

## A Look At New EPA Composite Wood Formaldehyde Limits

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*Law360, New York (January 30, 2017, 3:49 PM EST)* -- On Dec. 12, 2016, the U.S. Environmental Protection Agency published the final Formaldehyde Standards For Composite Wood Products Rule in the Federal Register. The compliance date for most aspects of the rule is Dec. 12, 2017, with a sell-through provision for wood composite products manufactured or imported prior to that date.

The rule limits formaldehyde emitted into the air from certain composite wood products, which are products made by binding strands, particles, fibers, veneers or boards of wood together with adhesives. Domestic and foreign companies operating in the U.S. use composite wood products to manufacture a wide variety of consumer products such as furniture, flooring, cabinets, children’s toys and more.

The EPA promulgated the rule to implement the 2010 Formaldehyde Standards for Composite Wood Products Act, which Congress enacted as Title VI of the Toxic Substances Control Act (TSCA). The Act established emission standards that mirror the California Air Resource Board’s (CARB) Phase II standards for composite wood products — including hardwood plywood (HWPW), medium-density fiberwood (MDF) and particleboard (PB).[1]

Similar to the California requirements, the new federal rule regulates composite wood products from initial manufacture to final sale by (1) imposing emissions restrictions; (2) regulating product labeling, chain of custody, non-compliant product sell-through, recordkeeping and enforcement; and (3) requiring certification by EPA-approved third-party certifiers (TPC) that conduct quality assurance activities, emissions testing, inspections and auditing services.

### New Federal Emissions Limits

Suppliers of composite wood products and items containing composite wood products — including all manufacturers, importers, fabricators, suppliers, distributors and retailers — must comply with the following emission standards for HWPW, PB, and MDF to be offered for sale in the United States:



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- HWPW (made with a veneer core or a composite core) = 0.05 ppm
- PB = 0.09 ppm
- MDF = 0.11 ppm
- Thin MDF = 0.13 ppm

The effective date for these emissions limits is Dec. 12, 2017, one year following final publication of the Rule, subject to limited exceptions. Producers of laminated products have until Dec. 12, 2023, to comply with the Rule's emission standard for HWPW.[2]

### **Applicability and Scope**

The emission standards apply to any defined composite wood product in the form of a panel or a component part, or incorporated into a finished good. The rule applies to all entities along the supply chain, including importers, distributors, retailers, panel producers, fabricators, TPCs and accreditation bodies.

The EPA's Summary of Provisions (pp. 89675-89676) unpacks the major compliance obligations particular to each type of supplier. Like CARB's Composite Wood Products Measures, the rule imposes robust compliance obligations on panel producers (manufacturers), but softens obligations down the supply chain, with the least burden imposed on distributors and retailers of finished goods.

Exclusions apply to certain types of products, and goods made from them. For example, any "finished good" that has been previously sold or supplied to a good faith purchaser for purposes other than resale, including antiques and secondhand furniture, is not subject to emissions limits imposed by the new rule.

Structural plywood and structural panels, as specified in National Institute of Standards & Technology (NIST) Voluntary Product Standards are likewise exempt.[3]

Further, certain products made with no-added-formaldehyde-based resins and ultra-low-emitting formaldehyde resins are exempt from the rule, such as hardboard, oriented strand board, structural composite lumber and more. Renovators and construction contractors that sell, remodel or renovate buildings containing composite wood products are not covered by the rule, and neither are new vehicles (other than recreational vehicles), new rail cars, new boats or new aircraft.

Notably, the rule does not contain a wholesale exemption for laminated products, which some have viewed as closure of a loophole left by CARB in its Composite Wood Products Measures. Rather, the rule distinguishes between exempt and non-exempt sorts of laminated products.[4]

As indicated in the compliance chart below, before the Dec. 12, 2023, manufactured-by date, laminated product producers must use compliant composite wood product platforms.[5] After that date, producers of exempt laminated products must keep, as a condition of the exemption, records demonstrating eligibility for the exemption.

Producers of non-exempt laminated products will have to comply with the full emissions testing and certification requirements for HWPW as of Dec. 12, 2023.

### **Sell-Through and Stockpiling of Non-Compliant Products**

The Formaldehyde Standards for Composite Wood Products Act allowed the EPA, in developing the final rule, to incorporate “sell-through regulations” that permit the continued sale of non-compliant products produced or imported before the compliance date. The EPA set the compliance date one year after the final rule’s publication, or Dec. 12, 2017.

To prevent circumvention of the new limits by over-producing prior to the compliance date, the rule prohibits sale of “stockpiled” inventory, defined as manufacturing or purchasing of non-compliant products at a rate 20 percent or greater above 2009 annual average levels at any time during the period between passage of the Act on July 7, 2010, and the effective date of the rule on Dec. 12, 2017.

To enforce the rule against sale of stockpiled inventory, the EPA must find that the producer increased production for the specific purpose of circumventing the rule’s emissions standards.

### **Third-Party Certification**

All panel producers, as well as laminated product producers subject to the Dec. 12, 2023, compliance date, are required to have their products certified by an EPA-approved TPC that tests samples of the products for compliance with the emissions standards.

Panel producers are also required to conduct quality control testing to ensure that regulated composite wood products meet emissions standards. TPCs or their laboratories must test their panel producers’ composite wood products quarterly.[6]

TPCs must also perform quarterly inspections of producers’ products and records, and where a certified product fails a quarterly test, certifications for all products represented by the failing sample must be suspended until a compliant quarterly test is obtained.

### **Required Precautions for Non-Producers**

Importers, fabricators, distributors and retailers must take “reasonable precautions” to ensure that the composite wood products they supply or offer for sale comply with the rule’s emission standards.

Importers, who are subject to the strictest precautionary requirements, must demonstrate that they have taken reasonable precautions by maintaining bills of lading, invoices or comparable documents that include a written statement of compliance from their suppliers.

Importers must maintain these documents for three years, and must make available to the EPA upon 30 days’ notice (1) records identifying the panel producer and the date the composite wood products were produced, and (2) records identifying the supplier (if different) and the date the composite wood products, component parts, or finished goods were purchased.[7]

Down the supply chain, for three years following the date of import, purchase or shipment, all fabricators, distributors and retailers can demonstrate reasonable precautions by obtaining bills of lading, invoices, or comparable documents containing a statement of compliance from the supplier.

### **Civil and Criminal Penalties for Violators**

Any individual or entity that violates any requirement under the rule is deemed to have committed a

“prohibited act” under TSCA Section 2614, and is therefore subject to strict liability civil penalties not to exceed \$37,500 for each day a violation persists.

TSCA also allows for heightened penalties for certain categories of violators. An individual or entity that commits a “knowing or willful” violation of the rule is subject to additional criminal penalties, including imprisonment up to a year and daily criminal fines of up to \$50,000 on top of any assessed civil penalties.

In limited circumstances, violations of the rule could also trigger prosecution under TSCA’s felony endangerment provision, which provides for a maximum daily fine of \$250,000 and up to 15 years imprisonment where a knowing and willful violator causes “imminent danger of death or serious bodily injury” to an individual.

### **Potential Implications**

Given the breadth of obligations under the rule and potential exposure to substantial monetary penalties for violations, suppliers of composite wood products and finished goods are advised to develop compliance strategies to be prepared for the rule’s compliance dates, beginning Dec. 12, 2017.

This includes compliance with the rule’s certification, recordkeeping and labeling requirements as well as the emissions limitations.

Of note, by operation of a White House memorandum issued Jan. 20, 2017, the effective date of the rule is postponed from Feb. 10, 2017, to March 21, 2017, to give the new administration review opportunity. This creates potential that there will be amendments and/or further delay to the rule.

However, because many in the industry have desired a consistent standard nationally, there may be little if any change, making it advisable to assume the deadlines and requirements of the rule will remain as shown in the Summary of Provisions.

Reportedly, the White House also has ordered a communications blackout for EPA (which may be lifted by the time of publication of this article) and a freeze on grants and external contractors. This may delay issuance of EPA guidance for compliance with the Rule, beyond that already available, increasing need to carefully review and analyze the Rule’s provisions and their applicability to one’s circumstances.

Stakeholders might begin by surveying the compliance chart reproduced below, as well as EPA’s Fact Sheet and EPA guidance materials. EPA also has released notices for upcoming Rule Requirements Webinars during January and February 2017 directed variously at the general public and targeted stakeholder groups. Additionally, CARB has indicated that guidance will be provided “to the regulated community regarding how the U.S. EPA and CARB rules interact.”

Concomitantly, potential high-priority objectives for those operating in the composite wood products supply chain include:

- Internal compliance audits and product testing to identify sources of potential enforcement risk. Elements of a successful internal audit might include (a) identification of types and volumes of composite wood products and regulated finished goods offered for sale; (b) confidential preliminary emissions testing under contract with EPA- or CARB-approved TPCs; and (c) review of invoicing, labeling, quality control and recordkeeping practices.

- Timely preparation of all required certification applications by producers of panels and non-exempt laminated products to EPA-authorized TPCs;
- Notification and obtainment of assurances of compliance from upstream suppliers and, if prudent, written indemnification agreements with third-party suppliers against future non-compliance.

### Summary of Provisions

REQUIREMENT	COMPLIANCE DATE
<b>Composite Wood Product Producers</b>	
Hardwood plywood (made with a veneer core or a composite core) = 0.05 ppm Particleboard = 0.09 ppm MDF = 0.11 ppm Thin MDF = 0.13 ppm (40 CFR 770.10)	Dec. 12, 2017
Products must be certified by an EPA TSCA Title VI TPC unless they are eligible for a limited exemption for products made with NAF-based or ULEF resins. (40 CFR 770.15, 770. 17, 770.18)	Dec. 12, 2017
Products must undergo quarterly testing and routine quality control testing using specified methods. (40 CFR 770.20)	Dec. 12, 2017
Panels must be labeled with the producer's name (or other identification), lot number, TPC number, and a statement of compliance with TSCA Title VI. (40 CFR 770.45)	Dec. 12, 2017
Records, including testing, production, purchaser, transporter, and non-complying lot information, must be kept for 3 years Records demonstrating initial eligibility for reduced testing or a limited third-party certification exemption for products made with NAF-based or ULEF resins must be kept for as long as exemption eligibility is claimed. (40 CFR 770.40)	Dec. 12, 2017
<b>Producers of Laminated Products That Are Not Exempt From the Definition of Hardwood Plywood</b>	

Bills of lading, invoices, or comparable documents must be obtained and maintained for 3 years. (40 CFR 770.30, 770.40)	Dec. 12, 2017
Finished goods must be labeled with the producer's name, the date the good was produced, and a statement of TSCA Title VI compliance. (40 CFR 770.45)	Dec. 12, 2017
Laminated products must comply with the hardwood plywood emission standard of 0.05 ppm, and the testing, certification, and recordkeeping requirements for composite wood products. (40 CFR 770.10, 770.15, 770.20, 770.40)	Dec. 12, 2023
<b>Producers of Laminated Products That Are Exempt From the Definition of Hardwood Plywood</b>	
Records demonstrating purchase/use of compliant platforms and NAF or PF resins and bills of lading, invoices, or comparable documents must be obtained and maintained for 3 years. (40 CFR 770.40)	Dec. 12, 2023
Bills of lading, invoices, or comparable documents must be obtained and maintained for 3 years. (40 CFR 770.30, 770.40)	Dec. 12, 2017
Finished goods must be labeled with the producer's name, the date the good was produced, and a statement of TSCA Title VI Compliance. (40 CFR 770.45)	Dec. 12, 2017
<b>Fabricators (Other Than Laminated Product Producers)</b>	
Bills of lading, invoices, or comparable documents must be obtained and maintained for 3 years. (40 CFR 770.30, 770.40)	Dec. 12, 2017
Finished goods must be labeled with the producer's name, the date the good was produced, and a statement of TSCA Title VI Compliance. (40 CFR 770.45)	Dec. 12, 2017
<b>Importers</b>	
Bills of lading, invoices, or comparable documents bearing a statement of TSCA Title VI compliance must be obtained and maintained for 3 years. In addition, must have the	Dec. 12, 2017

ability to make records identifying the panel producer, the date the products were produced, the supplier (if different) and the date the products were purchased available to EPA within 30 calendar days of request. (40 CFR 770.30, 770.40)	
Import certification under TSCA section 13 is required. (40 CFR 770.30, 770.40)	Dec. 12, 2018
<b>Distributors and Retailers</b>	
Bills of lading, invoices, or comparable documents must be obtained and maintained for 3 years. (40 CFR 770.30, 770.40)	Dec. 12, 2017

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[1] Compare 15 U.S.C. § 2697(b)(2), with 17 Cal. Code Regs. § 93120 et. seq. (Airborne Toxic Control Measure to Reduce Formaldehyde Emissions from Composite Wood Products (“Composite Wood Products Measures”)).

[2] Noting, however, that non-exempt producers of laminated products are still subject to recordkeeping, labeling and other non-emissions requirements applicable to “fabricators” as of Dec. 12, 2017.

[3] The rule incorporates by reference NIST Voluntary Product Standards PS 1-07, Structural Plywood, May 2007, and PS 2-04, Performance Standard for Wood-Based Structural-Use Panels, Dec. 2004. 40 C.F.R.

[4] Specifically, laminated products made by attaching a wood or woody grass veneer to a core platform consisting of compliant MDF, compliant PB or compliant veneer, with either a phenol-formaldehyde resin or a resin formulated with no added formaldehyde as part of the resin cross-linking structure, are exempt. See 40 C.F.R. § 770.4.

[5] All producers of laminated products, whether exempt or nonexempt, must still comply with recordkeeping and labeling requirements as of Dec. 12, 2017. 40 C.F.R. § 770.02.

[6] The rule specifies use of test method ASTM E1333–10 or, with a showing of equivalence, test method ASTM D6007–02. Testing can be performed on-site if the appropriate equipment is available.

[7] On or after Dec. 12, 2018, importers of composite wood products must also comply with the certification regulations for importation of chemical substance in bulk, as required by TSCA. 40 C.F.R. § § 770.30(d); see also 19 C.F.R. §§ 12.118-12.127.

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