Episode Title: TSCA Section 8(a)(7) PFAS Reporting Rule -- A Conversation with Richard E. Engler, Ph.D.

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Lynn L. Bergeson (LLB): Hello, and welcome to *All Things Chemical*, a podcast produced by Bergeson & Campbell, P.C. (B&C®), a Washington, D.C., law firm focusing on chemical law, business, and litigation matters. I'm Lynn Bergeson.

This week, I discuss with my colleague, Dr. Rich Engler, Director of Chemistry here at B&C and The Acta Group, our consulting affiliate, the super-hot topic of PFAS reporting under the Toxic Substances Control Act (TSCA). PFAS, the class of so-called "forever chemicals," are the talk of this town and likely the talk of many jurisdictions, given the intense global scrutiny of all things PFAS. Rich and I focus our broad-ranging discussion on federal TSCA reporting requirements under TSCA Section 8(a)(7). We discuss what PFAS are reportable, what information is due and by when, why finished product importers are on the hook for reporting, why there is a 12-year look-back period, and the all-important topic of how much diligence is due before you can conclude that information is not known or reasonably ascertainable. Now, here's my conversation with Dr. Rich Engler.

Rich, it is so great to have you back in the studio. I look forward to our conversation on our favorite subject: PFAS.

Richard E. Engler (REE): It's always a pleasure to be here.

LLB: We have been talking about PFAS for a long time now, and more recently zeroing in on TSCA Section 8(a)(7) reporting obligations. It sounds like the May 2025 deadline is far, far away, but it isn't. Let's begin at the beginning and help our listeners understand what is a PFAS, writ large, and then zero in on what PFAS are reportable for purposes of TSCA Section 8(a)(7).

REE: PFAS is a per- or polyfluoroalkyl substance. The Organisation for Economic Co-operation and Development, the OECD, proposed a definition where any substance with a saturated carbon -- a carbon with four separate atoms attached -- where all of the hydrogens on that carbon have been replaced by fluorine. That's the OECD definition. There's a little bit more

subtlety to it, but we're in an audio medium, and I don't want to get into a lot of the technical details. Basically, one fully fluorinated carbon is the OECD definition. A lot of people rely on that. A lot of the state actions are relying on that. REACH [the European Union [(EU) Registration, Evaluation and Authorization of Chemicals regulation] is relying on that.

But EPA under TSCA has taken a different approach. They have ruled out of the TSCA definition for purposes of this reporting, single fluorinated carbons, so a trifluoromethyl, as a PFAS, and that reduces the universe of substances. But the TSCA definition is you have two adjacent substances where you have at least one fluorine on one atom or two adjacent carbons, one fluorine on one carbon and two fluorines on an adjacent carbon. They don't have to have all the hydrogens replaced, which is a departure from the OECD definition as well. It also includes a CF_2 group between two oxygens and two trifluoromethyls attached to the same carbon. Again, it gets a little bit complicated, but essentially EPA's looking for more than just a single trifluoromethyl in the definition of a PFAS.

LLB: Congress -- not EPA [the U.S. Environmental Protection Agency] -- Congress enacted a new provision of TSCA, Section 8(a)(7), I think, largely to help EPA obtain information that it otherwise was lacking regarding the manufacture, use, disposal, and toxicity of these chemicals. What information is required to be reported and submitted to EPA, and by which members of the regulated community?

REE: The reporters are manufacturers and importers, so only manufacture or import are reportable activities under the Section 8(a)(7) rule. EPA does limit -- did you manufacture *a* PFAS substance, not did you make something in the United States that might contain a PFAS? But did you make a substance? Did you run a chemical reaction that produced a PFAS? That's a TSCA manufacturer. Or did you import a product, whether it's a substance or an article, that contains a PFAS? If you did one of those things, you're potentially a reporter. If you purchased a PFAS from a domestic source, you're not a reporter, again, unless you ran a chemical reaction. That's the universe of who has to report.

If you are a potential reporter, a lot of information is required. If it's a substance, not an article, the data requirements are very similar to Chemical Data Reporting (CDR) -- if our listeners are familiar with that -- but it includes identity of the chemical, the volume, physical form, how it's processed or used, what industries, what is the function (commercial or consumer uses), byproducts formed during a chemical reaction, release quantities, release media. There's a whole plethora --

LLB: Yes, it's a lot.

REE: -- of data fields, that are required for -- if you are a manufacturer or an importer of PFAS as a substance. There is some more limited reporting for PFAS as part of an article. EPA recognized that some of those parameters aren't necessarily available, or appropriate, for article importing. There's also some simplified reporting for articles. But there's still a lot of information that's going to be required. The lightest reporting burden is if you manufactured an R&D [research and development] substance under ten kilograms in a year, so really quite small quantities, lab-scale quantities. That is the smallest reporting burden. But other than that, EPA is expecting quite a lot from quite a lot of reporters.

LLB: You mentioned so effortlessly, Rich, articles. An article is one of the key issues that's causing significant heartburn here. I mean, there are lots of reasons why this reporting obligation is causing fear and trembling throughout the regulated community, but the

inclusion of PFAS in imported articles within the scope of the reporting requirement is causing a whole lot of agita, for lack of a better word. Let's talk about what an article is and why this is such a big deal.

REE: An article is a product that's been manufactured with a particular shape or design. It has been made to have a particular form, and its use is related to that form or function. A pen is an article; it needs to have a certain size, a certain weight, because you need to be able to write with it. Now, the *ink* in the pen is not part of the article. The ink is a substance, or mixture of substances, because it's intended to be released from the article. Articles are a little bit complicated, but basically, if it is an object where its use in the United States is related to its physical form, then that is likely eligible as an article under TSCA. The reason this is a big deal is because articles, historically, have been exempt from many provisions of TSCA. There's an exemption for premanufacture notice (PMN) for new chemicals that are imported as part of articles. There's an exemption for most SNURs --

LLB: -- a significant new --

REE: -- a significant new use rule. Most SNURs have exemptions for articles, except for the PFOS [perfluorooctane sulfonic acid) and the LCPFAC [long-chain perfluoroalkyl carboxylate] SNURs are two specific examples where the prohibitions also apply to articles. More recently, the PBT [persistent, bioaccumulative, and toxic] rules apply to articles. Articles have been largely exempt; they have been exempt from CDR reporting, the quadrennial Chemical Data Reporting, which we are in the midst of for 2024.

Luckily, the deadline for 2024 CDR will come before the opening of the PFAS reporting rule, so they won't truly overlap, although there's -- certainly a lot of work is going on; it's overlapping between the two. But articles have been largely exempt from TSCA obligations, and I think as a result, a lot of wholesalers and importers that import articles don't think of themselves as TSCA reporters. Now, they are definitely in the soup. If your business was sofas -- you're importing sofas from all over the world and selling them in the United States -- you're a furniture wholesaler, you're like, "TSCA doesn't have anything to do with me." Well, sorry. It does.

LLB: Right. Think again.

REE: You are definitely in the soup for reporting for -- under Section 8(a)(7).

LLB: That's going to realistically bring in many more reporters.

REE: Many, many, many more reporters.

LLB: First you have to know the rule applies to you because you're an article importer. And then the second question is does this article contain PFAS?

REE: Right.

LLB: Which is -- what's a PFAS? And how do I know *my* PFAS is subject to reporting? That's just a little glimpse into the uncertainty --

REE: -- the challenges.

LLB: -- the challenges that this rule is imposing. As you noted a minute ago, Rich, the final rule offers some diminished streamline reporting for smaller businesses, largely because of Small Business Administration and other activists in that area really focused an awful lot on the reporting burden that this rule imposes. We appreciate that EPA needs information, but I think reasonable people may disagree as to whether the type of information these smaller entities may ultimately be able to elicit will contribute meaningfully to that. But what do smaller businesses *not* have to worry about?

REE: There's not much they don't have to worry about. The CDR has a small business exemption, which is part of the problem here. Let's just be clear; small businesses, for purposes of this rule and CDR, is a company with $12 million or less in total sales, or $120 million or less if no substance was manufactured or imported over 100,000 pounds. That's how small business is defined for CDR and the Section 8(a)(7) rule. Under CDR, such small businesses would be exempt from reporting. Under Section 8(a)(7), they are *not* exempt from reporting. They are required to report. The only relief that EPA gave to such small businesses is they get an extra six months to report if all they did was import articles. If you're a small business that imported articles, you get an additional six months to report. Everyone else gets 12 months. Those small businesses get -- or everyone else gets a six-month preparation and six-month reporting period, and the small businesses get an additional six months in the reporting period.

LLB: I've kind of saved one of the better aspects of this route 'til last, and that is the 12-year look-back period. That is an awfully long period of time to be looking back at your business operations. The statute -- again, people need to appreciate that EPA didn't kind of concoct this rule. This was a Congressionally mandated provision as part of the fiscal year (FY) 2020 NDAA, the National Defense Authorization Act. EPA implemented the rule, and some might argue, EPA probably had a little more discretion to provide some exemptions. But again, the Agency's commitment to identifying PFAS and diminishing the risk these chemicals pose under its Strategic Roadmap is very clear. The Agency has been very aggressive in implementing it. They're -- really took kind of a take-no-prisoners approach here in implementing the statutory requirement, but help us understand why it's such a long look-back period of 12 years, and what EPA has done to account for the fact that some -- and perhaps a lot -- of the information that is required may not be reasonably ascertainable to reporters.

REE: You're jumping ahead to the question of what is known or reasonably ascertainable. Let's talk about 2011. That was written into the statute; EPA had no discretion. The look-back period starts in 2011, and it ends in the year before the rule was final. The rule was final late in 2023. Thank goodness it didn't spill over into 2024, because as of now, reporting is 2011 through 2022, inclusive. That's a 12-year period that people will have to search for their records.

The question -- and we can talk about it -- is what level of effort -- what is known or reasonably ascertainable? Do you have to go back? When I read the rule, I'm like, "Wow, EPA is asking for a lot!" And the way I framed this is I was trying to imagine if I had to go back and look at every online purchase I made since 2011 and look on each of those product -- all the product information that was available to me when I made that purchase -- and see if the supplier made a statement about PFAS. That's sort of what EPA's asking for. Does that fit the definition of reasonably ascertainable? It is arguable that I could go back to wherever I've made online purchases and, maybe I can't get 12 years of my purchases, but I can probably get five or eight.

Do I have to look at each one of those? Because did the supplier change? When I purchased them in 2022, did the supplier tell me something different than what they said in 2021? It's not simple. I was really disappointed. EPA was very dismissive of the level of effort that would be required to go back -- not to report -- they were so focused on, "Reporting is not going to be that big a deal." To me, 90 percent of the effort is going to be figuring out what you have to -- digging through the records and figuring out what did you know? What do you know now? What is known or reasonably ascertainable? The due diligence burden -- it's going to be due. In the end, EPA adjusted their estimate for burden up to $865 million.

LLB: Just under a billion, yes.

REE: Nearly $1 billion worth of effort. Again, you touched on this earlier. I really question if EPA's going to get any meaningful information from really having no exemptions whatsoever. They said, "We need to know where this stuff is." You may need to know, but that doesn't mean that the reporters know. Saying that they can respond "not known or reasonably ascertainable," that only means that EPA doesn't get the information. It doesn't mean *they* didn't have to go and dig around and see if they know it. I think the real question here -- and it's a real interesting topic that we've been discussing with a lot of clients -- is "What does due diligence mean?"

LLB: Right. Let's focus on that standard, because we lawyers have been challenged to impress upon our clients just how important it is to develop a coherent protocol that is consistently applied for establishing due diligence, because the TSCA Section 8 standard has not changed, right? It has always been "known or reasonably ascertainable." EPA has a very good TSCA Section 8 reporting guidance document and collateral documents that will assist reporters in trying to figure out how to apply this rule to their business operations. It's also important to really focus on the reporting standard here because of the extended look-back period and the fact that I don't maintain records in my personal life going back 12 years. A lot of businesses don't either, so what exactly *is* known or reasonably ascertainable? At what level can a reporter feel comfortable in concluding that, "Nope. I've done my due diligence. It is not known or reasonably ascertainable." Then let's talk about that and some of the language in the preamble discussion, so our listeners understand this is a very, very pivotal portion of the rule.

REE: Yes, I think it's a very difficult question, because there is not a single standard of due diligence. I mean, EPA has even stated -- states in the rule that they understand there's going to be different levels of knowledge and what is reasonably ascertainable. More sophisticated companies will know more, and so they will be expected to *do* more. Smaller companies may know less and may be able to satisfy their due diligence with less effort. But there's also a point at which, even a big company, the universe of things that they imported in 12 years is so enormous that it would be impossible. You may find a maximum due diligence at big companies that had a limited scope of what they imported. Very small companies just may not have much to look at, and very large companies may have -- there is not enough time to look at all the records between now and the reporting deadline next May to look at all the records for all the product SKUs [stock keeping unit], however they're identified, that were imported in that 12-year look-back period. There's an argument to be made that if it is impossible to do in the timeframe, then it's not reasonably ascertainable.

I think we're going to find -- and this is a very unsatisfying answer I think -- is that due diligence is going to be company-specific. Do companies have record retention programs, where at seven years, they discard stuff? But then, do they actually discard it? There's some record retention policies that --

LLB: Everything's on electronic file.

REE: Right. Is it in a backup tape buried in Iron Mountain somewhere? Is that reasonably ascertainable? These are the questions. As you mentioned, what we've been telling clients is, "Come up with a strategy. This is what the company can do, what facilities it has. Then come up with strategy and implement that consistently."

But there are questions like, "I have an old computer that was my computer when I first started nine years ago. I've still got it, the hard drive, and it has data on it. Is that hard drive reasonably ascertainable?" If it's one company with one hard drive, then arguably maybe it is, but if you've got a giant company with thousands of these hard drives that haven't been shredded yet, at some point, no, that's not reasonably ascertainable.

Again, it's going to be fact-specific. EPA has made it clear that surveying the entire supply chain is not necessary. You don't have to ask -- if you're an importer, you don't have to ask your foreign supplier. You might ask them, was there a PFAS? But you don't have to ask them to ask their suppliers to ask their suppliers. You don't have to probe way up the supply chain.

LLB: But how far up you probe, again, is going to be a company-specific decision.

REE: Sure. You may want to probe for other reasons. You may want to probe because you want to know going forward because of state actions or other PFAS activity. You may want to know, but that is independent of the PFAS reporting requirements. EPA has stated that surveying suppliers is not necessary. That's not what is necessary to satisfy the due diligence. But there may be some companies that *wish* to survey. Again, it's going to depend on the business that you're in. I think it's most challenging for articles, because articles, you rarely know what's in the article.

LLB: Right. What's in the box.

REE: You know, I received a computer, but you don't know what all the chemicals are that were in the computer. I imported an automobile. There are thousands of parts in an automobile. Or, for goodness' sake, an aircraft. There are some, certainly, expectations that a car, or plane, or computer might have a PFAS. You might ask, is there a PFAS? The supplier might say, yes. And you say, what's in there? And they go, "We're not going to tell you." Now you're in a tough spot, because you know there's a PFAS, but you don't know what it is. So now you're a reporter, but you really can't tell EPA anything about it, other than "Yes, there's a PFAS. I don't know what it is. I don't know how much of it there is, but there's a PFAS." I don't know what EPA is going to do with that. That's not particularly meaningful.

LLB: It's not helpful, but it's better than nothing.

REE: I guess. EPA then knows lots of cars have PFAS in them. Okay.

LLB: What do we do with that?

REE: Yes. I'd feel very differently about this rule if it was a prospective reporting rule, if EPA said, "In five years, we're going to expect you to know what PFAS are in your products," and give people time to figure that out. But this retrospective -- and again, this wasn't EPA's idea. This was Congress's idea, this retrospective reporting. I just think there's not going to be a wealth of information other than -- except for the people that would normally report to

CDR, the normal universe of CDR reporters. Maybe you expand, you limit some of the exemptions. I think EPA would have gotten 90 to 95 percent of the information that they are going to get if they had expanded some of the reporting. But the utter absence of exemptions, I think EPA is going to get a lot of useless information. But we'll see. Time will tell.

LLB: We'll see. Are there opportunities to work with your supply chain in the form of joint submissions, for example?

REE: Yes. If your supplier tells you there's a PFAS, but they're not willing to tell you what it is, you can initiate what's called a joint submission, where the U.S. company, the importer, submits a primary submission, and then the foreign supplier submits the secondary submission. Each one submits their own confidential information, and EPA assembles them together, the primary and the secondary together, to get a complete picture, or a more complete picture. The two submitters are not privy to each other's information, so the primary never sees the secondary submitter's information, and *vice versa*. That could help. I think that'll be especially helpful for companies that are importing substances and the foreign suppliers not willing to provide the CAS [Chemical Abstracts Service Registry] Number or the accession number. You could do it for articles, too, but my guess is you would initially -- they would say, "Yes, there's a PFAS," and you'd say, "What is it?" They may not even know. They might say, "I don't know." There's not much point in doing a joint submission, because then the secondary submitter really has nothing to tell EPA that the primary submitter can't report. But if the secondary submitter knows and they're unwilling to share that with the primary, then the joint submission is a possibility to initiate that so that EPA can potentially get that information.

LLB: Behind all of this, Rich, is the need to document, document, document efforts to obtain information from upstream suppliers. You may not be rewarded with meaningful information that you can report, but the efforts that went into the actions that enabled you to say, "I don't have reasonably available information" are very, very important to record.

REE: Yes. Interestingly, EPA says you don't have to keep records of why you're not reporting. You only have to keep records of what you *are* reporting, which seems odd to me, because how do you show that you -- how does EPA know that you've done your due diligence?

LLB: Exactly.

REE: But they said you don't have to keep those records, so fine. We're not going to keep those records. We're not going to keep them for Section 8(a)(7) reporting. I think there are other -- we can talk about the obligations under Maine, or Minnesota, or California -- what those actions are -- Washington state. But also -- we've been talking about this. We've been talking with clients about it, is the concerns for the plaintiff's bar. If you become the subject of a lawsuit and discovery, do you have good records of the due diligence? "We tried really hard. Look, this is what we did. We did it consistently, and this is what we found." That will be important, to have; even if EPA is not requiring those records, it will be important to have those records.

LLB: Yes, and you never let EPA tell you what you should and should not maintain as a matter of your own business protocol. There are many people that will be looking at these data. One cohort is EPA, and then there's the rest of the world. You need to document what you've done and be very clear about what your protocol is. I think our listeners need to appreciate that there *is* no one way here.

REE: Absolutely.

LLB: It's so important to read the preamble to the final rule in the *Federal Register*. We have all kinds of information on our website, on PFAS and this reporting rule in particular. But EPA makes it crystal clear, to your point, Rich. It's a case-by-case analysis. A small company that has been importing and didn't know what a PFAS was before reading this rule, and sure as heck didn't know what an article was, may be subject to a different standard of due diligence in discharging the reporting obligations than a Fortune 10 company, which has a much more disciplined burden and much heavier burden, for all the reasons you might imagine. EPA is cognizant of that fact. How it shakes out in the real world, how a third-party litigation, how a competitor litigation, how NGO- [non-governmental organization] initiated litigation will play into this, is anybody's guess. But that's what's -- some of the reasons why this rule is causing so much heartburn.

You also mentioned a very important point that increasingly we're being asked about: Look, there are some 35 states that either have on the books or are preparing PFAS regulations of one form or another. Some of them are notification: if you offer a product for sale in our state, we want to know about it. Others are categorical bans over a period of years, depending upon what type of product you're offering. Particularly hard hit are consumer products, not surprisingly. Knowing that many states are collecting a wide swath of information, should entities be trying to collect more than just what EPA is requiring here? Because EPA's working definition is quite different from virtually all of the state definitions, and the European one.

REE: Yes. We've been speaking to clients a lot about that lately. My view is it is more efficient -- is to not focus your ask on the PFAS Section 8(a)(7) definition. First of all, your suppliers probably don't know what it is. They're probably not sufficiently sophisticated, especially if it's an article. They probably don't know how to interpret the structural definition. I would ask them, "Is there a PFAS present, yes or no?" Using the OECD definition of one or more fully fluorinated carbons, is there a PFAS present? You might even go further than that. "Is there a substance with a fluorine, yes or no?" And if they say yes, and you say, "What is it?" and if they say, "We're not going to tell you," then okay, that's an answer. Or maybe you then ask the OECD, "Well, can you tell me if it fits within the OECD definition?" Because more and more, I think, generally, people are recognizing that OECD definition, "one fully fluorinated carbon" is sort of -- it's becoming the consensus standard. But if they *can* tell you what the substance is, then you can look. You're like, "Oh, I have a CAS RN, or I have an accession" -- if it's an accession number, you wouldn't necessarily have the structure. But if they will tell you what it is, then you can examine and say, is it reportable under Section 8(a)(7)? Or is it just a trifluoromethyl, which would not be reportable under Section 8(a)(7), but would be potentially subject to one of the state actions.

I would favor asking more broadly from the supplier, so that you ask once, you get that information, and then you figure out how that information applies to state actions, to Section 8(a)(7), or anything else, that if you're supplying into Europe or you're subject to the potential restriction in Europe.

LLB: In that regard, we've had quite a number of questions about, "For Pete's sake, can't we just get a list of PFAS?" Wouldn't that make life so much easier? If it's on the list, I have a reporting obligation. The answer is?

REE: Yes and no. There is a list. EPA has published a list of all the substances across the Agency databases, including CompTox, that in EPA's view, meet the definition of a PFAS. EPA

makes it clear: it is not an authoritative list. There may be things that are on it that are not PFAS. I think that's unlikely, but EPA has made it clear that if it's not on that list, it might still be reportable. There are things that meet this definition of a PFAS that do not have CAS RNs, so EPA cannot -- in fact, the list, if you do download the list from the Substance Registry Service, there are thousands of substances on that list that are on the list that don't have a CAS RN or accession number. There is no authoritative list of all the CAS RNs, but that list probably has EPA's best guess at the substances that EPA is aware of that do have CAS RNs. But if it's not on the list, you can't assume that it's not reportable. If it's on the list, I would assume that it *is* reportable.

That's an unsatisfying answer. People want, like, "Just tell me. Tell me the 2,000, 5,000, whatever it is. Tell me the CAS RNs. I'll look." But all along, EPA is like, "Yes, but there are impurities and byproducts and things that don't have CAS RNs. We need to know about those, too," so they're stuck with this categorical definition, and that's what's reportable.

LLB: Maybe you can help our listeners understand the approaches EPA is offering for quantifying PFAS in imported articles, recognizing that it just really is an impossible task. If you know there are PFAS, but you don't know how much, or what the utility is, or what species it might be, but giving some sort of quantitative approach to determining that, EPA has provided some options. What are they, Rich?

REE: Unlike -- with substances, you import a substance, you are expected to report the quantity of the substance. It might be not known or reasonably ascertainable if you don't know the percentage in an imported product. But effectively, if you're importing a substance, EPA expects you to report on the quantity of substance.

For articles, EPA gives three options. One is report on the quantity of the PFAS. If you know what the PFAS is and you know how much is in the article, you can report the quantity of PFAS. Number two is you can report the tonnage, the mass, of the article that you imported. Some articles, you know, nails, are sold by mass, not by count. You might -- when you import an article -- you might be importing some number of tons of articles, as opposed to some number of counts. You can report the total mass of the PFAS-containing articles that were imported.

If it's more like a computer, you can report counts. Computers, you probably don't buy by the pound. You probably buy those by the each. When you report computers, it was, "We imported 52,732 computers." You can report the number of PFAS-containing articles that were imported in a year.

You do have three options for article reporting. I applaud EPA for offering that, because that's really -- those are the three ways that people might approach -- especially the mass of the articles and the count of the articles. It's a much more reasonable way to approach articles, because for most cases, the importer's not going to know the quantity of the PFAS, if they even know the identity of the PFAS.

LLB: Right. Another point that we've been really emphasizing is that the deadline for reporting this information ends in May 2025, and you get a longer period of time if you're a small business. We've been trying to have people appreciate that that's the beginning of your journey here. Once that information is embedded in a document and you're submitting it to EPA, and you've discharged your obligation to meet this Section 8(a)(7) reporting obligation, that's step one. After that, there are many other considerations that reporters

need to focus on, managing the implications of the disclosure of that information. There are CBI [confidential business information] opportunities, right, Rich?

REE: Yes. CBI is still available for many things. You can't claim "not known or reasonably ascertainable CBI," but many other aspects. Like with Chemical Data Reporting, with the quadrennial CDR reporting, you can claim most data fields. There are some where EPA says they are not amenable to CBI protection, but most data fields are amenable to CBI protection.

LLB: This will be a publicly available document associating your products with PFAS.

REE: Right.

LLB: -- which will be new --

REE: -- new information to the world. Yes.

LLB: To the world. Managing that information is as important as meeting the reporting deadline.

REE: Oh, right. You do the research; you find out whatever you find out. You now have the information that tells you how to report to Section 8(a)(7). But as you say, you now have these other records. Whether it's reportable or not, you have records that you need to manage. You need those. You need to figure out how those relate to the various state actions.

Now you know things. How does that relate to a state action? How does that relate to ECHA [European Chemicals Agency], to ECHA's restriction?

LLB: -- the European --

REE: Right, the European restriction proposal under REACH. And what does that mean in terms of the plaintiff's bar? What might people come seeking?

I know we talk about this with clients, and it's a potential trove of litigation targets, so have those records squared away so that you've got a good story to tell during discovery or a suit. I mean, I worry. I know there've been some PFAS suits that have been dismissed that -- the court that dismissed that found that the presence of a PFAS did not equate to harm, which is comforting, that at least one court has found that it's not enough to say there's a PFAS present, because not all PFAS are the same, and not all PFAS are toxic, and not all PFAS are -- it depends on the amount, and the specific hazards, and the quantities, and the exposure route. All those things go into whether or not there might be harm. But that's not the public narrative. Right now, the public narrative is any PFAS anywhere is going to kill you.

LLB: Right.

REE: And that's just not true, but that could be the driver for a bunch of lawsuits. It's going to be a heavy burden for companies to have to deal with. Even if they're frivolous, it's not zero effort to fight those.

LLB: Absolutely. And the connection between a product, a brand, and PFAS, whether it is ongoing and known, for other reasons unrelated to this reporting obligation, or new, we've

been encouraging our clients to be well prepared in the communications department to be communicating with your customers, purchases of your product, your communities. Because there are lots of other regulatory initiatives that are coming at you. EPA fairly recently proposed to add PFOS and PFOA [perfluorooctanoic acid] to the CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act of 1980] 103(a) substance list, which will make cleanup opportunities available under CERCLA. EPA recently proposed to include nine or so PFAS substances, their structural isomers, and salts to the Appendix 8 list of RCRA [Resource Conservation and Recovery Act] for RCRA corrective action.

You need to prepare for the eventuality of the disclosure of this information. It is important for purposes of protecting yourself *vis-à-vis* third-party liability along the lines that you discuss, Rich. In addition to perhaps some commercial litigation, like, "Oh, wow! There's PFAS in your product? Didn't you give me a supply certification three years ago that said it was PFAS free?" Catching up with all of these loose ends will be a full-time job for several years to come.

REE: Yes. You do need to -- again, you're going to have this new information. Whatever you find, you find it. What does it mean? What might it mean to external stakeholders, to customers, to NGOs, to states, to communities, to consumer groups? Again, the universe of PFAS is so large, it encompasses so many things, that we cannot assume. It is inappropriate to assume that there's equal harm from the presence of *any* PFAS. And so, if you have PFAS in a product, you need to be able to explain. "Oh, yes, there's a PFAS, but here's why there's no harm," and to give people some comfort that the presence of that PFAS is not a harm to them or the community. But again, it's information that you need to have that you need to manage in other regulatory contexts or other legal contexts.

LLB: In your view, Rich, do you think this reporting obligation and the tsunami of state regulations that are coming our way will result in a lot of PFAS deselection and product reformulation?

REE: Maybe a little. I mean, PFAS has been a four-letter word for a while now, and people have been working very aggressively to move away from PFAS. We're aware of some clients that have been searching for years for PFAS alternatives, and they just can't find things that work. It's across a variety of applications. Some are purely industrial, and some do include consumer products, but I think companies have been trying to move away from PFAS just to not be painted with the same brush as some of the rather admittedly harmful PFAS. But PFAS are used because they're extraordinarily useful.

Generally, they're more expensive than other options. For a lot of applications, PFAS were only used because it was *the* thing that did the job. Will customers -- if you find a PFAS-free alternative, but you're losing 50% of the performance -- will customers accept that?

LLB: Right.

REE: I don't think the PFAS Section 8(a)(7) is going to lead to a lot of reformulation, because it's already been ongoing. There might be some things in the margin where the PFAS was not known to be present, and then once the U.S. importer knows that the PFAS is there, they might tell the foreign supplier, "You know what? You've got to get that out." Because there are some -- there have been some instances where there have been substitutes that work. And so if it was not known before, then it becomes known, and it's one of those classes

where there's a suitable substitute, then I think we'll see some reformulation, but I think it's going to be a relatively small set of products.

LLB: We're aware in at least two states of a forthcoming -- later this week --deadline for purposes of commercially unavoidable uses. I think for the federal government, the European government, and state governments appreciate that -- to your point, Rich -- there are a lot of absolutely unavoidable uses of PFAS in a variety of very, very important formulations: firefighting foams --

REE: -- computers,

LLB: Computers, you name it.

REE: EV [electric vehicle] batteries.

LLB: There are work-arounds for the ongoing use of PFAS. But that, of course, wouldn't shield an entity from collateral liability in a commercial, or cleanup, or other sense. That might be forthcoming, but I rather doubt it. In my view, this *will* hasten reformulation, simply because customers, particularly in consumer markets, are just ill suited to avoid the commercial peril that they experience by having PFAS-laden products that they're offering for sale to people.

REE: Yes, and so --

LLB: -- however unavoidable.

REE: There's a particular cosmetic that's got a PFAS in it. I'm not sure what it is, so that cosmetic company reformulated its way from PFAS. Now, there's no longer tear-proof mascara. I don't know whether -- I suspect that some mascara -- I have no idea, but I suspect that some mascara has PFAS to avoid the smearing from crying. Will customers accept that? Some might say, "I don't mind having the smearing because I want to avoid the PFAS." But others might say, "I really want the PFAS because I want my mascara to stick when I'm crying on stage at the Oscars" -- or at the altar. Some people really, really, really want that performance.

Does that become a consumer choice, where you're providing that consumer product and you're like, "Here's the one that gives this peak performance, but it contains PFAS. Doesn't contain any PFAS that's going to harm you, or the environment, according to all this information, but it's there. If you really don't want it, fine. You can get the one that smears, and that is your choice."

Will consumers have that choice? Or will those companies just say, "We're not even going to offer it." But then there might be some premium brand that *does* say, "Look, we admit there's a PFAS in here, but here's what you get when you use it. And here's why there's no harm --"

LLB: -- it's your choice.

REE: Maybe a bunch of people rush to that because they really do want the performance. Not sure how the market's going to react.

LLB: Yes. We have our own views on that. But our point is bringing to our listeners just the fact that there are a variety of responses to the presence of PFAS.

REE: Absolutely, absolutely.

LLB: States recognize there are commercially unavoidable --

REE: -- I think they're beginning to. I think initially they were like, "Oh, we've just got to ban all these." I mean, that's what REACH said: "We've got to ban all these."

LLB: Right.

REE: We were like, "Wait, do you really want to give up this and this and this and this and this and this and this?" And they went, "Okay, tell us how they're unavoidable, and maybe we won't ban them."

LLB: Right. And hence your 15-year derogation.

REE: Yes, and you get a certain amount of time where you have to come back and say, "Yes, we looked for another 15 years, and we still haven't found an alternative."

LLB: The upside is for all of our chemical innovators who are listening to this podcast, think of the opportunities to develop new chemical substances that are as resourceful and offer as many functionalities, but are not based on a PFAS chemistry.

REE: That's not news. They've been doing that for at least a decade.

LLB: Without success.

REE: Well, with *some* success. But will they -- will there continue to be research and innovation in that space? No question. Will people find things that work as well, or almost as well?

LLB: Yes. Good enough.

REE: They might. Or there might be some cases where it's like, you know what? It's good enough. And we're just going to forego the top, the peak performance. I think it really depends on what PFAS you're replacing. Because again, I refuse to buy into the idea that all PFAS are harmful because there is not evidence of that.

LLB: It's because they're not.

Last question, Rich, and that is EPA will soon -- by November of next year -- have an awful lot of Section 8(a)(7) reports -- maybe not a lot of Section 8(a)(7) information -- but they will have a lot of reports. What do you think EPA is going to *do* with all that information?

REE: I think they're going to dump it into ChemView, right? ChemView is where EPA publishes its CDR reporting, so you can go back and look at 2012, 2016, and 2020 CDR reports in ChemView. EPA may stand up a separate sort of window in ChemView that's specific for PFAS, but I don't think they're going to reinvent the wheel. They're going to put the data in an existing database, in an existing data portal. They will publish, just as they do with ChemView. There will be some information that's CBI and some information that's not CBI, but that's where they'll publish it.

I think the other question is what will they do with that huge trove of information where the reports are not known or reasonably ascertainable? I don't know what they can do with that, other than go, "Wow, there's a bunch of unknown PFAS in a bunch of things, and we have no idea what to do with that."

LLB: No, how much or what PFAS.

REE: We don't know what it is, or how much it is, or what the harm might be. There's just no way to know when it's not known or reasonably ascertainable. And then the information where you get CDR-like reporting, where companies can report specific quantities of specific substances that they manufactured intentionally, maybe they get some byproduct information. That, I think, EPA could use in a risk assessment context.

Will they use it in that context? I don't know. I don't know what that PFAS -- what the strategy for PFAS going forward is going to be. EPA is still issuing test rules for PFAS, so they're still trying to gather -- this will help inform the release and exposure part of that. The testing will help elucidate some of the hazard information. Although the Section 8(a)(7) rule does require, if you have data on hazards or exposure, you have to report those as well. I think the -- I don't know that there's a lot of that out there, but if it's out there, that'll be reportable. But EPA hasn't done much with their nano reporting from 2017-2018.

LLB: Right, I was just going to mention that.

REE: There's that big -- all the effort that went into reporting that, I have seen very little public utterances about all that data. And remember back then it was like, "Oh, we need to know. This nano stuff is -- because we don't know what harm it's going to do." What happened to all that data and the effort to collect it?

LLB: -- which is an ongoing data requirement.

REE: It is an ongoing data requirement. People forget -- *I* forget that the nano reporting is an on -- unlike PFAS. PFAS is one-time reporting.

LLB: -- is one and done, right.

REE: We all -- we -- *I* certainly thought of the nano reporting as -- it was a one-time obligation -- but it continues to be an obligation. If you manufacture or import a new nanoform of a substance of an existing chemical, you're required to do the nano reporting 135 days prior to that commercial activity. It slips my mind all the time, but what is the point of that rule? Why is that rule still in place? Probably because EPA doesn't have the bandwidth to rescind it. But I don't know that there's any benefit to collecting the data when there's a ton of data there that EPA really hasn't looked at.

LLB: Right. Rich, we've come to the end of our questions. There's so much more to talk about. We are going to do in another podcast some of these state issues, because they're fascinating. We have a ton of information on our website. We report on all of the TSCA PFAS reporting on our TSCAblog®. We have a lot of information on the European requirements. PFAS is just part of the lexicon of environmental compliance these days. And stewardship.

REE: Yes.

LLB: I've greatly enjoyed chatting with you, Rich. I know there's far more to talk about. We'll get to it.

REE: We'll get to it.

We really hope this has been helpful for our listeners. And thank you so much for joining me.

REE: Pleasure to be here, Lynn.

LLB: Thanks again to Dr. Engler for speaking with me today about a topic that has become a forever topic: PFAS reporting under TSCA. We will tackle state reporting obligations next, so stay tuned.

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