



Issues Alert

SPI COMPLIANCE ALERT

EPA RELEASES FINAL LABELING RULE ON OZONE DEPLETING COMPOUNDS

The Environmental Protection Agency (EPA) has released its Final Rule implementing the labeling requirements of Section 611 of the Clean Air Act Amendments of 1990 (CAA). 42 U.S.C. § 7601 ~~et seq.~~ Section 611 requires that containers of ozone-depleting chemicals, and products containing or manufactured with an ozone-depleting chemical, bear the following warning:

WARNING: Contains [or Manufactured with, if applicable] [insert name of substance], a substance which harms human health and environment by destroying ozone in the upper atmosphere.

This summary will highlight the pertinent provisions of the Final Rule. Publication in the Federal Register is expected shortly. While considerable changes were made in the Final Rule to address concerns of industry, some questions still remain with regard to the effect of this Final Rule on certain members of the plastics industry.

AFFECTED SPI FACILITIES - Companies who manufacture an ozone-depleting chemical or whose products contain or are manufactured with an ozone depleting compound.

APPLICABLE LAWS - This Final Rule implements Section 611 of the CAA. 42 U.S.C. § 767(j). The Rule will be published at Title 40, Code of Federal Regulations Part 82. EPA may be issuing further guidelines to address certain questions about the labeling requirements.

PENALTIES - Violations of Section 611 are subject to the full range of penalties established in Title VII of the Clean Air Act Amendments.

EFFECTIVE DATE - The effective date of this Final Rule is May 15, 1993. Under Section 611, products manufactured with or containing a Class II substance must be labeled by January 1, 2015, unless EPA determines, after a rulemaking proceeding, that adequate substitutes for the Class II substance are available before that date. No such determinations are included in this Final Rule.

ENFORCEMENT - The Agency has acknowledged that due to the short time frame between issuance of the Final Rule and the effective date of the Rule, it will be "the Agency's policy to take no enforcement action for matters occurring within the first nine months following the publication of these regulations."

QUESTIONS ABOUT COMPLIANCE

1. What chemicals are subject to the Rule?

Only ozone depleting compounds listed under the CAA are subject to the labeling Rule. They include chlorofluorocarbons (CFCs), halons, carbon tetrachloride, methyl chloroform ("Class I" substances), and hydrochlorofluorocarbons (HCFCs) ("Class II" substances). Other compounds likely to be listed in the future include methyl bromide and hydrobromofluorocarbons (HBFCs), but no substance other than those currently listed under the CAA is subject to immediate labeling under this Final Rule. On the other hand, labeling requirements will automatically apply to any substance subsequently listed one year after the effective date of the listing, or in a date specified by EPA at the time such substance is listed.

2. Are containers of all ozone depleting chemicals covered?

Containers of all Class I and Class II substances presently listed under the CAA are subject to labeling. This is the only requirement that applies to Class II substances, i.e., HCFCs, at this time.

3. Are products containing and manufactured with all ozone depleting compounds covered?

At present, only products containing or manufactured with Class I substances are subject to the labeling requirements.

4. What is required for products containing an ozone depleting compound?

Products which contain a listed ozone depleting chemical, like certain types of foam plastic insulation, refrigerators and the like, must bear the warning statement and the label must be passed through the stream of commerce to the ultimate consumer. Please refer to Question 15 for location and other requirements.

5. Chemical reactions are not 100% complete. Did the Agency establish an exempt "de minimis" amount, or must any product

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containing even a minute amount of an ozone-depleting chemical bear a warning statement?

While the Agency did not establish a specific "de minimis" level below which labeling is not required, it has established that labeling is not required in instances where "trace" quantities of a Class I substance remain as an impurity due to a chemical reaction, and where the Class I substance serves no useful purpose in and for the product itself. The manufacturer must determine what amounts are "trace."

6. Are products "manufactured with" an ozone depleting chemical subject to the same requirements?

Products "manufactured with" an ozone depleting chemical must bear the warning statement but the warning statement does not have to be passed through the stream of commerce to the ultimate consumer. Only the next direct purchaser must be advised.

7. Who is considered the next direct purchaser for purposes of labeling?

For purposes of the Rule, EPA has determined that divisions of a company, wholly owned subsidiaries and parent corporations are considered to be a single manufacturer. Thus, if an ozone depleting compound is used to manufacture a raw material which is subsequently used by another division, wholly owned subsidiary or parent corporation to make another product, labeling would be required (unless other exemptions apply) to the next direct purchaser.

8. In what circumstances are manufacturing processes exempt from labeling?

Labeling is not required where (1) there is no physical contact with a Class I substance and the product being manufactured (*i.e.*, use of a refrigeration system or halon fire extinguishing system in a plant); (2) the manufacturing equipment has had physical contact with the Class I substance only in an intermittent manner, resulting from maintenance or cleaning of equipment; or (3) the Class I substances has been transformed, except for trace quantities.

9. Are there any other pertinent exemptions?

Companies in the solvent sector which have reduced their use of CFC 113 and methyl chloroform by 95% compared to the

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baseline 1990 calendar year use are exempt from labeling where they have made "good faith efforts" to eliminate use of the substances. This requires a 95% reduction based on 1990 use. Additionally, the exemption is limited to companies that can certify to the actual reduction by May 15, 1994. To qualify for the exemption by May 15, 1993, certification must be provided to EPA by that date.

10. Is a manufacturer who adds only a small amount of an ozone depleting chemical directly to a manufacturing process exempt?

If an ozone depleting compound is deliberately introduced during manufacture, and its use is essential to the manufacture of the product, the warning requirements apply. By way of example, EPA states that the use of carbon tetrachloride as an explosion prevention measure in the manufacture of chlorine constitutes the manufacture of the product with an ozone depleting compound, and is not exempt from labeling. Only trace quantities associated with the inadvertent production of a controlled substance or unintended residues are exempt from labeling.

11. Are any special accommodations made for resin producers?

While resin producers and other manufacturers are subject to the labeling requirements if their products contain or are manufactured with an ozone depleting chemical, EPA agrees that a single label listing all substances used is appropriate. To the extent a resin is "manufactured with" an ozone depleting compound, pass-through labeling is not required, and only the next direct customer outside the company must be notified.

12. Is labeling required where the ozone depleting chemical is "destroyed"?

While labeling does not apply to products manufactured using a process which the Agency has determined meets the "coincidental unavoidable by-product" (CUBP) exemption criteria under the regulations implementing Section 604 of the CAA (the provisions related to production and consumption allowances for ozone depleting compounds), that rule defines CUBP as compounds "immediately contained and destroyed by the producer, using a maximum available control technology with a destruction efficiency of 99.99%." Subsequent to issuance of that Final Rule, the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, in their meeting in Copenhagen last November, agreed to several approved destruction technologies. Not all of

these technologies will meet the 99.99% efficiency requirement established in the U.S. EPA is seeking comments on whether it should exempt from the labeling requirements the five destruction technologies agreed to in Copenhagen: liquid injection incineration, reactor cracking, gaseous/fume oxidation, rotary kiln incinerators, and cement kilns. At a briefing session on the Final Rule held February 8, 1993, EPA staff indicated that a decision on the issue would take 6-9 months; labeling is required in the interim unless the 99.99% efficiency standard is met or other exemptions apply.

13. How are exports and imports treated?

Products manufactured exclusively for export are not subject to the labeling rule. Such products may not be sold in the U.S. Conversely, imported products are covered by the labeling rule, where otherwise applicable. The broad definition of a manufacturer to include divisions, wholly owned subsidiaries, and parents could be relevant to assessing an importer's labeling obligation.

14. Can I change the wording of the warning?

Except for certain prescription drugs, no changes in the exact wording is permitted.

15. Where must the warning be placed?

The warning must be "clearly legible and conspicuous." The EPA will allow some flexibility in the location of the warning. Use on the principal display panel, use on the outer packaging of a product, use of a hang tag, sticker, or the like, and use on associated printed material, such as material safety data sheets (MSDS), and the like, may be appropriate. Manufacturers subject to the Rule should consult the Rule to assist in determining where to place the label, and to be sure that the format, type style, etc. is as specified in the Rule. Note that the warning statement must be parallel to other written information on the product or product package.

16. What about products in my warehouse?

The EPA has agreed that products which are "warehoused" should be grandfathered and not subject to labeling. Only products manufactured after May 15, 1993 will be subject to these labeling requirements.

17. What if I am only a distributor, wholesaler or retailer?

Distributors, wholesalers and retailers must pass through all warnings received. They are not, however, required to independently investigate whether the labeling requirements apply so long as they have a reasonable belief that the supplier of the product or container is in compliance.

18. Is there a process for manufacturers to apply for an exemption from labeling requirements, or for other Class II substances to be added?

The Agency has established a specific petitioning process to address both situations. Petitions must be accompanied by "adequate data," as specified in the Rule, along with a certification statement by the submitter. The EPA may make a decision to temporarily exempt a manufacturer from labeling. The warning statement must be provided until EPA decides to exempt the product from labeling. If the Agency decides to accept a petition to add the labeling requirements to a product containing or manufactured with a Class II compound, labeling will not be required until completion of a rulemaking proceeding on the matter.

19. Do I have to keep any special records?

EPA is requiring that for products manufactured before May 15, 1993, upon 24 hours of receiving a request from EPA, the manufacturer must demonstrate that the product was made prior to the effective date of the Final Rule. While no special records are required, the burden is on the manufacturer to show that unlabeled products are exempt.

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This Alert was prepared with the assistance of Keller and Heckman, SPI's legal counsel. It is not intended as and does not constitute legal advice for particularized facts. Affected manufacturers are advised to review the Final Rule carefully and to consult with their own legal advisors to assess their obligations. For questions about ozone depletion rulemaking activities, or for a copy of this Final rule, contact Maureen A. Healey at (202) 371-5219.