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Lawyer Offers Steps To Shield CBI From Reverse Engineering Under CDR

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As firms begin complying with EPA's Chemical Data Reporting (CDR) rule, an industry lawyer is detailing a series of questions they should answer when seeking to protect confidential business information (CBI), including in cases where they are seeking to protect the chemical identity to shield the data from being revealed by "reverse engineering."

According to Gregory Clark, a partner at the law firm Keller Heckman, as chemical companies prepare to submit their quadrennial reports to comply with CDR, in cases where they are seeking to shield the chemical identity, they should inform EPA if the substance leaves the manufacturing or processing site, either as an environmental release or in a product, whether the substance is "publicly known" in the marketplace and whether it could be identified by some form of analysis.

Clark laid out these questions for protecting CBI from "reverse engineering" during a June 10 webinar on EPA's recently issued CDR rule, which reflects additional requirements for chemical companies under the 2016 reforms for the Toxic Substances Control Act (TSCA).

The TSCA revisions require companies to substantiate upfront CBI claims, and the use of "reverse engineering" methods could allow commercial competitors or corporate espionage bad actors to infer the identify of chemicals listed for CBI protections.

Clark says for each data element claimed as confidential, submitters must answer six questions, including whether the submitter would face "substantial harm to [the] business's competitive position," whether the business has taken precautions to protect the information, the availability of information in public documents, trade secrets, the duration of the claim and prior confidentiality determinations.

Companies claiming the confidentiality of a chemical identity should also provide EPA with the answers to a series of four questions to ensure CBI protections.

The first three questions relate to potential "reverse engineering" risks and the fourth question addresses how the release of the chemical name could reveal confidential information about processing.

If a chemical identity is claimed as confidential, the submitter must include answers for four additional questions, Clark says in **a slide presentation** during the webinar.

The questions for addressing reverse engineering are: "Whether [the chemical is] publicly known to be in U.S. commerce; Whether it leaves the site in any form (product, effluent, emission); and if "Discoverability by analysis of the substance" could reveal the chemical's identity.

To address CBI claims about process, companies should tell EPA if the "chemical identity reveals confidential process information," says Clark's slide presentation.

Appellate Ruling

In an interview with *Inside TSCA* following the webinar, Clark explained that the provisions for protecting CBI from "reverse engineering" stem from the U.S. Court of Appeals for the D.C. Circuit's ruling last year in *Environmental Defense Fund (EDF) v. EPA*, which helped shape revisions to EPA's TSCA Inventory Notification Requirements rule.

In its ruling, the court found that Trump EPA efforts to drop a provision from the inventory rule that had required companies to substantiate CBI claims in cases where the identities of their chemicals could be reverse-engineered

were arbitrary and capricious. The court deemed EPA's "explanation for excising that criterion was, nonsensically, a denial that it had done so."

As a result, EPA's **Feb. 19 final rule**, which went into effect in March, adds CBI substantiation questions to the regulation. "These substantiation questions address whether a specific chemical identity is readily discoverable through reverse engineering and will ensure the submission of information that EPA will use to evaluate CBI claims for specific chemical identities," EPA says.

At the same time, EPA on March 17 issued its updated CDR rule for data collection that began this month covering the last four years. The rule includes a number of changes from the prior version intended to ease reporting for companies and better align data with changes in EPA's toxics program following Congress' 2016 reform of TSCA.

For example, EPA relies on CDR data for exposure analyses in its draft TSCA risk evaluations and also to generate its preliminary lists of companies which could be responsible for paying industry's share -- $1.35 million per chemical -- of conducting the next 20 evaluations of existing chemicals.

But Clark notes in his slide presentation that information not claimed as confidential under CDR "may be made public without further notice to submitter."

In general, Clark urges submitters to include all chemical substances in their reports, watch imports, report production volumes "accurately."

As such, he says it is important to keep "clear, concise" records because a "robust" reporting system is critical. And, he warns, errors and omissions "can create substantial enforcement liability." -- *Rick Weber* (**rweber@iwpnews.com**)

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