

# EPA Chemical Safety Rule Raises Questions About Authority

By **Justin Savage, Ike Adams and Aaron Flyer** (April 25, 2024)

The U.S. Environmental Protection Agency recently finalized a rule that imposes novel board reporting regulations and signals that the agency may seek a role in regulating corporate governance.

Specifically, the EPA's recent amendments to the Risk Management Program, or RMP, requires certain chemical plants and refineries to submit third-party audit reports on process safety directly to the audit committee of the company's board of directors.

This appears to be the first time that the EPA has required board-level involvement in EPA-administered programs. Under the new RMP rule, the agency is dictating what information management must provide to the audit committee and when — regardless of management input.

The EPA's foray into corporate governance raises questions about the agency's legal authority. And, if the RMP rule survives judicial review, it may embolden the EPA to issue other board reporting obligations in any number of its regulatory programs governing corporate operations.

## Background: The EPA's Risk Management Program

In the Clean Air Act amendments of 1990, Congress revised Section 112 of the act and added subparagraph (r), directing the EPA to establish requirements related to the prevention and mitigation of accidental releases of regulated substances into the air. These requirements, which apply to owners and/or operators of facilities that use these regulated substances, eventually became the EPA's Risk Management Program.

To establish RMP requirements, Congress directed the EPA to coordinate with the Occupational Safety and Health Administration, or OSHA, to ensure that the EPA's RMP requirements and OSHA's similar Process Safety Management program requirements were consistent and did not contradict one another. On a general level, the PSM program is intended to protect employees on-site, while RMP focuses on off-site impacts.

The divide between on- and off-site consequences, however, can blur at times. In practice, compliance efforts cannot predict whether the effect of an accidental release will remain in the "fence line" of a site. Thus, in promulgating its RMP requirements in 1996, the EPA adopted most of the PSM program's requirements, which had been promulgated five years earlier in 1991, and made clear that regulated entities should not be subject to inconsistent requirements for on-site versus off-site risks.

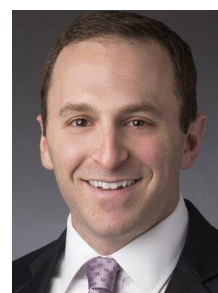
More recently, RMP has been the subject of a decadelong battle to update chemical accident prevention and mitigation requirements.



Justin Savage



Ike Adams



Aaron Flyer

In 2013, former President Barack Obama issued an executive order focused on further preventing and mitigating risks associated with accidental chemical releases following several major incidents. In mid-January 2017, still under the Obama administration, the EPA then published a final rule amending its accidental release prevention requirements.

In March 2017, under former President Donald Trump, the EPA's administrator announced the potential reconsideration of the January 2017 rule. In June 2017, the EPA published a final rule delaying the effective date of RMP amendments after receiving petitions from industry stakeholders requesting that the EPA reconsider and stay the January 2017 rule.

However, the June 2017 rule delaying the effective date was challenged in court, and in August 2018, the U.S. Court of Appeals for the D.C. Circuit issued a decision vacating the rule in *Air Alliance Houston v. EPA*.<sup>[1]</sup>

Several months later, in December 2018, the EPA published another final rule reconsidering many of the requirements from the original January 2017 rule. As a result, many of the contemplated requirements never went into effect.

### **The EPA's New Safer Communities by Chemical Accident Prevention Rule**

On March 11, the EPA published the final Safer Communities by Chemical Accident Prevention rule in the Federal Register,<sup>[2]</sup> which reinstates several of the requirements that never went into effect from the January 2017 rule and introduces new, broad requirements for owners and/or operators of regulated facilities that had not been contemplated in the previous rulemakings.

Among other things, the new RMP rule:

- Requires petroleum refineries, chemical plants and coal product manufacturing facilities to incorporate additional elements into process hazards analyses that consider using less hazardous substances, moderate the use of regulated substances, or simplify covered processes to prevent or mitigate the effect of an accidental release;
- Requires a third-party auditor to perform any scheduled compliance audit following an RMP-reported release at certain facilities;
- Mandates consideration of the latest industry best practices — known as recognized and general accepted good engineering practices — when conducting process hazards analyses;
- Mandates employee participation in resolving findings and recommendations from process hazards analyses, compliance audits and incidents;

- Requires the development of public disclosure procedures for certain RMP facilities and requires the disclosure of certain accidental release-related data to local responders;
- Requires that facilities provide certain chemical hazard information to any member of the public who resides, works or otherwise spends time within a six-mile radius of the facility; and
- Requires owners and/or operators to account for natural hazard-related risks, such as wildfires, earthquakes and extreme weather, in facility hazard analyses.

The requirements in the new RMP rule are costly, with the EPA estimating implementation costs to range between approximately \$260 million to \$300 million for the affected industries. As with prior amendments to the RMP program, litigation challenging the new RMP rule is likely.

### **New Requirements for Corporate Governance**

The new RMP rule requires that chemical manufacturing plants and petroleum refineries have a third-party conduct the triannual compliance audit if an RMP reportable release has occurred since the last compliance audit.

As part of the third-party compliance audit requirement, the new RMP rule also requires owners and/or operators to submit to the audit committee of its board of directors copies of: (1) the third-party auditor's final report, which includes a summary of any changes between its draft and final reports; (2) the owner's/operator's response to the third-party auditor's final report; and (3) a schedule to address the deficiencies noted in the final report.

This appears to be the first time that the EPA has sought to directly regulate corporate governance and to impose board-level reporting obligations.

Particularly interesting is that nowhere in the EPA's proposed rule, final rule nor its response to comments document does the EPA spend significant time discussing why it is requiring third-party auditor reports to go directly to the audit committee of the board of directors, which is traditionally focused on monitoring the integrity of a company's financial reporting, financial audit process and system of internal controls.

While commenters raised concerns with both the EPA's authority to regulate corporate governance requirements and the practical value in doing so, the EPA's response is limited to saying that it "believes that immediately providing the facility's owner or operator's Audit Committee of the Board of Directors with third-party audit findings will ensure the committees and their Board of Directors are simply aware of any deficiencies and then have the opportunity to properly budget for any required corrective actions in a timely manner."<sup>[3]</sup>

But the EPA does not explain how this requirement will actually assist in preventing or

mitigating the consequences of accidental releases, why every third-party audit merits board-level attention, or why management is unable to properly perform any corrective actions in a timely manner.

Moreover, the EPA does not grapple with questions of its statutory authority to go beyond regulating day-to-day operations and stationary sources and delve into fundamental issues of corporate governance.

And practically speaking, this reporting requirement may make it more difficult for owners and operators to adequately prevent or protect against the consequences of accidental releases by potentially disrupting the balance of responsibilities between management and its board of directors. Management, with its subject-matter expertise, runs day-to-day operations and is primarily responsible for ensuring compliance with RMP requirements.

The board of directors, on the other hand, provides oversight and accountability. The EPA states that the requirement "is not intended to suggest that the Board of Directors usurp management decisions, be the ones to oversee corrective action, or insert themselves into the auditing process in any way,"[4] while at the same time removing from facility owners and operators any opportunity to first address or act on the audit findings in a manner that best protects against accidental releases.

The EPA's one-size-fits-all approach to board-level reporting under the new RMP rule risks disrupting established corporate governance processes and demands audit committee members' attention for every audit — regardless of how significant — in a highly technical area. Companies, however, already have their own procedures to vet issues and elevate to their boards of directors.

Significant issues are already reported as determined by internal policies and practices. While directors have fiduciary duties of oversight,[5] the new RMP rule risks injecting directors into routine audits regardless of whether there are any significant deficiencies. Inserting board members into every RMP audit risks overloading those directors and slowing the process, which may have the opposite of the EPA's desired result by delaying prompt action and remediation.

Importantly, there is no such requirement in OSHA's nearly identical PSM program — which served as the basis for RMP program requirements — and the EPA has offered no explanation why the EPA is now attempting to regulate corporate governance matters through its RMP program.

Furthermore, the factors the EPA has set forth to designate a facility as higher risk and subject to these auditing and reporting requirements are broad and have no bearing on whether the facility's management needs additional board oversight, or whether every audit warrants being raised to the audit committee. By requiring immediate and mandatory board-level reporting for any third-party compliance audit finding, the EPA may contribute to audit overload and distract from issues that are more worthy of board-level attention.

In addition to a lack of factual and policy justifications, also missing from the new RMP rule and its supporting documents is a discussion in which the EPA provides a legal interpretation explaining its view of its authority to impose the board reporting requirement.

Unlike the U.S. Securities and Exchange Commission and environmental, social and governance factors — where there is a clearer link between the Securities Act of 1933, the Securities Exchange Act of 1934, the SEC's mission to protect investors, and its ESG

disclosure requirements — the EPA's purpose of protecting human health and the environment is not obviously connected to mandatory board-level reporting.

Similarly, unlike the power granted to the SEC through the Sarbanes-Oxley Act, Congress did not grant the EPA statutory authority to regulate corporate governance in the Clean Air Act. The Clean Air Act does not purport to disrupt standard principles of corporate law and thus cannot displace the "entire corpus of state corporation law," per the U.S. Supreme Court's 1998 decision in *United States v. Bestfoods*.<sup>[6]</sup>

Rather, the EPA's board reporting requirement brings to mind the landmark case *West Virginia v. EPA*, decided by the Supreme Court in 2022, and the "major questions doctrine," through which courts will presume that Congress did not intend to delegate questions of major political or economic significance to agencies without clear authorization.<sup>[7]</sup> The EPA's cursory discussion of board reporting also raises questions about whether the agency has engaged in reasoned decision making and fulfilled its procedural obligations to justify its legal authority under Section 307(d) of the Clean Air Act.

Overall, stakeholders should be aware of the EPA's novel attempt to step into the world of corporate governance regulation and carefully consider both the practical and the economic costs of such a requirement. Any litigation challenging the EPA's board reporting requirement would shed further light on the agency's legal authority in this area.

---

*Justin Savage is a partner at Sidley Austin LLP and global co-leader of the firm's environmental practice.*

*Ike Adams is a partner at the firm.*

*Aaron Flyer is a senior managing associate at the firm.*

*Sidley managing associate Rose Quam-Wickham contributed to this article.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] See *Air Alliance Houston v. EPA*, No. 17-1155 (D.C. Cir. Aug. 17, 2018).

[2] *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*; *Safer Communities by Chemical Accident Prevention*, 89 Fed. Reg. 17,622 (Mar. 11, 2024).

[3] EPA, *Response to Comments on the 2022 Proposed Rule*, at 170 (Dec. 15, 2023).

[4] EPA, *Response to Comments on the 2022 Proposed Rule*, at 170 (Dec. 15, 2023).

[5] *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

[6] See *United States v. Bestfoods*, 524 U.S. 51, 63 (1998).

[7] *West Virginia v. EPA*, 597 U.S. 697 (2022).