

LEGAL UPDATES

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## EPA Offers Guidance to Clarify Compliance Obligations for Retailers Under RCRA

The U.S. Environmental Protection Agency (EPA) recently issued its “Strategy for Addressing the Retail Sector under RCRA’s Regulatory Framework” (Strategy Document), which addresses growing concerns about the application of federal hazardous waste regulations to retail operations. The Strategy Document takes into account retail sector practices, such as reverse logistics, that present unique compliance challenges for retailers who accept returns from customers of products that might be considered “hazardous waste” under the Resource Conservation and Recovery Act (RCRA).

### Background

In recent enforcement actions, EPA has settled with retail stores over violations of RCRA hazardous waste regulations, with fines well over \$1 million for not properly documenting or disposing of regulated consumer goods that were opened and returned by customers and that could not be returned to store shelves. EPA continues to seek millions in penalties against retailers for alleged improper disposal of seemingly mundane household items such as hand sanitizer, vitamins, perfumes, nail polish, strong liquors, and some cleaning products. Significant examples of enforcement actions include: Whole Foods Market, \$3.5 million (2016); Wal-Mart Stores, \$81.6 million (2013); CVS Pharmacy, \$13.75 million (2012); and Target Corp., \$22.5 million (2011).

### RCRA’s Regulatory Framework Applied to the Retail Sector

RCRA is best known for its “cradle-to-grave” approach to management and disposal of solid and hazardous wastes. It subjects generators of hazardous waste to strict storage and recordkeeping requirements. Common consumer

products that may be regulated as hazardous waste include aerosols, cleaning solvents, pharmaceutical waste, batteries and fluorescent light bulbs. While RCRA contains an exemption for household products discarded as municipal trash by households, many of these products are regulated when retailers accept damaged, defective or otherwise unusable products as returns. As a result, retailers must be careful in their storage and disposal of such items.

RCRA's regulatory framework, perhaps drafted with large manufacturers in mind, is not well-suited to the retail industry. Retailers often sell a multitude of products and are not always familiar with the composition of each of them. Other factors such as staff turnover and the complexity of the reverse distribution/logistics process also contribute to the difficulty retailers face when dealing with product returns that may be regulated as hazardous wastes under RCRA. While delaying the determination of a returned product's hazardous waste status may subject a retailer to significant penalties, treating every returned product as hazardous waste would also create unnecessarily high disposal costs.

## EPA's Strategy Document

EPA's Strategy Document seeks to acknowledge and address some of the compliance issues facing retailers and pharmacies by attempting to make it less burdensome for the retail sector to properly classify and dispose of returned products. EPA plans to implement this strategy using a variety of proposed rulemakings and guidance documents, including three recently proposed regulations:

**1. Definition of Solid Waste Rule.** EPA modified the definition of solid waste in January 2015 to exclude certain hazardous materials sent to a "verified recycler" when certain conditions are met. See 80 Fed. Reg. 1694 (Jan. 13, 2015). The Strategy Document encourages retailers to take advantage of this exclusion for aerosol cans, which constitute a significant portion of the hazardous waste generated by retailers.

**2. Hazardous Waste Generator Improvements Rule.** This proposed rule would increase flexibility for retailers by adding new provisions addressing episodic generators of hazardous waste and allowing those episodic generators to consolidate conditionally exempt small quantity generator waste at large quantity generator facilities. See 80 Fed. Reg. 57018 (Sept. 25, 2015). Further changes to this rule are possible, but EPA plans to release a final version of the rule in October 2016.

**3. Pharmaceuticals Rule.** This proposed rule sets forth new standards designed to reduce the complexity and regulatory burden of properly managing pharmaceutical hazardous waste by the retailers of such drugs. See 80 Fed. Reg. 58014 (Sept. 25, 2015). It also seeks to reclassify low-concentration nicotine-containing products from acutely hazardous waste status to non-acutely hazardous or non-hazardous status. This change would reduce the burden on retail facilities that may otherwise find themselves regulated as large quantity generators of hazardous waste due to their

marketing of nicotine-containing products. EPA expects to promulgate a final version of the rule sometime in 2017.

## **What This Means to You**

While EPA's acknowledgment of the difficulty of complying with RCRA standards at retail facilities may lead to positive regulatory changes, retailers should not interpret this to mean that EPA has reduced its enforcement efforts. Recent enforcement actions underscore the importance for retailers to have a plan in place and educate their employees about how to manage their returned, expired, or otherwise unmarketable consumer products to ensure compliance with RCRA. In light of changing regulations, existing plans should periodically be reviewed both to ensure compliance as well as take advantage of changes intended to reduce costs of compliance.

## **Contact Us**

For more information on compliance obligations under the RCRA, contact Megan Caldwell, Megan McLean or your Husch Blackwell attorney.