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Wal-Mart Hazardous Waste Settlement Reveals Pitfalls of Managing Damaged or Returned Products

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A May 28, 2013, settlement by Wal-Mart Stores Inc. to resolve violations of the Resource Conservation and Recovery Act (RCRA), the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and the Clean Water Act (CWA) makes clear that retail and other operations must be very careful in the handling of returned, unsold, and off-specification products. Wal-Mart agreed to pay $7.628 million in civil penalties and pled guilty and agreed to pay $81.6 million in three federal criminal cases. As part of the resolution of the civil violations, Wal-Mart entered into a Consent Agreement and Final Order (CAFO) with the United States Environmental Protection Agency (EPA), under which Wal-Mart agreed to implement various measures to ensure future compliance. Although the FIFRA and CWA violations led in part to the massive fines, this article focuses on the violations of RCRA, the federal statute governing the disposal of solid and hazardous waste, as they apply to product returns.

RCRA Violations and EPA's Position

Wal-Mart sells various retail consumer products which may be considered hazardous waste under RCRA, including bleaches, pool chemicals, pesticides, fertilizers, paints and varnishes, lamp oil, aerosol products, oven cleaners, automotive products, and solvents. Wal-Mart's retail locations nationwide send their damaged and returned consumer products to Wal-Mart reverse distribution centers, which then determine how to manage or dispose of the products. EPA alleged that, as part of this practice, prior to 2006, Wal-Mart illegally handled and disposed of hazardous materials by failing to make hazardous waste determinations; failing to prepare hazardous waste

manifests; offering hazardous waste to unpermitted treatment, storage, and disposal facilities; and failing to meet hazardous waste, handling, storage, and emergency response requirements.

Of particular interest are Wal-Mart's hazardous waste determination violations. 40 C.F.R. § 262.11 requires generators of waste to determine if the waste is hazardous at its "point of generation." This is key because, at the point when a waste is found to be hazardous, various RCRA requirements – such as shipping manifest rules and disposal facility restrictions – immediately attach. Prior to 2006, Wal-Mart's retail centers did not make any hazardous waste determinations before shipping the consumer products to reverse distribution centers.

In the CAFO, EPA outlined a procedure whereby Wal-Mart's damaged or returned consumer products would be sent to reverse distribution centers, where the hazardous waste determination would be made, unless Wal-Mart's reverse distribution centers nationwide discarded more than 85% of a particular damaged or returned consumer product in a given year because recycling or reuse was not a feasible option. In that case, going forward, the retail centers would be the ones to make the waste determination and would presume the product is a hazardous waste, and the retail centers could not send the product to the reverse distribution centers.

What This Means to You

The guidance provided by EPA on precisely when and where the "point of generation" occurs in the context of returned, unsold, and/or off-specification products has been far from clear. Adding to the confusion is the fact that EPA has suggested there may be multiple points of generation for some wastes. The issue can become particularly perplexing to suppliers with damaged or returned products that the suppliers want to send to centralized reverse distribution centers that they own (and/or that they manage through a third-party contractor), similar to those employed by Wal-Mart. It can be difficult to pinpoint precisely whether the point of generation occurs at the retail centers or at the reverse distribution centers. Although it is sometimes more attractive for the supplier to have its reverse distribution center make the hazardous waste determination, the Wal-Mart case points out that there are circumstances where this approach can be risky.

The Wal-Mart CAFO indicates EPA might be willing to consider, at least in some cases, suppliers moving their point of generation for purposes of hazardous waste determinations for damaged and returned products away from retail centers and to centralized material handling facilities, even where some of that material ends up being disposed. These centralized centers then work to identify the most effective disposition for damaged or returned products, whether that may be sending them back to the manufacturer, reusing or recycling them, or sending them to a disposal facility. In the CAFO, EPA allowed these centralized centers as an effective means of managing and minimizing wastes. However, in light of CAFO's 85% disposal exception to this approach, it is clear that the centralized center actually must have alternatives for the materials and that there must be some realistic potential

for reuse or recycling. Where damaged and returned products are clearly waste, the retail centers must make the hazardous waste determination, not the centralized material handling facilities.

Notably, the CAFO is an agreement that applies only to Wal-Mart given its specific facts; the CAFO does not necessarily reflect how EPA would decide other cases. Suppliers should not assume for instance, that if they are recycling more than 15% of their damaged or off-specification consumer products, the retail centers can automatically forego making hazardous waste determinations. The 85% figure is not a bright line rule. The CAFO, however, does provide some insight into EPA's current position on point of generation issues. We at Husch Blackwell can advise you on the best approach given your specific situation.

Contact Information

If you have questions concerning these or other related issues, please contact your Husch Blackwell attorney, Megan Caldwell at 314.480.1648 Amy Wachs at 314.480.1840 or Robert Wilkinson at 314.480.1842.

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