

# Tips For Online Pesticide Industry Amid Growing EPA Scrutiny

By **Andrew Stewart, Matthew Brewer and Caleb Bowers** (July 13, 2022)

U.S. regulators are playing an aggressive game of catch-up as they grapple with how to apply environmental laws, many enacted decades ago, to e-commerce businesses.

In a July 5 press release,[1] the U.S. Environmental Protection Agency described its latest issuance of a stop-sale order for products sold on the e-commerce site of ContextLogic Inc., doing business as Wish, which the EPA alleges constitute unregistered disinfectant products.

This follows other enforcement actions the EPA has taken since the COVID-19 pandemic against products claiming to be effective as disinfectants, among other types of products.

Publicly reported data shows overall heightened enforcement activity related to pesticides in recent years. The potential for criminal charges for violations of pesticide laws, with several prosecutions occurring since the pandemic, highlights the importance of compliance.

E-commerce sales involving pesticides in particular have garnered increased scrutiny in recent years as enforcement agencies shift their focus from brick-and-mortar sellers to those doing business online.

This intensified focus makes it timely for online sellers of pesticides or pesticide devices in the U.S. to assess their compliance programs with an eye toward identifying and mitigating any risks that could lead to liability under the Federal Insecticide Fungicide and Rodenticide Act, or FIFRA, and similar state laws.

## Risks Across the Supply Chain

For e-commerce businesses, the challenges and regulatory risks run across their global supply networks.

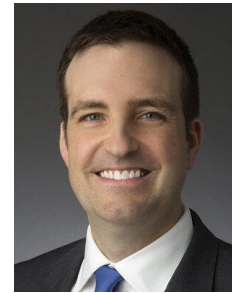
Both the EPA and state agencies are conducting investigations and enforcement actions stemming from online pesticide listings and sales, distribution of products alleged to violate FIFRA, as well as claims of illegal imports.

Businesses operating with long supply chains face particularly steep challenges in ensuring compliance across their networks given the stringent position on distribution or sale liability taken by the EPA under the federal pesticide law.

## Desktop Enforcement

FIFRA makes it particularly easy for regulators to conduct desktop monitoring investigations because compliance with FIFRA often hangs on specific claims sellers make about pesticides in their advertising and on their websites.

This means regulators can simply perform keyword searches on publicly available webpages



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to identify products that may be out of compliance. This kind of desktop monitoring is resource-efficient for regulators, and they can generate target products fairly easily while readily tracking how long products have been online and offered for sale.

The EPA put down a clear marker in its 2017 FIFRA enforcement guidance[2] that the agency would treat e-commerce sales like brick-and-mortar sales in conducting enforcement. That enforcement guidance provides that the EPA's "goal is to ensure that pesticides that are distributed and sold in e-commerce are treated the same as pesticides marketed in the more traditional manner."

The EPA's recently published fiscal year 2022-2025 guidance states likewise, making clear that operators of e-commerce platforms are not immune from EPA enforcement under FIFRA.

### **Brick-and-Mortar Law Applied to E-Commerce**

There are key differentiating features of e-commerce transactions that need to be considered alongside the EPA's pledge to apply decades-old FIFRA provisions and regulations created for a brick-and-mortar business world.

In traditional brick-and-mortar businesses, retailers generally purchase products from manufacturers and sell them to consumers. In e-commerce, sales often involve third-party sellers with two primary methods of fulfilling online orders: (1) The e-commerce store contains a product listing for a third-party seller, but leaves fulfillment of the order to the third-party seller; or (2) the e-commerce store lists the product and fulfills the customer's order on the seller's behalf.

Some online stores also sell products retail, where they purchase the product from another party and distribute it to the customer directly.

### **Distribute or Sell Liability**

Under FIFRA, liability may be imposed on those who distribute or sell certain pesticide products or devices, which extends to those who receive and deliver, or offer to deliver, those products. But FIFRA does not expressly address how these requirements may apply when a party conducts a pesticide transaction on behalf of a third party.

This comes into play particularly where the operator of the online store has some limited physical touch points with products in fulfilling the order but does not take legal ownership of the goods.

Another situation may arise when an e-commerce company sells its own products in its store, but this situation is fairly analogous to a brick-and-mortar operation.

### **FIFRA Guarantee Protection**

Apart from the statute's legal requirements, FIFRA also contains a unique and critical guarantee provision in Section 12(b)(1) that exempts distributors and sellers from FIFRA liability when certain requirements are met.

The guarantee has six elements that distributors and sellers must meet to take advantage of the safe harbor. The first four requirements relate to the information that must be contained in a written guarantee provided by the seller for the exemption to apply, while the

last two focus on the recipient or distributor of the pesticides, provided that products subject to the guarantee must be received from the seller in good faith and in an unbroken package.

Although the EPA has issued no regulations or guidance addressing how the FIFRA guarantee provision specifically applies to online pesticide transactions, at least one court has interpreted the statutory elements strictly in considering alleged violations by a brick-and-mortar store.

Therefore, while the guarantee provides an opportunity for an e-commerce business to avoid FIFRA liability for the distribution or sale of noncompliant pesticides — potentially even when it has physical touch points with the goods — the online company must be extremely careful in developing guarantee language that meets the statutory requirements and in otherwise meeting the statutory elements. This includes conducting diligence regarding pesticide transactions to meet the good faith standard.

Meeting these requirements may necessitate, among other things, specific measures to ensure products in the online store comply with legal requirements for products under FIFRA, such as premarket registration for pesticides utilizing chemical substances.

### **Cross-Border Requirements**

FIFRA also contains specific requirements related to pesticide imports, which may also need to be observed by a distributor in e-commerce. These requirements include, among others, filing a notice with the appropriate EPA regional office prior to entry of the products into the U.S., and compliance with other FIFRA provisions, such as the product labeling requirements.

Inconsistent determinations for pesticides by customs officials at different ports can result in unfavorable determinations even when a product has previously been allowed entry. The EPA has said that the granting of permission to enter at a port is not a compliance determination for a particular product.

When an unfavorable determination is received at one port of entry, it casts all shipments nationwide into doubt until a solution can be reached with the regulator. Companies importing regulated pesticides can find their merchandise detained for months, with mounting storage costs, and the prospect of having to destroy or reexport goods if a resolution with the EPA cannot be achieved to allow domestic sale.

These considerations also raise questions regarding whether an e-commerce company should serve as the importer of record for pesticide products.

### **What Can You Do?**

Sales of pesticides and pesticide devices in e-commerce present special considerations for companies, and those operating an online store should be proactive in evaluating compliance with legal requirements under FIFRA and similar provisions of state laws.

These considerations include:

- Conduct an end-to-end review of the supply chain beginning with suppliers and including any suppliers located outside the U.S., where the company serves as importer of record.

- Due diligence should assess whether any products imported from a foreign supplier comply with FIFRA — including production in an EPA registered establishment and compliance with other labeling requirements — and required import filings are made.
- If you are relying on a customs broker to handle import, the broker's awareness of and compliance with FIFRA requirements should be confirmed.
- Any import-related compliance issues should be carefully coordinated with the relevant U.S. Customs and Border Protection offices in addition to EPA regions that may be involved. Pay particular attention to fact patterns where CBP or EPA offices may take contrary positions on the regulatory status of pesticides.
- Online stores should consider periodic audits of their inventory to ensure compliance with FIFRA and state pesticide systems.
- E-commerce businesses with pesticide listings should implement the FIFRA guarantee to mitigate FIFRA liability.
- Managing FIFRA risk in the context of online pesticides transactions requires a tailored approach that accounts for how a company interfaces with its sellers and other third parties.
- Pesticide law is a fast-evolving area with many novel issues and developing standards. Companies facing compliance questions or enforcement attention should ask the EPA for a clear explanation and basis for any assertion of FIFRA applicability and noncompliance allegation with citations to current regulations and guidance.

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[1] <https://www.epa.gov/newsreleases/epa-orders-e-commerce-platform-wish-stop-selling-illegal-disinfectants>.

[2] <https://www.epa.gov/sites/default/files/2014-10/documents/15-17guidance.pdf>.