



AmericanCoatings  
ASSOCIATION<sup>SM</sup>

## ACA Inventory Reset Rule Compliance Guidance

### **Introduction**

This guidance is intended to help product formulators manage their obligations under the Toxic Substances Control Act (TSCA) Inventory Reset Rule. Under the rule, companies are required to notify the U.S. Environmental Protection Agency (EPA) of a change of status for chemicals currently designated as “inactive” in commerce on the TSCA inventory prior to becoming “active” in commerce under the parameters of the Inventory Reset Rule. This obligation is especially challenging in instances where a manufacturer has listed a chemical on the TSCA Inventory as confidential. Nevertheless, EPA requires a manufacturer of formulated products to confirm inventory status, and face penalties for failure to exercise sufficient diligence in doing so.

### **Disclaimer**

This guidance document is intended to assist members in understanding EPA’s Inventory Reset Rule. This information is not intended to represent an interpretation of EPA rules and regulations or constitute compliance or legal advice. The information contained in this document has been compiled from sources believed to be reliable and represent the best information on the subject as of **December 1, 2019**. The American Coatings Association, Inc., makes no warranty, guarantee, or representation as to the completeness, accuracy or sufficiency of any information herein, and the Association assumes no responsibility in connection therewith; nor can it be assumed that all necessary measures are contained in these documents, or that other or additional information or measures may not be required or desirable because of particular or exceptional conditions or circumstances, or because of applicable federal, state, or local law.

## Notifying EPA of a Chemical's Status in the TSCA Inventory

Effective August 5, 2019, companies must notify EPA prior to initiating commercial activity with a chemical designated as “inactive” on the TSCA Inventory.<sup>1</sup> EPA would then update the designation to “active” in the TSCA Inventory. Manufacturers of formulated products (“processors” under TSCA) are in violation if products contain chemicals listed as “inactive.”<sup>2</sup> To avoid violating the rule, processors must confirm inventory status from upstream manufacturers or suppliers and notify EPA of any “inactive” chemical prior to placing products on the market.

“Processors,” under TSCA, making formulated products face a unique challenge when attempting to comply. To confirm inventory status, processors must have a way of identifying a chemical on the inventory, such as specific chemical name, a listed generic name, CAS number or EPA accession number. Manufacturers often choose to list a chemical on the TSCA Inventory as confidential, while not providing a chemical's identity to downstream users, making it impossible for processors to confirm inventory status.

EPA addresses this issue in a guidance document published on July 15, 2019, called, [TSCA Inventory Notice of Activity Form B Questions and Answers](#).

To confirm inventory status, EPA explains that a processor should<sup>3</sup>:

- 1) Obtain from suppliers EPA Accession Numbers with generic names used on the TSCA Inventory, in order to find the chemical on the TSCA Inventory; or
- 2) Obtain a letter or e-mail from a supplier or manufacturer confirming inventory status while conducting additional due diligence to confirm accuracy of information in the letter, using any information *known to or reasonably ascertainable by* the processor, as detailed further below; or
- 3) File a Joint NOA (Notice of Activity) Form B, requiring the manufacturer to provide chemical identity or confirm prior notification directly to EPA, as discussed below.

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<sup>1</sup> EPA's TSCA Inventory is a list of chemicals manufactured or imported for commercial purposes in the U.S. EPA and the public rely on accuracy of the inventory as a starting point in evaluating chemical safety. EPA's TSCA Inventory Reset Rule establishes the process by which substances on the TSCA Inventory are designated as “active” or “inactive.” For notification requirements see 40 CFR §§ 710.25(c) and 710.30(b).

<sup>2</sup> For the purpose of this guidance, ACA is focusing on the responsibilities of processors. EPA would also hold the manufacturer of a raw material containing an “inactive” chemical in violation of the rule.

<sup>3</sup> EPA, Office of Pollution Prevention and Toxics, *TSCA Inventory Notice of Activity Form B Questions and Answers* (July 2019), see EPA's Response to Question 1, available online at: <https://www.epa.gov/tscA-inventory/materials-about-filing-notice-activity-form-b-active-inactive-rule>

**Notably, when a paint or coatings product contains a chemical listed as inactive, EPA states that processors can be liable in addition to the manufacturer placing the raw material on the market. EPA states that processors are liable for products with “inactive” chemicals, even with a letter from a supplier stating raw materials contain “active” chemicals, when the processor failed to check reasonably available sources to verify the letter.** In EPA’s view, additional due diligence of processors promotes a more accurate TSCA Inventory. EPA also encourages manufacturers to start listing EPA Accession Numbers and generic names on Safety Data Sheets for all chemical components, so processors do not need to obtain a letter and conduct additional due diligence.

I. Due Diligence Protocol and the *Known to or Reasonably Ascertainable* Standard

To avoid liability after receiving a letter confirming inventory status, a processor must develop practices to identify information *known to or reasonably ascertainable by* it, as EPA defines this phrase.<sup>4</sup> If a processor discovers identifying information, it could then check the TSCA Inventory to confirm status.

The *known to or reasonably ascertainable by* standard is case-specific and compliance practices may vary depending on circumstance. EPA explains processors are expected to review information in its possession or control **and** any information that a reasonable, similarly situated person would be expected to possess, control or know.<sup>5</sup> The standard is designed to encourage processors to thoroughly review documents it maintains in the normal course of business, supplemented by brief, targeted external inquiries when justified. A processor can also be liable for failing to check any documents normally held by similarly situated companies, even if it not currently held by the processor.

Preliminarily, ACA recommends requiring all suppliers provide an EPA Accession Number and generic name<sup>6</sup> for all chemical products including components in mixtures. With this information, a processor can confirm inventory status

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<sup>4</sup> EPA developed the *known to or reasonably ascertainable by* standard to describe the degree of due diligence of a manufacturer reporting processing and use information under the CDR (Chemical Data Reporting Rule). EPA provides best practices to meet this standard for CDR compliance at 76 Fed. Reg. 50816, 50829 (August 16, 2011).

<sup>5</sup> EPA provides best practices to meet this standard in its CDR compliance recommendations at 76 Fed. Reg. 50816, 50829 (August 16, 2011).

<sup>6</sup> EPA lists chemicals with confidential identities on the public portion of the TSCA Inventory with an EPA Accession Number and a generic name. Processors that obtain an EPA Accession Number can search the public TSCA Inventory for a confidential listing using that number. EPA assigns an Accession Number and adds it to the Inventory upon receiving an NOC (Notice of Commencement) of commercial activity from a manufacturer or processor that has completed the PMN process for a confidential chemical. The submitter must re-assert its claim of confidentiality on the NOC.

If an EPA Accession Number is not available, a processor must review all records maintained in the normal course of business that could contain identifying information of a chemical, including:

- Files maintained by the processor such as marketing studies, sales reports, or customer surveys;
- Information contained in standard references such as safety data sheets;
- Publicly available information such as from the Chemical Abstracts Service Registry Number and Dun & Bradstreet number; and
- Any other information developed in the normal course of business or that you would otherwise have for internal use.

A processor must also:

- Inquire directly with a main supplier or manufacturer for additional identifying information.
- Inquire with any employees and/or agents of the processor that could have identifying information, including information obtained through research, development, manufacturing or marketing and information obtained through discussions, symposia and technical publications.

ACA underscores that processors should **document all steps** taken to identify inventory status with written records including dates, actions taken and any conclusions. This is crucial for demonstrating due diligence, as EPA has set forth.

## II. Inquiries Beyond Review of Internal Records

As noted above, companies should briefly contact a main manufacturer or supplier. Companies are not required to survey several suppliers to identify a chemical. However, a processor must make a focused, targeted inquiry, if it could provide chemical identity, EPA Accession Number and/or inventory status of a raw material. For example, if a processor has manufacturer information for a product or it deals with one main supplier for a product, it must inquire with that manufacturer or supplier. EPA recommends “brief” contact to confirm inventory status or obtain additional identifying information.<sup>7</sup> This can be a letter or a phone call to a responsible individual within the manufacturing company or supplier, as a supplement to internal review of documents described above.

EPA indicates that if a manufacturer or supplier does not provide information to a processor after an inquiry, then the processor has met its due diligence burden.<sup>8</sup> A processor does not need to contact multiple suppliers and manufacturers to obtain information about a chemical

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<sup>7</sup> 76 Fed. Reg. 50816, 50829 (August 16, 2011)

<sup>8</sup> 76 Fed. Reg. 50816, 50829 (August 16, 2011)

raw material. However, circumstances may warrant further targeted inquiries in some situations.

### III. Joint Submission of NOA Form B

In its guidance about TSCA Inventory NOA Form B submissions<sup>9</sup>, EPA suggests processors initiate joint submissions of NOA Form B<sup>10</sup> for confidential chemicals. The manufacturer would then confirm status directly to EPA. A processor can file a joint Form B as an alternative to obtaining an EPA Accession Number or obtaining a letter of confirmation while conducting additional review. Since filing a joint Form B requires information about the manufacturer and a generic chemical name, this option is not feasible in most situations, especially considering processors may want to confirm TSCA Inventory status of hundreds or thousands of chemicals.

Despite its limitations, if a processor chooses to, it can initiate the process on EPA's CDX online system. The application includes a field for a manufacturer or supplier to certify a chemical has already been notified as "active." If the manufacturer or supplier does not provide information within 90 days, the processor must refile the joint submission or it will be deemed a void submission. Refiling begins another 90-day period. The processor must continue refiling every 90 days until the manufacturer or supplier provides information to complete the submission or the processor allows the filing to expire after 90 days by not refiling it.

### IV. Additional Online Links and Resources

The following links may provide additional guidance or can be used when implementing due diligence procedures:

- EPA Guidance *TSCA Inventory Notice of Activity Form B Questions and Answers*: <https://www.epa.gov/tsca-inventory/materials-about-filing-notice-activity-form-b-active-inactive-rule>
- TSCA Inventory: <https://www.epa.gov/tsca-inventory>
- EPA CDX (Central Data Exchange): <https://cdx.epa.gov/>
- EPA Inventory Notification Informational Website: <https://www.epa.gov/tsca-inventory/tsca-inventory-notification-active-inactive-rule>

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<sup>9</sup> *TSCA Inventory Notice of Activity Form B Questions and Answers*, available online at: <https://www.epa.gov/tsca-inventory/materials-about-filing-notice-activity-form-b-active-inactive-rule>

<sup>10</sup> This is the EPA form notification to change inventory status from "inactive" to "active." The form must be submitted on EPA's CDX online system. Submission requirements are detailed at 40 CFR 710.29(d)(4)(i)-(iii).

- EPA Notice on the CDR Rule, introducing the due diligence standard, 76 Fed. Reg. 50816, 50829 (August 16, 2011): <https://www.govinfo.gov/content/pkg/FR-2011-08-16/html/2011-19922.htm>

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