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## **Companies Grappling With REACH Face Big Burdens**

By **Sara Stefanini**

Law360, New York (August 29, 2008) -- With the deadline looming for companies to preregister the chemicals they use with the European Union, it's becoming clear that Europe's tough new REACH regulations could have a particularly harsh impact on small and medium-sized companies outside the EU.

With the Registration, Evaluation, Authorization and Restriction of Chemical Substances legislation, known as REACH, unveiled in June 2007, the EU overhauled its existing chemicals safety regulation by shifting the duty to test and register any substances produced in or sent to the EU onto companies themselves, and by creating a path for phasing out chemicals considered the most environmentally harmful.

With the Dec. 1 due date for preregistering chemicals and products containing certain chemicals fast approaching, companies that export to the EU are scrambling to figure out what to preregister, how to preregister and whether this process might put confidential trade secrets at risk of disclosure, according to attorneys.

If companies miss the preregistration deadline, their products will not be allowed into EU until they complete the lengthy registration process that awaits a wide span of industries.

"We are seeing an increased focus on REACH in the past month because companies are getting the message about the importance of using the preregistration process," said Andrew Kolesar, leader of the environmental practice at Thompson Hine LLP.

"It is possible that some suppliers will choose to take chemical substances off the EU market rather than comply with REACH. Downstream users will need to discover this as soon as possible so as to find substitute chemical substances," Kolesar added.

REACH is aimed at better protecting human health and the environment by identifying and keeping track of the dangers that substances present. The legislation calls for the registration of about 30,000 chemical substances currently in use over a period of 11 years.

The rules are intended to fill the holes in previous regulations that did not keep track of existing

chemicals and their hazards, and to slowly ween out the use of the most high-risk chemicals in exchange for new, more environmentally friendly substances.

The legislation gave rise to the European Chemicals Agency, a Helsinki, Finland-based regulator charged with running a central database that tracks registered substances, providing consumers with hazard information, guiding companies into compliance and coordinating the in-depth evaluation of chemicals that raise suspicions.

The agency opened its doors this past June 1, the same day the preregistration phase kicked off.

“I think this European regulation will change business dramatically, not only in Europe but also in the United States and Asia,” said Dominique Devos, a partner in the Brussels office of DLA Piper LLP. “The main thing is that when companies are importing into Europe, be it a chemical substance or a substance in a product that can be released, and when they import it in a quantity of more than 1 ton per year, these substances need to be registered.”

Companies currently can preregister any chemical of which they import over a ton annually until Dec. 1, which will allow them to continue sending the substance or product to Europe while they undertake the more extensive registration process.

The rules apply equally to companies with operations in the EU and outside Europe, the only difference being that foreign companies must enlist an EU-based partner.

Companies could ask their importers in Europe to register the product for them. This, however, could require the producers to divulge trade secrets, such as the formula of the product, to a downstream user or to coordinate with numerous importers, attorneys said.

Otherwise, firms could appoint an “only representative,” such as a law firm, to act as their stand-in in Europe. The advantage of this can be that only representatives do not have to tell the EU who they are representing, keeping the firm's identity private.

Still, hiring a law firm can be costly for some companies, adding to the existing expenses of gathering and analyzing data for the registration, attorneys said.

Large global corporations should be willing and able to cover the added expenses, said Darren Abrahams, a Brussels-based attorney at Steptoe & Johnson LLP.

“But for the small or medium-sized companies, there are a lot of costs, not just fees, but a lot of costs associated with compliance, such as getting the data together and managing the data,” Abrahams said. “And the small or medium-sized companies will have difficulty doing this.”

The disproportionate impact that REACH is expected to have on small and medium-sized firms is already begin to show, Devos noted.

“Most of the big companies have teams working on REACH, but I think a lot of medium and small companies are not aware of what it means to preregister before the first of December,” he said.

Added problems with complying with REACH will present themselves in the form of unexpected glitches expected to come with setting up an entirely new regulator at the same time as initiating the preregistration phase, said Shaun Donnelly, senior director of international business policy at the National Association of Manufacturers, an industrial trade group.

“People are being asked to report into a void,” Donnelly said. “It isn't clear what chemicals are covered, it isn't clear what downstream uses are covered. Meanwhile, this time period for preregistration is quickly passing. Companies, not just in the U.S. but in Europe and everywhere, are going to almost inevitably find some gaps.”

Once companies have preregistered, the far more taxing registration phase will begin. This procedure will have to be completed within either the next three and a half, six or 11 years, depending on how much of the product touches the EU every year and how dangerous the substance is deemed to be.

To register their substances and products, firms will need to provide the EU with technical dossiers describing the properties and uses for each item and a guide for using the items safely, among other details.

Companies have expressed concern, however, about a requirement that they share data and details about the hazards of their substances with rivals that use the same ones, in order to reduce the cost of researching the information. This cooperation could force firms to share trade secrets about their products, although the EU has said it's aware of the risks and will work to protect confidential information.

These new duties, as well as worries that the new European Chemicals Agency will be ill-equipped to deal with a flood of preregistrations, registrations and questions that are likely to pour in as Dec. 1 approaches, could dissuade certain foreign companies from exporting to Europe, attorneys said.

“I expect the number of people marketing in the EU will diminish, there will be consolidation as small companies fall away,” Abrahams said. “And I suspect that European companies will fare a little bit better because they will have been exposed to REACH for just a little bit longer.”

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