

Trump EPA Expands Rigorous Enforcement of Pesticide Law as Part of "Return to Core Mission"

December 13, 2018

Regulatory

Despite its deregulatory efforts in other areas, the Trump administration continues to enforce pesticide laws rigorously as part of its stated goal of [returning EPA to its "core mission."](#) EPA is acting pursuant to its authority under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*, under which EPA regulates the registration, sale, and distribution of pesticides in the United States. "Pesticides" are broadly defined to include any substance intended used for destroying, mitigating, or repelling any pest, which include not only insects and rodents but also bacteria and microorganisms. 7 U.S.C. § 136(t)-(u). Thus, pesticides that must be registered under FIFRA can include a wide range of products not colloquially thought of as pesticides: alcohol wipes used for sanitizing surfaces, products used to clean animal stalls, and cleaning products used to disinfect household objects, as well as conventional pesticides used to control pests on agricultural crops.

Partly as a result of a 2016 increase in FIFRA penalties, EPA collected an all-time high of over \$7 million in publicly-announced penalties in 2018 to date, far exceeding the equivalent figures of \$2 million in 2016 and \$774,000 in 2015. The overall number of enforcement cases also remains consistent with past years.

The Trump EPA's continued emphasis on FIFRA enforcement underscores the need for companies to engage with counsel to ensure compliance with FIFRA and avoid the business disruption, brand damage, and significant penalties that can accompany FIFRA violations. As described below, among other enforcement activities, we expect continued enforcement in the Midwest (Region 5) relating to a wide variety of products, including products approved for various FDA uses but not by EPA for use on surfaces.

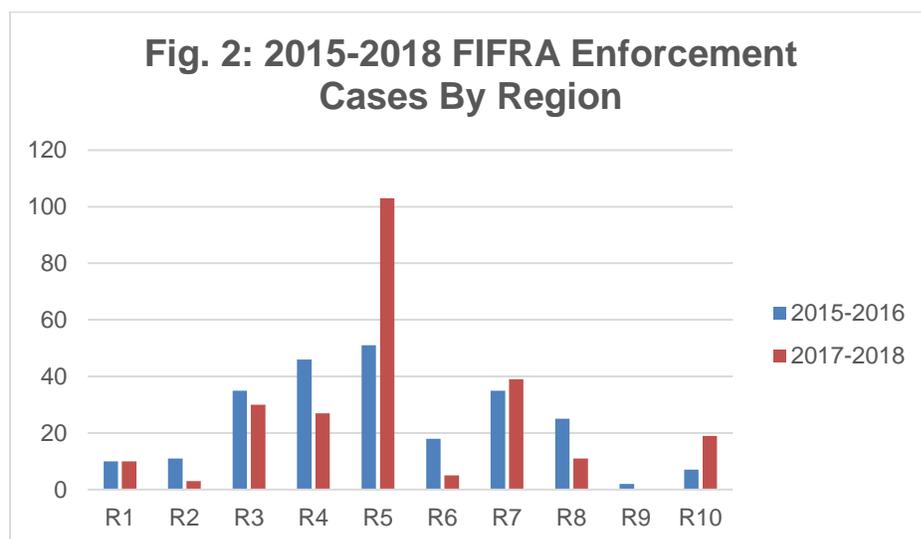
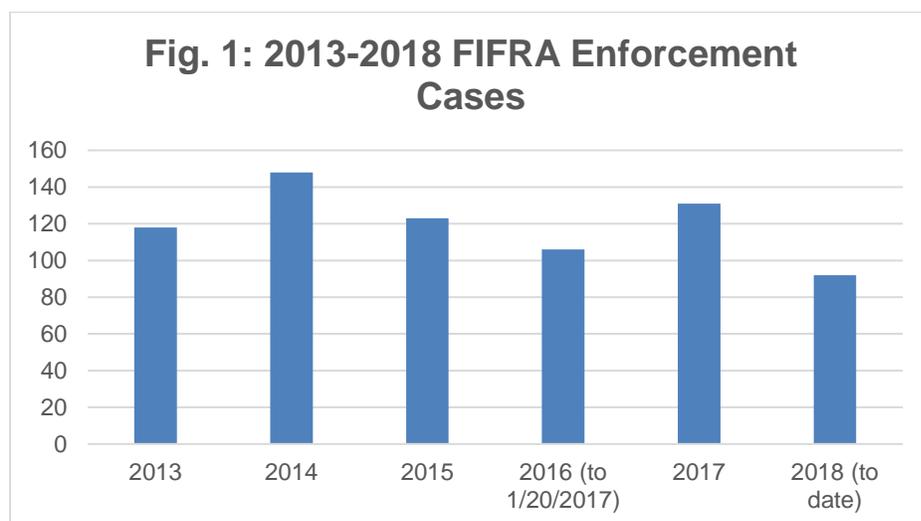
Recent Trends & Data

While EPA publicizes its efforts to deregulate, Covington's analysis of EPA's enforcement data demonstrates that EPA's settlements for FIFRA violations have continued at a similar pace, and a higher dollar amount, under the Trump administration. EPA publicized 16 settlements in 2017-2018 (to date), totaling over \$8.5 million in penalties. By contrast, in 2015-2016, EPA publicized 21 settlements, for a total penalty amount of \$2.7 million.

Part of the reason for this jump in penalties is the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015. Under a 2016 EPA rule implementing that law, the maximum

penalty for a single FIFRA violation increased from \$7,500 to \$19,446. EPA considers each sale or shipment of a product to be a separate violation subject to a separate penalty, which can quickly lead to substantial penalty amounts. Incentivized by this increased cap, EPA is more aggressively pursuing cases, resulting in greater aggregate penalties.

Likewise, our analysis of EPA’s enforcement data shows that EPA’s overall number of FIFRA cases remains relatively constant, as demonstrated in Figure 1 below. Interestingly, EPA’s Region 5, long one of the more active regions for FIFRA enforcement, has significantly increased the volume of its enforcement cases, bringing nearly half of the agency’s enforcement cases in 2017-2018, as seen in Figure 2.



Administration Policy

The Trump Administration’s stated FIFRA policy is consistent with the data. For instance, EPA’s [strategic plan for 2018-2022](#) indicates that one “objective” of the agency’s return to its “core mission” is to enforce FIFRA to “ensure safety of chemicals in the marketplace.”

Likewise, EPA's [2019 budget justification](#) explained that “[i]dentifying, assessing, and reducing the risks presented by the pesticides on which our society and economy rely is integral to ensuring environmental and human safety.”

Recent EPA Actions

Three recent EPA actions illustrate the broad scope of EPA's return to its core mission of FIFRA enforcement.

In the first case, [EPA ordered a company to stop nationwide distribution, transport, and sales of a pesticide](#) that was registered with EPA. The registered version had been manufactured in the United States, but the company had shifted manufacturing to China without obtaining EPA approval or registering the new manufacturing site. The new version was therefore an improperly registered pesticide.

In the second action, [two companies reached a settlement with EPA after a water filtration device manufacturer imported pesticidal products](#) without filing the proper EPA notice of arrival forms needed to import a pesticide.

In the third case, [a company settled with EPA after selling electronic cleaning products that claimed to kill germs, but were not registered with EPA](#). EPA's inspector identified the product alleged to violate FIFRA by examining the company's website. This enforcement action is consistent with a broader EPA trend, particularly in the Midwest (EPA Region 5) of bringing enforcement actions against disinfectants that are not registered with EPA, even as to disinfectants approved by FDA.

Ensuring FIFRA Compliance

The FIFRA scheme is complex. For example, even determining whether a product makes a permissible “cleaning” claim or an impermissible “antimicrobial” claim that requires the product to be registered with EPA can be a tricky task. Likewise, FIFRA's import requirements and the myriad instances where companies must notify EPA of changes to their FIFRA-registered products involve intricate EPA regulations and guidance.

In a world where EPA inspectors can now identify violations merely by reviewing a website, proactive efforts to ensure compliance are critical in forestalling enforcement actions. FIFRA enforcement not only poses the risk of penalties but can result in immense damage to a company's brand. Covington has worked with clients in a range of industries to implement comprehensive strategies to mitigate FIFRA risk, including review of websites for potentially problematic claims and assistance in revising advertising material to conform to EPA guidance. We also have advised on various pesticide import issues, which pose their own unique set of requirements and challenges.

Particularly in light of EPA's return to its “core mission” of bringing FIFRA enforcement cases, it is critical that companies remain vigilant regarding FIFRA compliance issues.

Litigation and Investigations

If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

Thomas Brugato

+1 202 662 5515

tbrugato@cov.com

Hali Kerr

+1 202 662 5306

hkerr@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.