Info

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July 30, 1981

Memorandum For: Members

SUBJECT: EPA Clarification of Asbestos Export Notification Rule

In the Federal Register of July 21, 1981, the Environmental Protection Agency published a statement of clarification on the applicability to asbestos of the export notification rule required by section 12(b) of the Toxic Substances Control Act. The statement was issued in response to AIA/NA's efforts this past January to obtain a more precise delineation of the scope of the rule. As originally published in the December 16, 1980 Federal Register, the rule was not clear in distinguishing between asbestos "mixtures," which are subject to the rule, and asbestos "products," which are not.

According to the statement, EPA considers three categories of asbestos exports to be reportable: 1) Bulk shipments of raw fiber, 2) An asbestos-containing mixture which assumes the shape of its container, for example, asbestos-containing paints, and 3) An asbestos-containing mixture which is formed to a shape that must be fundamentally changed before use.

Given as examples of types of products which are not subject to the rule are asbestos-cement pipe, brake linings, sheet gasketing, unfinished asbestos textiles, floor tiling, and rolls of asbestos paper.

For your convenience, a copy of the statement of clarification is attached along with a copy of the original rule. If you have any questions please feel free to call me.

Nick Hluchyj

Nicholas J. Hluchyj, Esq.
Ass't for Government Affairs

NJH/dlc

Enclosures

federal register

Tuesday
December 16, 1980

Part IV

Environmental Protection Agency

Chemical Imports and Exports;
Notification of Export

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 707

[OPTS 120001A; TSH-FRL 16525]

Chemical Imports and Exports; Notification of Export

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule outlines procedures for exporters to submit notifications to EPA under section 12(b) of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2611(b). Section 12(b) requires these notices whenever certain regulatory actions have been taken under TSCA with respect to a chemical substance or mixture. The rule also outlines the procedures EPA will use in notifying foreign governments of such actions as required by section 12(b).

EFFECTIVE DATE: January 15, 1981.

FOR FURTHER INFORMATION CONTACT: John B. Ritch, Jr., Director, Industry Assistance Office, Office of Pesticides and Toxic Substances (TS-799), Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, toll free: (800-424-9065), Washington, D.C.: (554-1404).

SUPPLEMENTARY INFORMATION:

I. Background

Section 12(b) of TSCA requires that any person who exports or intends to export a chemical substance or mixture for which submission of data is required under section 4 or 5(b), for which an order has been issued under section 5, for which a rule has been proposed or promulgated under section 5 or 6, or with respect to which an action is pending, or relief has been granted under section 5 or 7, must so notify the Administrator. Upon receipt of such notification, section 12(b) requires EPA to furnish the government of the importing country with:

1. Notice of the availability of data received pursuant to action under section 4 or 5(b), or
2. Notice of such rule, order, action, or relief under section 5, 6, or 7.

EPA issued interim guidance published in the Federal Register of June 2, 1978 (43 FR 24818) for submitting notice of export for chlorofluorocarbons (CFCs) and polychlorinated biphenyls (PCBs), the two chemicals regulated at that time under section 6. EPA proposed this rule to implement section 12(b) in general, and to immediately supersede the interim guidance for CFCs and PCBs, published in the Federal Register of October 2, 1979 (44 FR 56856). The comment period for this proposal ended December 31, 1979.

This rule applies to PCBs, CFCs, 2,3,7,8-TCDD (tetrachlorodibenzo-p-dioxin), asbestos—the chemicals presently subject to section 6 regulations—and any future substances or mixtures subject to appropriate section 4, 5, 6, or 7 actions.

Under this rule exporters are required to submit, for each affected chemical substance or mixture, a single notice each year for each country to which the chemical substance or mixture is exported. Notice must be submitted to EPA by letter and include the following: The name and address of the exporter, the name of the chemical substance or mixture, the date of export or intended export, the country of import, and the section of TSCA under which EPA has taken action. The Agency, in turn, will advise the government of the importing country about the U.S. regulatory action concerning the substance or mixture.

II. Issues and Public Comments

EPA received twelve comments from exporters, industry trade organizations, public interest groups, and a foreign government. Although only one foreign government formally commented on the proposed rule, the United Nations Environment Programme Governing Council decisions of 1977, 1978, and 1980 reflect other government's desires for full disclosure of information to importing nations.

Rulemaking Authority

Two industry comments stated that EPA does not have specific rulemaking authority under section 12(b) of TSCA.

It is clear that EPA does not have substantive rulemaking authority under section 12(b) of TSCA. However, these rules are not substantive rules. Rather they are procedural and interpretative rules. While Congress did not grant EPA general substantive rulemaking authority under TSCA, Congress did intend that EPA be able to issue such procedural and interpretative rules in order to implement the statute. This is made clear in the Report of the House Committee on Interstate and Foreign Commerce reporting H.R. 14032 in which the following comments were made:

> The bill contains specific grants of substantive rulemaking authority to the Administrator and the Committee does not intend that the Administrator have any substantive rulemaking authority which is not specifically granted. A general rulemaking authority is not needed to authorize the issue of procedural, interpretative, or similar administrative rules, consequently, such a provision is not included in the bill. (H.R. Rep. No. 1341, 94th Cong., 2nd Sess. 62 (1976); *reprinted in* Legislative History of the Toxic Substances Control Act, at 469 (1976)).

Scope of the Rule

In the proposed rule, EPA took the position that section 12(b) is primarily intended to alert and inform foreign governments, in a general manner, of hazards that may be associated with a chemical substance or mixture. The intended focus of the notice to foreign governments is the chemical substance or mixture and what EPA has done or found out about it, rather than specific export shipments from the United States. Therefore, EPA proposed that exporters only submit a single notice each calendar year for each country to which a regulated chemical substance or mixture is exported. Foreign governments would then be notified of the fact of export and the nature of the TSCA action.

Industry comments favored this approach. However, a public interest group and a foreign government disagreed. Their comments favored notice of each shipment.

This rule adheres to the approach proposed, instead of the "each shipment" approach. As noted in the proposed rule, the language of section 12(b) simply indicates that EPA is to notify the foreign government of domestic actions taken under TSCA, and does not say to do so in conjunction with each shipment. EPA believes that the purpose of the notice is to inform foreign governments of U.S. findings rather than to provide the basis for stopping individual shipments. The focus of the notice should therefore be to provide information to the foreign governments so that they may impose their own regulatory controls if appropriate. In addition, section 12(b) appears to limit the information that can be required from exporters. It is doubtful that the Agency can require from exporters the full scope of information necessary to make each-shipment notices useful. It is also questionable how useful such notices would be to the foreign government without similar export notices and data from other countries. However, EPA will provide, if requested, any information it possesses on individual shipments, including exporter identity, unless such information is claimed confidential. If the exporter's name is not confidential, the foreign government could then contact the exporter to obtain more specific information on a given shipment.

Intent To Export

The proposed rule defined "intent" to export as having a definite contractual obligation to export. An industry comment asserted that this definition is not adequate for exports to foreign distribution centers owned by the exporting company. In such cases, there is no specific contractual obligation to export as there would be between two separate business entities. They suggest that, in such cases, the exporter file a single notice at the beginning of each calendar year. The notice would be based on the history of past shipments or their own business planning and could cover all projected exports of affected substances to all affected countries.

EPA believes that the definition of intent can be clarified to cover the case of exports to a company's foreign distribution center. Section 707.65(a)(3) (proposed § 707.3(a)(3)) has been changed to read "a definite contractual obligation to export *or an equivalent intra-company agreement*". A non-specific intention to export based on past business practices or a general expectation of continued demand for a substance is not an acceptable trigger for a notice. EPA is attempting to ensure that notices to foreign governments are meaningful by reflecting an actual export to that country, rather than only a potential export that may never occur.

Timing of Notice Submittal

The proposed rule allowed for a notice of *either* actual export or intent to export to be submitted no later than seven days after export. A public interest group disagreed with this approach. They objected to allowing export reporting after the fact and said that intent to export obviously precedes actual export. They argued that notification will be more valuable to the receiving country if it is received prior to export and asserted that the proposed approach would not yield such early notification to the receiving country.

EPA believes that this comment has merit and the rule will now generally require notification early in the export process. However, the Agency has not excluded reporting of actual exportation. Instances could arise where it would be impossible for exporters to comply, in a practical sense, with an exclusive requirement for advance notice. For example, exporters may receive orders for a substance with such a short turnaround time that shipment would need to be held up in order to submit notice of intent to export. Therefore, to require only advance notice of shipment would be inconsistent with what section 12(b) provides and would potentially, needlessly disrupt normal business transactions and trade patterns.

The Agency shares the commenter's desire to receive timely export notices, and thus notify foreign governments as early as possible. The final language of § 707.65 (proposed § 707.3) has been changed to emphasize reporting intent to export. Exporters must submit notices no later than seven days after accepting a definite contractual obligation to export or equivalent intracompany agreement. In cases where actual export takes place less than seven days after the intent to export is formed, the notice must be submitted to EPA no later than the same day as export.

This change will allow more timely notice to the importing country. The requirement should not be burdensome to exporters since the notice can be prepared simultaneously with the Bureau of Census Shipper's Export Declaration Form which must be filed in connection with the shipment.

Quantities Exported

Another issue raised in the proposed rule was whether notices should include some estimate of the quantity of a chemical being exported. The proposed rule did not require reporting of quantity data. Therefore, no quantity data would be included in the notice to a foreign government. A foreign government commented that quantity data should be included in the notice. Apparently such information has been useful to them in reaching agreement with U.S. exporters concerning PCB-containing organic pigments.

This rule does not require such estimates of quantity. The language of section 12(b) does not appear to give EPA authority to require quantity information. In addition, under this rule, the foreign government will only receive notice of the first annual export of any given substance or mixture. The inclusion of quantity data for just the first shipment (from the U.S. only) would be of questionable value in their overall assessment of the substance or in making regulatory decisions concerning domestic manufacture and continued importation from other countries.

Export of Mixtures

An industry comment asks EPA to establish a minimum cutoff point for the percentage of a regulated substance in a mixture that would require notice to EPA. The suggestion is that if a mixture contains less than 1 percent of a regulated substance, the export of that mixture need not be reported.

Such a cutoff is not included in the rule. EPA does not believe that such an exemption would be wise given that some substances may retain their toxic or hazardous properties below a 1% level in a mixture. However, exporters need not test their export products for impurities in order to comply with these regulations. The requirement for notice covers only substances known to be in the exported material.

Exports for Uses Not Regulated

In the proposal, EPA took the position that the export notification requirement for a chemical is not contingent on whether the intended use of the chemical has been regulated. This final rule adopts the proposed approach. Notice must be given to EPA even though the chemical is being exported for a use, or in a manner, that is not regulated domestically under the relevant section 5, 6, or 7 action, rule, or order. An exporter of CFCs stated that if use of a chemical is allowed in domestic commerce, then, "industry should not be burdened with unreasonable reporting requirements for their exporting business." They cite as support the Trade Agreements Act of 1979 (Title IV, Standards Agreement of PL 96–39) which states that no Federal agency may engage in any standards-related activity that creates unnecessary obstacles to foreign commerce of the United States.

EPA does not agree that the reporting requirements of section 12(b) represent an obstacle to foreign commerce. Further, these regulations are not a standards-related activity. The reporting requirements themselves contain no restrictions on exports and do not prevent or delay the export process. Also, as discussed earlier, EPA does not believe that these regulations place an undue burden on exporters. This opinion was also shared by most of the other commenters.

As for the intended-use issue itself, the Agency is responsible for informing the importing country about actions taken or data gathered with respect to a regulated chemical. This notice will include information about any exempt uses of such substance or mixture within the U.S. However, it is up to the foreign government to determine what action, if any, it will take with respect to the substance or mixture, including exempted uses. Moreover, in many cases the exporter will not know the intended use of the substance or mixture. To require the exporter to make such a use determination would be unnecessarily burdensome, and in some cases, impossible.

Country to Which Exported

An exporter commented that when a chemical is shipped to a foreign distribution center, the exporter may have limited or no knowledge of the final destination of the substance. The exporter requested that EPA clarify whether the country of initial destination is considered to be the country "to which exported."

The Agency's primary concern is providing information to the government of the country in which the regulated substance will be used. However, the Agency realizes that there may be limits to an exporter's knowledge of the ultimate destination of the substance. EPA believes that the term "country to which exported" means the same as the Bureau of the Census definition of "country of destination" used for its export statistics requirements (U.S. Bureau of the Census, Schedule B, "Statistical Classification of Domestic and Foreign Commodities Exported from the United States"). The country of destination is defined as the country where the goods are to be consumed, further processed, or manufactured, as known to the shipper at the time of exportation. If the exporter does not know the country of ultimate destination, the shipment is credited to the last country to which the exporter knows that the merchandise will be shipped.

PCB Items

One company objected to including PCB-containing items in the rule. They feel it is inappropriate and goes beyond the statutory authority of section 12(b). Also, they believe it would be a redundant requirement since section 6 PCB regulations already ban manufacture and distribution in commerce, including exports of PCB items.

For the purposes of section 12(b), the Agency's authority applies to the chemical substance or mixture, and does not distinguish as to the form of the substance or mixture, e.g., whether it is in bulk form or contained in an article. Therefore, notice of export for "PCB Articles," except PCB equipment, as defined at 40 CFR 761.2(f), is required.

As a general policy, EPA will not require notice of export for articles unless the Agency specifically so requires in the context of individual section 5, 6, or 7 rulemakings or actions. Notice of export for "PCB Articles" was specifically required in section 6 PCB ban regulations and in the proposed section 12(b) rule.

The decision not to routinely require notice of exports for articles is based on the general difficulty in determining that a specific chemical substance or mixture is present in the article. In the future, if export notices are required for articles containing regulated substances, the section 12(b) regulations will be amended. Such an amendment will be made in the context of specific section 5, 6, or 7 rulemakings or actions. In such a context, the Agency will entertain public comments and be able to clarify which articles are of concern.

This comment also raises the issue of export notices about regulated substances or mixtures for which an export exemption has been granted. Under section 5 and 6 regulations, manufacture, processing, and distribution, including for export (as provided in section 12(a)(2) of TSCA) of a chemical may be prohibited unless a specific exemption has been granted. The PCB Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions regulations (40 CFR 761) contain such a provision. After May 1, 1980 no person may manufacture, process, or distribute PCBs, including for export, without a specific exemption from these regulations. If such an exemption is granted for PCBs (in articles or otherwise) or for substances under future section 5 or 6 actions, exporters must submit a section 12(b) notice for any such export. The language of § 707.60(b) (proposed § 707.1(b)) of this rule has been modified accordingly.

Chemicals Accompanying Equipment

Two exporters suggested that shipments of regulated chemicals that accompany articles or equipment in which they are intended to be used, or which are included in maintenance kits for such articles or equipment should be exempt from section 12(b) reporting. For example, shipments of electronic equipment service kits which contain cans of CFC aerosol cleaner, or separate containers of CFC refrigerant packed in shipments of air-conditioning equipment should not require export notices.

The Agency disagrees. Both examples involve shipments of regulated chemicals subject to section 12(b) requirements. Simply because a regulated chemical accompanies a shipment of articles or equipment does not alter the fact that the regulated chemical *per se* is being exported. Therefore, notice of export is required for such exports.

Citing Regulations

A company requested that EPA delete § 707.67 (proposed § 707.4(e)) in which an exporter must cite the EPA action that triggered their report on the substance.

The Agency does not believe that this section is an unnecessary or burdensome requirement. Exporters will already know which EPA regulation triggered an export notice. In addition, inclusion of this information will aid in the timely processsing of the notice, especially in such cases where a substance is a member of a regulated category, but is not specifically named in the rule.

Notices Prompted by Proposed Rules

One chemical company suggested that section 12(b) notices should not be submitted as a result of proposed rules. They want clarification of when, after a proposal, reports need to be submitted.

Section 12(b) clearly requires notice of export for chemicals *proposed* to be regulated under sections 5 and 6. Ideally, an export notice on a substance covered by a proposed or final rule would be submitted immediately. However, it is unrealistic to expect exporters to obtain copies of such a proposed rule, understand it, and comply with the section 12(b) requirements in such a timeframe. Therefore, notice of export will be required only for exports beginning thirty days following Federal Register publication of the proposal.

Company Reports

Another company wanted to know who specifically is responsible for reporting, i.e., each plant site, company subsidiary, or corporate headquarters. In their opinion, the decision should be left up to the company.

The Agency agrees and will accept notices from plant sites, subsidiaries, or corporate headquarters.

Form of Notice

A company stated that a requirement to file a separate notice for each chemical shipped to one location is overly burdensome.

With regard to the format of the notice, EPA has never stated that an individual notice would be required for each substance exported to the same country. Information on several substances going to several countries may be combined into one notice to EPA as long as the content of that notice meets all the requirements of §§ 707.65 and 707.67. Notice by letter will suffice. The Agency does not believe it is necessary to create a form for such notices.

Notice to the Foreign Government

A public interest group urged EPA to reduce the turnaround time for sending a notice to a foreign government from seven days to three days. This commenter also wanted EPA to send notices directly to EPA's counterpart rather than the country's embassy in Washington.

EPA plans to achieve as short a notice turnaround time as possible, but believes that a three-day maximum is unworkable. However, § 707.70 (proposed § 707.5(a)) has been changed to reduce this time from seven to five working days. Foreign governments may designate any official or agency as their proper recipient of section 12(b) notices. Absent any special designation, EPA will continue to notify the appropriate embassy in Washington. EPA believes this provides ample opportunity for direct notification. In addition to direct notification, EPA will inform the Department of State. EPA will, of course, keep a current file of appropriate notice recipients.

Possible Prejudicial Notice

A company stated that EPA should be aware that the notice it sends to a foreign government could be misleading and cause undue alarm. The notice may, they assert, be inappropriate to the other government's assessment of the risk involved.

EPA's notice to foreign governments will be as objective as possible. The notice will summarize EPA's action or findings with respect to a substance or mixture. The foreign government's response to the notice or the applicability of this information to their own risk assessment process is something the Agency cannot foresee or control.

EPA Contact

An exporter suggested that § 707.70(b)(2) (proposed § 707.5(b)(2)) be clarified to indicate whether the individual to contact for further information is an EPA or foreign official.

The final language specifies that the person a foreign government can contact for further information will be an EPA official.

Confidentiality

No specific confidentiality provision was included in the proposal. A company and a trade association strongly urged EPA to include such a section in the final rule. They assert that an exporter should be allowed to claim notices confidential to protect trade secret information and the exporter's business and trade investments. They also stated that this information should not be put in a public file or released to the public in any manner. One company stated that information claimed confidential should be protected in the notice provided to the foreign government, such as by protecting a confidential chemical identity by substituting a generic class description.

A confidentiality section has been added to this rule. The new § 707.75 allows the exporter to assert a confidentiality claim for any information contained in the notice. It provides that the exporter must assert any claims of confidentiality at the time of submission by clearly marking those portions of the notice that are considered confidential. Any information claimed as confidential in the notice will be treated by EPA as confidential and will only be disclosed to the public through the procedures set forth in 40 CFR Part 2.

With respect to the notice to the foreign government, the rule provides that EPA will include the specific chemical name of the substance to be exported, as well as the other information set forth in § 707.70, in each notice notwithstanding any claims of confidentiality for the information. This may result in disclosure of some confidential information to a foreign government, i.e., that a particular chemical substance is being exported to that country. In recognition of this possibility, EPA will tell the foreign government that there is confidential information in the notice and request that they take appropriate measures to safeguard the information. In addition, even though confidential information may be disclosed to a foreign government as part of the notice set forth in § 707.70, the rule provides that EPA will treat any such information as confidential with respect to other persons in accordance with section 14 of TSCA and EPA's confidentiality regulations in 40 CFR Part 2. Further, EPA expects that in some cases foreign governments will ask EPA for additional information or data beyond that contained in the notice set forth in § 707.70. In responding to those requests for additional information or data, EPA will provide the information or data to the foreign governments only if that information can be disclosed under section 14 and 40 CFR Part 2.

This approach to the confidentiality of section 12(b) notices is based upon EPA's interpretation of TSCA. There is an apparent conflict on the face of the statute between section 12(b) and section 14(a). Section 14(a) could be read as prohibiting all disclosure beyond that set forth in section 14. However, this reading would contradict the mandate of section 12(b). Because the statute must be interpreted to give the fullest possible effect to both section 12(b) and section 14(a), EPA interprets section 12(b) to require notification of the foreign government even when information in the notice is confidential, but to prohibit disclosure to other persons of such confidential information.

Section 12(b) requires exporters of chemical substances for which submission of data is required under section 4 and 5(b) or which have been subjected to certain regulatory actions under section 5, 6 and 7 to notify EPA of the export of those substances. The sole purpose of this notice to EPA is to enable EPA to notify the government of the importing country that a chemical substance subject to those actions under TSCA is being exported to that country. In the case of substances subject to data submission requirements under sections 4 or 5(b), EPA is required to notify the foreign government of the availability of the data. In the case of substances regulated under sections 5, 6, or 7, EPA is required to notify the foreign government of the nature of the regulatory action. Upon receipt of the notice, the foreign government can consider its own actions.

There is no statutory purpose for EPA to receive notices under section 12(b) from exporters unless EPA can give notice to the importing governments. Therefore, in order to fulfill the purpose of section 12(b) it is necessary to give the foreign government notice even if the notice contains some confidential information. If this provision were interpreted otherwise, EPA would be unable to provide the foreign government with a notice that would have any meaning and that would carry out the purpose of section 12(b).

At the same time, to give full effect to the purpose of section 12(b), EPA does not have to disclose the information in an export notice to anyone other than the specific foreign government. The purpose of section 12(b) is served by disclosure to the foreign government. Disclosure to others would not further this purpose and would contradict the purpose of section 14(a) which is to limit unnecessary public disclosure of confidential information. Consequently, it is only necessary to interpret section 12(b) to require disclosure of confidential information to the foreign government, not to require further disclosure.

This interpretation of the requirements of section 12(b) is supported by a review of the legislative history of section 12(b). The provision that became section 12(b) appeared in both the House and Senate versions of TSCA. The language of each was virtually identical. Neither the House bill, nor the committee reports accompanying the House and Senate bills, addressed the question of confidentiality. However, the language of the Senate bill (S. 3149) as reported March 16, 1976 is instructive as to how confidentiality would bear on the notice to the foreign government. Section 12(b) of the bill reads as follows:

(b) Notice—(1) If any person exports or intends to export to a foreign country a chemical substance or mixture for which the submission of data is required under section 4 or 5, such person shall notify the Administrator of such exportation or intent to export and the Administrator shall furnish to the government of such country notice of the availability of the data (subject to section 14) submitted to the Administrator under section 4 or 5 for such substance or mixture.

(2) If any person exports or intends to export to a foreign country a chemical substance or mixture for which a rule has been proposed or promulgated under section 5 or 6, or with respect to which an action is pending, or relief has been granted under section 7, such person shall notify the Administrator of such exportation or intent to export and the Administrator shall furnish to the government of such country notice of such rule, action or relief.

Paragraph (b)(1) uses the phrase "(subject to section 14)" when referring to the availability to the foreign government of the data under section 4 or 5. This phrase is not used either in reference to the notice to the foreign government in paragraph (b)(1) or to the notice to the government in paragraph (b)(2). This indicates that the Senate intended the limits of section 14 to apply to the disclosure to the foreign government of data submitted under section 4 or 5 but not to the actual export notice to the foreign government under (b)(1) or (2).

The House bill does not contain any reference to section 14. However, in discussing the differences between the House and Senate bills, the Conference Committee stated:

Except for minor differences in language, the House amendment follows the Senate provision. [H.R. Conference Rep. No. 94-1679, 94th Cong., 2nd Sess. 88 (1976)).

The final language of section 12(b) also does not contain any reference to section 14. However, the Conference Report states:

The conference substitute follows the policy set forth in both the Senate and House provisions * * * to provide information to foreign governments regarding chemical substances and mixtures, so that such foreign governments can protect their own citizens. Supra at 88.

From this discussion it is clear that the Conference Committee did not view the absence of the reference "(subject to section 14)" in the House bill or in the final language of section 12(b) to be a substantive difference. Accordingly, it is reasonable to conclude that Congress intended the limitations of section 14 to apply to the availability of data to the foreign government, not to the notice EPA would give to the foreign government.

This conclusion is further supported by examining the intent of section 12(b) as discussed in the legislative history. As stated by the Conference Committee in the language referenced above, the clear intent of section 12(b) is to provide a foreign government with notice that a chemical substance which has been subjected to either testing requirements or regulation under certain provisions of TSCA is being exported to that country from the U.S. This notice is to enable the foreign government to protect its own citizens. If the notice were not sent because some of the information contained in the notice was claimed as confidential, the purpose of section 12(b) would not be served.

It is clear from the House and Senate committee reports that both houses intended that EPA send a notice to the foreign government for each chemical subject to section 12(b) which would be exported to that country. The House Committee on Interstate and Foreign Commerce stated:

The Administrator must furnish the government of the country of destination timely notice of the availability of data submitted under section 4 or 5 of the rule, action, or relief under section 5, 6, or 7. [H.R. Rep. No. 94-1341, 94th Cong., 2nd Sess. 49 (1976).]

A similar intent was expressed by the Senate Committee on Commerce:

The Administrator shall furnish the appropriate information pertaining to the application of this act to the government of the foreign country for which the export is intended. [S. Rep. No. 94-698, 94th Cong., 2nd Sess. 25 (1976)]

This language indicates that neither the House nor the Senate intended that the Administrator not give notice to the foreign government.

Section 14(a) of TSCA has the primary purpose of restricting public disclosure of trade secrets and other confidential commercial and financial information. EPA does not believe that disclosure to a foreign government of only the limited amount of specific information required by section 12(b) contradicts the intent of section 14(a). The minimal information in the notice, as set forth in § 707.70 of the regulation, contains only two potential commercial secrets—that a specific chemical substance is commercial and that it is being exported to a specific country.

This is information which many foreign governments can obtain under their own authority to control the entry of goods into their countries. The other information in the notice specifies that the substance in question has been subjected to a testing requirement and describes the availability of data or that the substance has been subjected to a specified regulatory action under TSCA.

EPA recognizes that the fact of export of a particular chemical substance to a particular country may in some cases be a commercial secret to the exporter. EPA believes that, while Congress intended that this basic information be provided to the government of the country of import, Congress did not intend that this information be disclosed to others. There is no indication in the legislative history that Congress intended to treat section 12(b) notices as available to the public. Rather the language of section 14 would control disclosure other than to the foreign government.

As to the disclosure of additional information to the foreign government, it is clear from the legislative history discussed above that Congress intended the availability to the foreign government of such information to be governed by section 14. The language of the Senate bill expresses this concept, and the Conference Committee makes clear that the final language is not a substantive change from the Senate bill. Accordingly, if the foreign government were to request further information concerning the specific export which triggered the section 12(b) notice, the government would receive only that information which can be disclosed under section 14. Similarly, the data submitted under section 4 or 5(b) of TSCA would only be available to the foreign government if it can be disclosed under section 14.

EPA expects that most of the section 12(b) submissions will not be confidential. A great deal of information about exports of chemical substances is already publicly available, for example, through statistics released by the Bureau of the Census. EPA also anticipates that exporters will not make overly broad claims of confidentiality. There are four key items of information that would be submitted to EPA: the name of the exporter, the name of the exported substance or mixture, the country of import, and the date of export. EPA believes that for most situations where some aspect of an export transaction is confidential, the confidentiality can be protected by claiming only a single item of information confidential, usually the exporter's name.

EPA has decided not to require substantiation of confidentiality claims at the time of submission. However, exporters will be required to substantiate claims of confidentiality under the procedure of 40 CFR Part 2 if EPA receives requests for the information.

If, for example, a section 12(b) submission were requested under the Freedom of Information Act (FOIA), the exporter would be asked to substantiate the confidentiality claims. If the exporter were to claim more than a single item of information confidential, the exporter would have to substantiate how disclosure of a given item, such as chemical identity, would be harmful if another item, such as the exporter's identity were held confidential. Accordingly, EPA expects that, in most cases, claiming only a single item of information in the submission as confidential will adequately protect proprietary information.

Submitters should carefully consider the need for confidentiality claims. Accordingly, EPA advises that the following questions will be among those which submitters of section 12(b) notices will be required to answer in order to substantiate their claims:

1. Do you assert that disclosing the information you have claimed confidential would substantially harm your competitive position? If so, what are those harmful effects, and why should they be regarded as substantial? What is the causal relationship between disclosure and the harmful effect?

2. If you have previously exported this chemical in any form to the destination country, what precautions did you take to protect the information you now claim as confidential from disclosure?

3. To what extent has it been, or will it be, revealed to others that this chemical will be exported by you to the destination country? What precautions have you taken regarding undesired disclosure of the information you have claimed confidential?

4. Has EPA, another Federal agency, or a Federal court made any determinations regarding the confidentiality of any item you have claimed confidential? If so, please attach copies.

5. How long should confidential treatment be given the information you have claimed confidential?

6. If you have claimed exporter identity plus any other item of information confidential, and EPA keeps exporter identity confidential, how would disclosing the other information you claimed confidential substantially harm your competitive position?

7. If you have claimed more than one item of information confidential, and EPA keeps one item confidential, how would disclosing the other information you claimed confidential substantially harm your competitive position?

Establishment of a Sunset Provision

EPA did not include a sunset provision in the proposal, but raised this issue for comment. Seven comments addressed the question. Industry comments favored a sunset provision that would phase out reporting on a regulated substance after three years, but no later than five years. However, one of these companies qualified its support for a sunset provision with a recognition of the problems and difficulties of imposing such a requirement in this case. They suggested as an alternative that EPA annually publish in the Federal Register a list of those substances for which section 12(b) reporting is no longer required. Others that commented opposed a sunset provision. They stated that such a requirement would deny foreign governments necessary information and would be contrary to Congressional intent.

As stated in the proposal, EPA is not required to include a sunset provision in these regulations because export reporting is mandated by statutory language. EPA has decided that, at present, it will not institute a sunset provision. However, as the Agency gains more experience with administering these regulations, it may be appropriate to amend them to discontinue requiring notices on certain substances. As pointed out in the proposal, it is possible that after a period of time the foreign government would gain no further benefit from such notices if no new information is included.

Other Comments

(1) One company was concerned that sections 5(a) and (b) of TSCA might be read together to trigger export notice requirements on all *new substances subject to premanufacture notification under section 5(a)*.

This is not a correct interpretation. Export notice would be required for a new chemical substance only if it is (1) subject to a section 4 test rule; (2) included on the section 5(b)(4) list; (3) subject to an order issued under section 5(e) or (f); or (4) is subject to a proposed or final significant new use rule.

(2) Another company pointed out that notices of export for individual chemicals within a category of chemicals subject to a section 4 rule would also increase the reporting burden. They suggest that the exporter only be required to say that they are exporting a member of the regulated category.

EPA will continue to require reporting of the specific substance name as well as the substance category. The Agency believes this information will be valuable to the foreign government, especially with regard to specific test results on that substance. The Agency understands the industry's concern about the number of reports that may be involved. However, such a policy could potentially work to the exporter's advantage. For example, it is possible that while the category of substances may be of concern, some specific member of a category could prove to have low or no toxic effects as a result of testing—information which could therefore help the exporter.

(3) One exporter proposed that, in lieu of section 12(b) requirements, foreign governments could be notified under existing Trade Agreements Act of 1979 provisions (Standards Agreement).

The Agency disagrees. First, section 12(b) requires that EPA notify *any* country importing the TSCA regulated substance. However, under the Standards Agreement, notices would only be sent to those countries that signed the standard Code portion of the General Agreement on Tariffs and Trade (GATT). Not all countries that import chemical substances and mixtures from the U.S. signed this agreement. Secondly, the Standards Agreement requires notice to participating countries of *all* standards-related activities, regardless of whether they pertain to exports of chemicals. Such GATT notices would not specify that a regulated substance was actually being exported from the U.S. to that country. On the other hand, section 12(b) notices are export *and* chemical specific. Therefore, GATT notices would not fulfill the intent of section 12(b). Finally, the procedure for notifying foreign governments would be much less direct under the Standards Agreement than under section 12(b). EPA would have to notify the U.S. Trade Representative and the Technical Office (Department of Commerce), which in turn would notify GATT headquarters in Geneva, Switzerland, which would then notify the foreign governments. Such a procedure would delay section 12(b) notification to the foreign government.

(4) One company asked whether notice was required for exports or regulated substances from Alaska to a U.S. mainland destination.

Shipments between points within the customs territory of the U.S. are not considered exports even though they may pass through a foreign country. Therefore, such shipments are not subject to section 12(b) reporting. This comment did, however, prompt a clarifying change in the definition of exporter. This definition under § 707.63(b) now includes the phrase "to a destination outside of the customs territory of the United States."

Official Rulemaking Record

EPA established the official record for this rule (docket number OTS-120001) which is available for public inspection in the Office of Toxic Substances, Rm. E-447 from 8 a.m. to 4 p.m. Monday through Friday except legal holidays. This record includes (1) the rule, (2) written comments, and (3) other information identified by the Administrator as pertinent to promulgation of the rule.

The record inlcudes the following categories of information:

1. The proposed rule and comments received.
2. A draft of the proposed rule sent to the Manufacturing chemists Association (now Chemical Manufactures Association).
3. Letters of transmittal sent with that draft (item 2), and written comments received on it.
4. Minutes of informal meetings held on September 13, 14, and 19, 1978, and October 27, 1978, with industry and foreign government representatives.
5. A letter from the Natural Resources Defense Council, dated May 8, 1978, concerning interim procedures under section 12(b).
6. Correspondence with the Bureau of the Census, dated April 18, April 30, June 14, and June 28, 1979, concerning possible use of Federal Trade Statistics Act data.
7. May 15, 1980 report by the House Committee on Interstate and Foreign Commerce on the Toxic Substances Control Act amendment of 1980.
8. A letter to Congressman Scheuer, Chairman of the House Consumer Protection and Finance Subcommittee dated October 17, 1980.

Under Executive Order 12044, EPA is required to judge whether a regulation is "significant" and therefore subject to the procedural requirements of the Order or whether it may follow other specialized development procedures. EPA labels these other regulations "specialize." I have reviewed this regulation and determined that it is a specialized regulation not subject to the procedural requirements of Executive Order 12044.

Dated: December 8, 1980.

Douglas M. Costle,

Administrator.

Therefore, Title 40 of the Code of Federal Regulations is amended by adding a new Part 707 as set forth below:

PART 707—CHEMICAL IMPORTS AND EXPORTS

Subparts A-C—[Reserved]

Subpart D—Notices of Export Under Section 12(b)

Authority: Sec. 12(b), Pub. L. 94-469, 90 Stat. 2033 (15 U.S.C. 2611(b)).

§ 707.60 Applicability and compliance.

(a) Section 12(b) of the Toxic Substances Control Act requires any person who exports or intends to export a chemical substance or mixture to notify the Environmental Protection Agency of such exportation to a particular country if any of the following actions have been taken under the Act with respect to that chemical substance or mixture:

(1) Data are required under section 4 or 5(b),

(2) An order has been issued under section 5,

(3) A rule has been proposed or promulgated under section 5 or 6, or

(4) An action is pending, or relief has been granted under section 5 or 7.

(b) No notice of export will be required for articles, except PCB articles, unless the Agency so requires in the context of individual section 5, 6, or 7 actions.

(c) Any person who exports or intends to export polychlorinated biphenyls (PCBs) or PCB articles, for any purpose other than disposal, shall notify EPA of such intent or exportation under section 12(b). PCBs and PCB articles have the definitions published in §§ 761.2(s) and 761.2(f) of this title respectively.

(d) Any person who would be prohibited by a section 5 or 6 regulation from exporting a chemical substance or mixture, but who is granted an exemption by EPA to export that chemical substance or mixture, shall notify EPA under section 12(b) of such intent to export or exportation.

(e) Failure to comply with section 12(b) as set forth in these rules will be considered a violation of section 15(3) of the Toxic Substances Control Act, and will subject the exporter to the penalty, enforcement, and seizure provisions of sections 16 and 17 of the Toxic Substances Control Act.

§ 707.63 Definitions.

The definitions set forth in the Toxic Substances Control Act, section 3, apply for this Part. In addition, the following abbreviations and definitions are provided for purposes of this rule:

(a) "EPA" means the Environmental Protection Agency.

(b) "Exporter" means the person who, as the principal party in interest in the export transaction, has the power and responsibility for determining and controlling the sending of the chemical substance or mixture to a destination out of the customs territory of the United States.

(c) "Regulated chemical" means any chemical substance or mixture for which export notice is required under § 707.60.

(d) "TSCA" means the Toxic Substances Control Act.

§ 707.65 Submission to agency.

(a) Exporters must notify EPA of their export or intended export of each regulated chemical in accordance with the following:

(1) The notice must be in writing;

(2) The notice must be for the first export or intended export to a particular country in a calendar year;

(3) The notice must be postmarked within seven days of forming the intent to export or on the date of export, whichever is earlier. A notice of intent to export must be based on a definite contractual obligation, or an equivalent intra-company agreement, to export the regulated chemical.

(b) If the EPA action that prompts the notice is a proposed rule, the requirement to submit export notices to EPA shall begin thirty days after publication of the action in the Federal Register.

(c) Notices shall be marked "Section 12(b) Notice" and sent to the Document Control Officer, Office of Pesticides and Toxic Substances (TS-793), Environmental Protection Agency, Rm. E-447, 401 M Street, SW, Washington, DC 20460.

§ 707.67 Contents of notice.

The notice to EPA shall include:

(a) The name of the regulated chemical as it appears in the section 4, 5, 6, or 7 action. If a category is regulated, the name of the individual regulated chemical within that category, as well as the category, must be given. The name shall be that which appears in Volume I of the EPA Chemical Substance Inventory, or its supplements, if the chemical appears there.

(b) The name and address of the exporter.

(c) The country (countries) of import.

(d) The date(s) of export or intended export.

(e) The section (4, 5, 6, or 7) of TSCA under which EPA has taken action.

§ 707.70 EPA notice to foreign governments.

(a) Notice by EPA to the importing country shall be sent no later than five working days after receipt by the Document Control Officer of the first annual notification for each regulated chemical.

(b) Notices shall:

(1) Identify the regulated chemical.

(2) Summarize the regulatory action taken, or indicate the availability of data under section 4 or 5(b) of TSCA.

(3) Identify an EPA official to contact for further information.

(4) Include a copy of the pertinent Federal Register notice.

(c) Notices shall be sent to the country's ambassador in Washington, DC, or other official designated by the foreign government, and to the United States Department of State.

§ 707.75 Confidentiality.

(a) A person may assert a claim of confidentiality for any information which is submitted to EPA in a notice.

(b) Any claim of confidentiality must accompany the information at the time it is submitted to EPA. In the notice, the submitter must clearly identify the information that is claimed confidential by marking the specific information on each page with a label such as "confidential business information", "proprietary", or "trade secret".

(c) Notwithstanding any claim of confidentiality, information outlined in § 707.70 will be included in the EPA notice to the foreign government. With this exception, EPA will disclose information that is covered by a claim of confidentiality asserted in accordance with this section only to the extent permitted by, and in accordance with, the procedures set forth in TSCA and Part 2 of this chapter.

(d) If a person does not assert a claim of confidentiality for information at the time a notice is submitted to EPA, the Agency may make the information public, including placement in a public file, without further notice to the person.

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