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Retailers May Be Liable for Hazardous Waste Violations

By Steve Morton and Janessa M. Glenn

Whole Foods, a high end national grocery store chain, just agreed to pay a \$3.5 million fine to the Environmental Protection Agency (“EPA”) for allegedly violating hazardous waste regulations. EPA has announced that it will be inspecting other retailers for the same issue. How can a retailer of common household goods be at risk for such significant fines?

Hazardous Waste Definition is Very Broad

When someone says “hazardous waste,” most people think of waste created by chemical plants or heavy industry manufacturers. But the types of companies that produce items that can become hazardous waste—as that term is defined by EPA—is quite broad and diverse.

Hundreds of thousands of products sold by retailers nationwide are returned, recalled, or expire on the shelves every day. Many of these products are considered by EPA to be solid waste when discarded, and they can also be considered hazardous waste if they meet certain additional criteria. Hazardous wastes are generally defined to include discarded materials that either: (1) contain one or more of the hundreds of chemicals specifically listed as a hazardous waste (examples include nicotine, phenol, and naphthalene); or (2) exhibit certain characteristics, such as corrosivity; ignitability; reactivity; and toxicity. Examples of discarded products that may fall in these two categories could include household cleaning solvents and rubbing alcohol (ignitability); drain cleaner (corrosivity); fertilizer, batteries (toxicity); e-cigarette cartridges (contains listed chemicals).

As a result, retailers can be subject to large penalties if they do not follow strict hazardous waste management, disposal, and recordkeeping requirements when discarding returned, recalled, or expired products that could be hazardous waste.

What Happened to Whole Foods?

As Whole Foods recently discovered the hard way, EPA expects all potential sources of hazardous waste to be in full compliance with the hazardous waste management requirements of the Resource Conservation and Recovery Act (“RCRA”) (42 U.S.C. §6901 *et seq.*).

After inspecting a number of Whole Foods’ stores, EPA alleged numerous facilities failed to properly determine whether certain discarded products were hazardous wastes, and subsequently failed to manage them in accordance with RCRA requirements. RCRA requires hazardous wastes to be properly stored prior to disposal, disposed only at authorized facilities, and transported in compliance with specific rules. In addition, records must be kept and reports must be made to the appropriate agency.

Whole Foods and EPA entered into a series of five Consent Agreement and Final Orders requiring Whole Foods to: (1) pay a penalty of \$3.5 million; (2) engage a third-party consultant to assist them in developing a program to properly identify waste as hazardous

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waste in the future; and (3) create and fund a Supplemental Environmental Project educating others in the retail industry.

How Does This Apply to My Retail Store?

Typically, hazardous waste issues arise when customers return products, there is a product recall, or when products expire before they are sold. Some examples of these products that could be hazardous wastes include returned hair spray, pest control chemicals, mouthwash, and household cleaners along with most aerosol cans. Retailers must decide what to do with these products. If they are to be discarded, retailers must make the determination of whether the item constitutes a hazardous waste and if so, they typically must comply with the storage, transportation, recordkeeping, and disposal requirements noted above.

EPA Announces RCRA Compliance Strategy

EPA recognizes the unique challenges faced by retailers in complying with the hazardous waste regulations, including: (1) the diversity of products handled; (2) the vast number of stores nation-wide a company may have; (3) high turn-over of employees detracts from the ability to properly train employees in RCRA Program compliance; and (4) the volume of hazardous waste being discarded ebbs and flows, particularly in a recall situation. Determining when or if a product is being discarded (and thus is a waste) is particularly confusing to retailers due to the now prevalent use of the reverse logistics system for customer returns. Returned items may eventually become waste, but they may instead be returned to the manufacturer, donated, or liquidated, for example. This uncertainty about the destination of the product makes it very challenging for a retailer to comply with the hazardous waste regulations.

EPA has promised to issue guidance and rulemaking to better apply the hazardous waste rules to the unusual circumstances faced by retailers, and will further research and develop policies that make sense in the world of reverse logistics. EPA Strategy for Addressing the Retail Sector Under RCRA's Regulatory Framework, September 12, 2016 found [here](#).

In the meantime, navigating through the hazardous waste program is complex and fraught with opportunities to inadvertently violate the law.

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