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Reinstated Superfund Excise Tax—Safe Harbor Rule Protection to End Q3 2023

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act (the Act). Along with funding a myriad of government programs, the Act reinstated two long-expired Superfund excise taxes, described in 26 U.S.C. §§ 4661 and 4671: one on a list of 42 taxable chemicals (the Chemical Sales Tax) and the other on 151 substances containing taxable chemical substances (the Substances Tax).

These taxes were initially imposed in connection with the Comprehensive Environmental Response, Compensation and Liability Act of 1980 and were established to fund the Hazardous Substance Response Trust Fund. The taxes, commonly known as the Superfund chemical taxes, expired on December 31, 1995, and became effective again on July 1, 2022. The Superfund chemical taxes have been reinstated through December 31, 2031.

The Chemical Sales Tax applies to the 42 chemicals (Taxable Chemicals) on a per-ton basis when sold by the manufacturer, producer or importer of the Taxable Chemical, or when the Taxable Chemical is imported into the United States for sale or use or is manufactured or produced in the United States. The Chemical Sales Tax does not apply to Taxable Chemicals sold for export or resale to a second purchaser for export outside the United States. See here for the list of Taxable Chemicals.

The Substances Tax applies to 151 substances (Taxable Substances) that contain 20 percent or more of Taxable Chemicals by weight or value. The list, which can be found here, is not exhaustive—any substance imported into the United States that is not listed as a Taxable Substance but that contains 20 percent or more of Taxable Chemicals by weight or value is subject to the Substances Tax.

In 2022, the IRS issued Notice 2022-15 (the Notice), which provided temporary relief for the third and fourth quarters of 2022 and the first quarter of 2023 for failure-to-deposit penalties imposed by § 6656 of the Internal Revenue Code as those penalties relate to the Chemical Sales Tax and the Substances Tax. The Notice also states that during the first, second and third quarters of 2023, the IRS will not withdraw a taxpayer's right to use the deposit safe harbor rules under § 40.6302(c)-1(b)(2) of the Excise Tax Procedural Regulations for failure to make required deposits of the tax.

These taxes are filed quarterly, and taxed persons or entities must make semimonthly deposits of not less than 95 percent of their net tax liability for that 15-day period in accordance with the table listed in § 4661, which can be found here. The applicable safe harbor rule allows any person who filed a quarterly Form 720 for the second preceding calendar quarter to have met the semimonthly deposit requirement if "(i) the deposit for each semimonthly period in the current calendar year is not less than 1/6 of the net tax liability reported for the look-back quarter; (ii) each deposit is made on time; (iii) the amount of any underpayment is paid by the due date of the Form 720 return; and (iv) the person's liability does not include any tax that was not imposed during the look-back quarter."

There are also notable exceptions to the Taxable Chemicals list, including methane and butane used as—or in the manufacture of—fuels, and nitric acid, sulfuric acid, ammonia and methane when used in the production of a qualified fertilizer. The full list of exceptions can be found here.

On March 29, the IRS published a notice of proposed rulemaking amending its regulations in §§ 4661 and 4671 that provides a number of clarifying definitions, addresses the dilution of chemical mixtures, clarifies the rules for calculating the amount of tax and further delineates the fuels exceptions for methane and butane and fertilizers, among numerous other updates. The

public comment period for these regulations expires on May 30. Comments can be submitted on the *Federal Register* website, which can be found here.

If your business imports, manufactures or produces Taxable Chemicals or Taxable Substances and you have a question about the Superfund chemical taxes, the IRS' proposed new regulations or their impact on your business, please reach out to one of the attorneys in the sidebar.

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