falls short of describing any nexus between the presence of PBDEs in articles and risk.

EPA also places a significant and arguably misplaced legal burden on commenters to explain existing uses, and to define terms and use applications with sufficient granularity to avoid being considered new. Given the complexity of imported articles, EPA’s “one size fits all” approach begs the question whether a more refined subset of articles—products that might actually pose risks to human health or the environment—is a more fitting candidate for SNUR regulation.
Other important issues that are not framed in the rulemakings are the threshold question of whether EPA should expand the scope of its SNUR authority in this way, and the practical implications of doing so. On the one hand, EPA is to be commended for seeking to use the tools it has to address potential chemical risks. On the other hand, whether TSCA’s SNUR authority is the best or only way to address chemical risks, and whether all articles as defined in the proposals present risks worth regulating, deserves greater stakeholder discussion. Comments in response to Federal Register notices that assume the legitimacy of EPA’s legal and policy approach are a poor surrogate for vigorous public debate. A key reason for this is while chemical manufacturers and importers are well aware of SNURs, SNUNs, and the implications of these terms, their downstream customers and article manufacturers are less familiar with TSCA and may be completely oblivious to the proposed rules and their game-changing commercial implications.

Industry too has a responsibility to step up and address these issues and the institutional and legal challenges EPA faces under TSCA to discharge its duty to protect human health and the environment. Critics will charge that the chemical manufacturing community cannot credibly continue to do little to rehabilitate TSCA’s deficits, and then criticize EPA for using its existing authorities creatively to achieve its chemical management objectives. EPA’s resources are diminishing at the same time chemical management challenges are expanding. Industry stakeholders should consider developing thoughtful legal positions and practical solutions to these challenges to assist EPA and ensure that TSCA authority is deployed effectively and rationally.

In this regard, perhaps the committee could consider developing a white paper or other legal analysis of the scope of EPA’s policy under TSCA in applying SNURs to articles. There is limited precedent to consider and likely little legislative history, but the opportunity to explore these issues would be both stimulating and potentially useful to the broader TSCA stakeholder community. If interested, e-mail lbergeson@lawbc.com.

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OSHA FURTHERS U.S. ADOPTION OF
GLOBALLY HARMONIZED SYSTEM OF
CHEMICALS CLASSIFICATION THROUGH
RECENT RULEMAKING

Karen Nardi, Jonathan Koenig, and
Shailesh Sahay

The classification and labeling of chemicals in commerce is regarded by many as an important tool in limiting risks associated with hazardous chemicals. In one view, the effectiveness of international classification and labeling requirements has been impeded by the diversity and inconsistency of such requirements in various jurisdictions across the globe. To eliminate this inconsistency, the United Nations (UN) developed the Globally Harmonized System of Classification and Labeling of Chemicals (GHS) in 2002. The GHS (including its subsequent revisions) was not implemented through a multinational treaty. Instead, it serves as guidance intended to be incorporated into law by individual nations. The goal of the GHS is for nations to adopt substantially similar classification and labeling standards, which would both grease the wheels of international commerce and provide for internationally consistent and comprehensible chemical labeling.

In the United States, the federal Occupational Safety and Health Administration (OSHA) recently undertook a major update of the Hazard Communication Standard (HCS), 29 C.F.R. § 1910.1200. An important aim of the new HCS is to conform the U.S. OSHA requirements with the GHS. This is the first major overhaul of the HCS since 1994. The new regulation became effective May 25, 2012, although implementation dates are staggered to give companies time to plan for and comply with the changes. The OSHA regulations (along with regulations already adopted by the U.S. Department of Transportation (DOT)) begin to align U.S. regulations with UN GHS goals, but additional agencies (including potentially the U.S. Environmental Protection Agency (EPA) and the Consumer Products Safety Commission) must adopt GHS compliance requirements for these goals to be fully realized in U.S. law. The following paragraphs highlight major elements of the OSHA regulatory revisions.

Consistent Labels and New ‘SDS’

One of the main purposes of the revised HCS is to make chemical hazard information easier for workers to understand. In the past, chemical manufacturers and importers were given leeway in drafting “appropriate” labels and data sheets. As a result, similar chemicals and products from different sources would often bear different labels or warnings.

The new 2012 HCS offers a more uniform approach to hazard classification and labeling. It also provides the format for a new safety data sheet (SDS) (formerly called a material safety data sheet or MSDS). Employers must train their employees on the new labeling and SDS formats. OSHA has provided a useful side-by-side comparison of the changes to the new HCS. It is available at http://www.osha.gov/dsg/hazcom/side-by-side.html.

Hazard Classification

The system for classifying chemicals according to their hazards has been changed in the new HCS. The 1994 HCS had a more performance-oriented approach. The new 2012 HCS establishes a detailed classification of chemical hazards based on physical and health risks.

Under the new 2012 HCS, a chemical characterized as any of following is categorized as a “Physical Hazard”—explosive; flammable (gases, aerosols, liquids, or solids); an oxidizer (liquid, solid, or gas); self-reactive; pyrophoric (liquid or solid); self-heating; an organic peroxide; corrosive to metal; gas under pressure; or when in contact with water, emits flammable gas.

A chemical associated with any of the following characteristics is categorized as a “Health Hazard”—acute toxicity (any route of exposure); skin corrosion or irritation; serious eye damage or eye irritation; respiratory or skin sensitization; germ cell mutagenicity; carcinogenicity; reproductive toxicity; specific target organ toxicity (single or repeated exposure); or aspiration hazard.

The 2012 HCS also creates a new hazard category entitled “hazards not otherwise classified” (HNOC),
which replaces the former “unclassified hazards” category. Under the new HNOC category, employers must provide information regarding chemicals with adverse physical or health effects that are identified during the evaluation of scientific evidence, even if the chemicals do not fall under an existing hazard class. In addition, combustible dusts now have their own hazard class, although the term has yet to be defined. Combustible dust hazards may result from many non-chemical materials in the workplace, and thus identifying hazards may present challenges.

Labeling

Shipping labels are a key source of information about chemical hazards. Under the HCS, chemical manufacturers, importers, and distributors are responsible for labeling each container of hazardous chemicals leaving the workplace. The new 2012 HCS standardizes the required labeling and incorporates uniform international GHS signal words, hazard statements, and symbols. OSHA now requires that labels on shipped containers include:

- Product identifier providing the name or number of the chemical;
- Signal word providing chemical elements and compounds;
- Hazard statement describing the nature of the hazard;
- Symbols (hazard pictogram) specific to the product’s hazard category;
- Precautionary statement describing recommended measures to minimize adverse effects resulting from exposure; and
- Supplier information identifying the chemical manufacturer, importer or other responsible party.

Safety Data Sheets

The new 2012 HCS provides for standardized SDS, which will contain 16 sections in a set sequence. The new SDS contains more information than in the previous MSDS. OSHA anticipates that the new format will make information easier to locate. Another change is that OSHA has published a mandatory Appendix D, which details the information that must be included under each heading, making the SDS a more rigorous format than the older MSDS. Under the 2012 HCS, the SDS must include the following categories of information—(1) identification; (2) hazard identification; (3) composition/information on ingredients; (4) first-aid measures; (5) fire-fighting measures; (6) accidental release measures; (7) handling and storage; (8) exposure controls/personal protection; (9) physical and chemical properties; (10) stability and reactivity; (11) toxicological information; (12) ecological information; (13) disposal considerations; (14) transport information; (15) regulatory information; and (16) other information, including date of preparation or last revision.

OSHA has formally stated that it will not enforce the information requirements of Sections 12-15 as these are outside its jurisdiction. Other agencies enforce these requirements through different statutes. For example, Section 13 (Disposal) is regulated by EPA under the Resource Conservation and Recovery Act (RCRA) statute, and Section 14 (Transport) is regulated by DOT.

Phased-In Compliance Deadlines

Recognizing the significant work that will be required of chemical manufacturers, importers, distributors, and employers, OSHA has adopted a phased approach to compliance. During the transition period to the final compliance dates, responsible parties may comply with either the new HCS, the current standard, or both.

- By December 1, 2013, employers must train employees on the new label elements and SDS format.
- By June 1, 2015, chemical manufacturers, importers, distributors, and employers must comply with all modified provisions of the final rule, except that by December 1, 2015, distributors will be prohibited from shipping containers with labels that do not satisfy the new requirements.
- By June 1, 2016, employers must update alternative workplace labeling and hazard communication programs as necessary, and
must provide additional employee training for newly identified physical or health hazards.

**Judicial Challenges**

Several industry groups have challenged the OSHA rulemaking through a number of petitions for review filed with the U.S. Court of Appeals for the District of Columbia Circuit. Although the petitioners have yet to articulate the bases for their challenges, they have hinted at potential bases in correspondence with media and in past meetings with the White House Office of Management and Budget.

Some industry groups are worried that updated regulations may actually create inconsistent labeling requirements. One specific concern relates to pesticides, which are also governed by labeling requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Similarly, other groups have expressed that the regulations are not aligned enough with GHS, in particular with respect to requirements for when mixtures that contain toxic compounds must be classified as hazardous. Other groups are concerned with the regulation of combustible dusts and the compliance deadlines. The success of these challenges may affect the ultimate content of the rules.

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