

CLIENT ALERT:

November 30, 2023

New EPA Rules for PFAS Reporting Under TSCA and TRI Programs

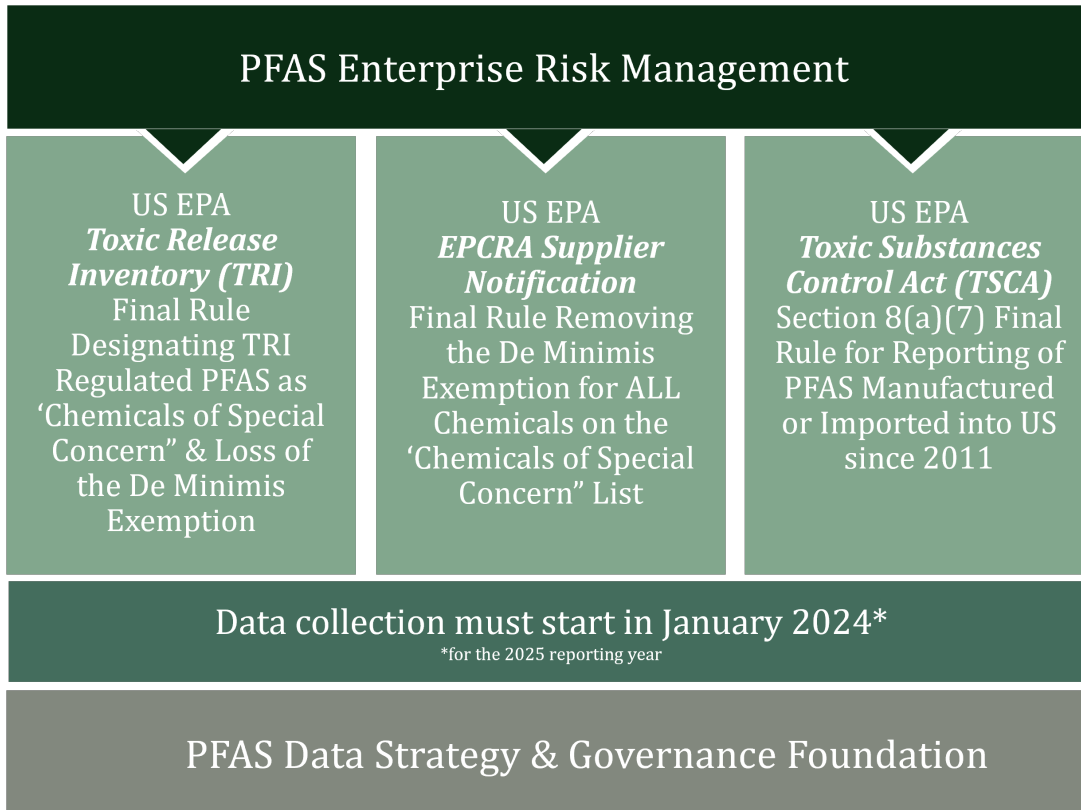


Sustainability is our business



1. What are the new reporting requirements in the US?

These new rules are extensive and far reaching and will require companies to develop and evolve data collection and record-keeping processes to comply with reporting obligations.



Emergency Planning and Community Right-to-Know (EPCRA) Toxic Release Inventory Reporting (TRI)

Regulation of PFAS under the TRI Program began with the PFAS Act of 2019 under the 2020 National Defense Authorization Act (NDAA), which has slowly been expanding in its scope over the past 3 years. Under the new EPCRA TRI Final Rule, TRI regulated PFAS will shift to the “Chemicals of Special Concern” list, which means staggering changes to who must report PFAS under TRI starting with Reporting Year 2024 (reports due July 2025) due to the resulting removal of the following “Burden Reduction Tools” not available for “Chemicals of Special Concern”:

- 1. Eliminates the de minimis exemption.** ALL concentrations of regulated PFAS in mixtures, no matter how small, must be considered in TRI threshold assessments and release calculations.

2. **Eliminates the Form A reporting option.** A Form A report is a certification statement only that facilities can submit in place of the standard Form R report when they manufacture/process/ otherwise use less than 1 million pounds of a regulated chemical and the total annual reportable amount for that chemical is less than 500 pounds. All PFAS TRI reports will have to be submitted via a Form R report with full release and waste management pathway reporting.
3. **Eliminates range code reporting.** The exact number of pounds of PFAS released per pathway must be reported on PFAS Form R reports, where previously range codes for 1-10, 11-499, and 500-999, pounds were an option.

EPCRA Supplier Notification

The EPCRA TRI Final Rule also makes a significant change to the EPCRA Supplier Notification requirements. Under this rule change effective November 30, 2023, regulated suppliers are now required to disclose TRI-regulated PFAS and existing Persistent, Bioaccumulative and Toxic (PBT) chemicals on the “Chemicals of Special Concern” list at ANY concentration in their products. A company has 30 days to provide/correct their EPCRA Supplier Notifications (i.e., SDSs) once they learn of the presence of a TRI-regulated chemical in a product previously sold to a TRI-regulated customer. Collectively, this change involves hundreds of chemicals that will now have to be disclosed at any known concentration in products.

TSCA Reporting

Companies that have manufactured (including imported) PFAS substances and/or PFAS-containing articles for a commercial purpose in any year since January 1, 2011 must report on those activities. The new reporting requirements for PFAS under TSCA require extensive information and apply to a greater range of chemicals than the TRI reporting provisions. The EPA provides a structural definition of PFAS developed to capture a broad range of fluorinated persistent compounds; the EPA acknowledges that the definition is not identical to that used by other authorities or even by the EPA itself for other purposes. The EPA has compiled a list of 1,462 PFAS known to meet the definition, but acknowledges that other PFAS may be subject to reporting.

A company must report PFAS under TSCA if they undertake, or undertook during **any** year since 2011, any of the following actions:

- Manufacture, including import, of PFAS as substances, in mixtures, or in articles (manufactured items with a functional shape or design)
- Manufacture of PFAS as byproducts or impurities
- Test marketing or research and development
- Imports in waste, e.g., for recycling or reuse (but not including municipal solid waste imported for disposal or destruction)

The new regulation requires extensive information about all PFAS manufactured as substances or articles, including manufacture or import activities dating back to 2011, as shown in the table below.

Parameter	Substance or Mixture	Article
Chemical identity	X	X
Use	X	X
Volume/amount	X	X
Byproducts	X	
Health or environmental effects	X	
Workplace exposure	X	
Method of disposal	X	

When reporting PFAS under TSCA:

- Manufacturers (including importers) must report the information that is “known to or reasonably ascertainable by” the company. This standard requires due diligence, or, in other words, a reasonable internal inquiry throughout the organization (not just of management or supervisory personnel), and may involve inquiries outside the company to fill gaps. The EPA does not expect companies to conduct new surveys for the purposes of this rule. If a supplier does not wish to divulge a trade secret, the regulations allow for joint submissions (other than article importers).
- TSCA does not allow for any de minimis exemptions to reporting, nor for exemptions for small businesses.
- Subject to certain regulatory requirements, submitters can designate some information as Confidential Business Information (CBI); this can include the identity of substances not on the TSCA Inventory, the company identifier, and production volumes. CBI claims must be asserted through the EPA’s PFAS reporting tool and substantiated according to TSCA requirements.

2. A summary of the reporting requirements

TSCA and TRI reporting requirements differ with respect to the PFAS included; each rule has different triggering actions and different reporting periods, among other provisions. The good news? They draw on similar sources of information on PFAS in the supply chain and manufacturing.

	TSCA	TRI
Citation	TSCA Section 8(a)(7), requirement under the fiscal year (FY) 2020 National Defense Authorization Act (NDAA)	40 CFR 372, statutory addition under the fiscal year (FY) 2020 NDAA, effective January 1, 2020
Status	Final rule effective November 13, 2023	Final Rule to move PFAS to “Chemicals of Special Concern” list effective November 30, 2023
Reporting period	Since 2011; due 18 months from effective date of final rule, i.e., May 2025 Small manufacturers who are only reporting on article imports will have 24 months from the effective date of final rule to report PFAS	Annual
PFAS included	Substances meeting the definition under this rule, including 1,462 PFAS known to have been made or used in the US; includes PFAS on their own, in mixtures, or in articles Will not require re-reporting of information provided under TRI or TSCA Chemical Data Reporting	Regulated PFAS listed in 40 CFR 372.65(d) and (e); and added automatically after: <ol style="list-style-type: none"> 1. A Final Toxicity Value is finalized; 2. A Significant New Use Rule covered determination is made or a PFAS is added to an Existing Significant New Use Rule; 3. A PFAS is added as an Active Chemical Substance to section 8(b)(1) of TSCA and designated as an active chemical substance under TSCA section 8(b)(5) (A), or a PFAS is designated as an active chemical substance under TSCA section 8(b)(5)(B) as published under TSCA section 8(b)(1)
Action triggering reporting	Manufacture (including import) for a commercial purpose	Manufacture (including import), Process or Otherwise Use greater than 100 pounds of an individual TRI-regulated PFAS
Information that must be reported	Chemical identity, uses, volumes made and processed, byproducts, environmental and health effects, worker exposure, and disposal	TRI Form R report disclosing all pounds of a reportable PFAS that are released to the environment or managed as waste
Confidential business information	Can be claimed for certain types of information	Can claim chemical identity as trade secret when report is submitted; substantiation of trade secret status must be agreed to by EPA
Current penalty for noncompliance	Up to \$37,000 per day, per violation	\$67,544 for failing to file per violation (applied per chemical, per year)

This alert provides general information on regulatory requirements as an aid to compliance. Information in this client alert should not be considered consulting or legal advice and should not be used as a basis to make statements or imply a level of expertise beyond the content provided herein.

3. Data collection, management, and governance

“EPA does not anticipate much, if any, overlap in reporting between [the TSCA reporting] rule and TRI... the only potentially overlapping reporting of PFAS releases and other waste management quantities would be since 2020.... Additional limitations in the potential overlap between this rule and TRI include the PFAS reporting threshold for TRI of 100 pounds manufactured, processed, or otherwise used.” [88 FR 195: 70526]

Many companies lack data on the presence of PFAS in their supply chain, or if data exist, the data source, management, transformation, and quality are unclear and inconsistent. Safety Data Sheets (SDSs) historically omit information on PFAS present at low concentrations or for which no toxicity data are available and technical data sheets for so-called articles (manufactured items with a functional shape or design) do not always include chemical composition information. The increased complexity of PFAS data reporting requires a robust and sustainable data governance strategy. This includes planning for the lack of readily available PFAS data, along with potential data discovery, if a supply chain inquiry is required. Relying on status quo data practices not only opens up the potential for regulatory non-compliance, but also presents risks with external B2B and B2C stakeholders.

Companies can take practical and proactive steps to compile PFAS data to support regulatory reporting and risk management using data processes that support automated, efficient, transparent, and fit-for-purpose data reporting. In addition, companies that proactively address data management issues can avoid the risk of being out of compliance and minimize the time and energy expended dealing with inconsistent, incomplete, and incorrect data. A review of existing data governance practices related to the collection, management, and quality assurance of diverse data sets (e.g., purchasing, operational, environmental, toxicological) is recommended as a best practice to identify data gaps and streamline processes.

In our work with clients and their suppliers, we’ve found that uncovering PFAS in the supply chain is an iterative process. We use knowledge about PFAS uses in various materials to target inquiries toward suppliers. Information has started to flow more readily as a result of the research many companies have undertaken in light of the proposed ban on PFAS in the EU.

Figure 1 illustrates the complexity of where PFAS data may be present in a company’s operation, through import, use, manufacture and/or release.

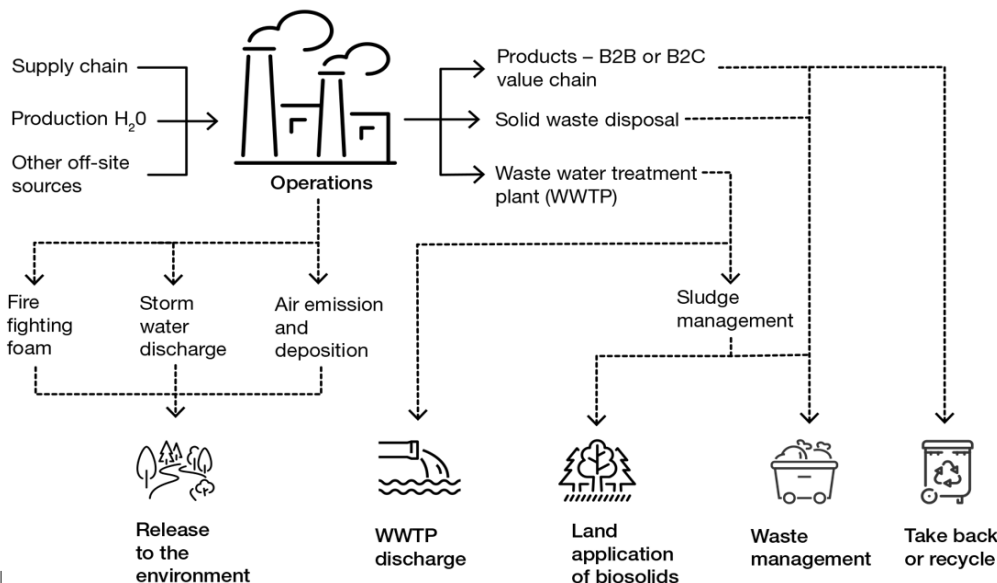


Figure 1. PFAS is Present Throughout the Value Chain

4. ERM Insights

As companies prepare to collect the required information in 2024 for reporting under TRI and TSCA in 2025, here are some important insights to keep in mind:

- **Understand PFAS in the value chain** – Develop and implement supply chain engagement and due diligence programs to identify PFAS present within the supply chain. Recognize the regulatory requirements for diligence in the US and leverage the work that the company may have already completed in response to the proposed PFAS ban in the EU.
- **Be careful of definitions** – Different rules include different subsets of PFAS and may not require reporting for the same list of chemicals; specifically, TSCA reporting is not “just” a list of PFAS, but of any chemical that meets the structural definition, while TRI reporting addresses a defined list of PFAS by CAS number.
- **Develop a management plan for PFAS information becoming public** – The business implications of reporting PFAS in products and PFAS releases from a facility should be carefully considered well in advance of report submissions and data disclosures. Potential reactions by workers, customers, people near facilities, and consumers regarding PFAS in products and PFAS released to the environment should be anticipated. It is highly advisable that organizations develop plans for how they will manage and respond to public and shareholder inquiries on PFAS, including plans for briefing the C-Suite and Board of Directors on the business risk implications. Preparation of corporate communications and consultation with legal teams regarding coordinated responses and stakeholder engagement should be considered.
- **Be ready for future regulations** – The first step to crafting any new regulation is to collect data, which the EPA is expressly doing through both these regulatory actions. The EPA collects data under TSCA to figure out which chemicals to regulate and how. Although new regulations on the manufacture and use of PFAS are at least several years away, companies must start looking at how they can minimize and eliminate PFAS from their value chain as new restrictions come into play.
- **Anticipate and manage supply chain disruptions** – Pending regulations in the EU and US may throttle the flow of goods through the supply chain. When the PFAS ban in the EU takes effect, it will disrupt the supply chain globally. Evaluate alternative sourcing models and alternate materials to obtain materials necessary for your operations, now and in the future, but beware of regrettable substitutions.
- **Manage PFAS risk proactively** – As PFAS reporting raises awareness of potential releases and exposures, the potential for stakeholders to perceive risk and demand action will grow. Consider taking a proactive, holistic look at operations and products to anticipate potential releases and exposures and assess whether it is prudent to act ahead of regulatory requirements to minimize business risk.

Regulators crafting the EU ban on PFAS and assessing the need to regulate PFAS under TSCA look to the concept of “**essential use**” to temper bans and restrictions. In the US, “The EPA may grant an exemption from a risk management rule for a specific condition of use if the EPA finds that the specific condition of use is a critical or essential use for which no technically and economically feasible safer alternative is available; compliance with the requirement, as applied with respect to the condition of use would significantly disrupt the national economy, national security, or critical infrastructure; or the condition of use, as compared to reasonably available alternatives, provides a substantial benefit to health, the environment, or public safety.”

As your company assesses its use of PFAS, consider both the availability of alternatives and which applications may warrant building a case for essential use.

Quotation from Microsoft Word - SAN_5944_TSCA_Section26(m)_Report-to-Congress_Final_2022-10-24.docx (epa.gov)



How ERM can help

As the only global pure-play sustainability consultancy, ERM is uniquely positioned to help our clients develop and implement PFAS risk management strategies that build long-term PFAS business resilience. We work with organizations across a wide range of industries and geographies to develop tailored strategies and programs to address and mitigate PFAS business risks.

ERM has decades of experience efficiently completing complex regulatory reporting under both TRI (including supplier notifications) and TSCA, from individual facilities to product and facility portfolios. Our team has many years of experience developing and implementing PFAS supply chain engagement and due diligence programs to identify where PFAS exist within the supply chain and operations. ERM has deep experience in developing data strategy and governance programs and implementing streamlined, efficient automation of data management workflows. Our holistic approach to PFAS management and reporting examines process, data, technology, and cultural elements alongside risk mitigation strategies to improve confidence and accuracy in data and reporting.

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