

registration requirement pursuant to 21 CFR 1309.24(g) for any person whose distribution of red phosphorus or white phosphorus is limited to residual quantities of chemical returned to the producer in reusable rail cars and intermodal tank containers which conform to International Standards Organization specifications (with capacities greater than or equal to 2500 gallons in a single container).

The October 17, 2001 rulemaking made it clear that the exclusion and waiver pertain only to these return shipments. Manufacturers shall still be subject to registration, recordkeeping, reporting and other CSA chemical regulatory requirements pertaining to the production and distribution of listed chemicals to their customers. The customers will not be subject to registration or recordkeeping requirements for the return of residual quantities in reusable containers to the producer. However, should these customers re-distribute any of the received material (other than the return of reusable containers to the producer), they shall be subject to all CSA chemical regulatory requirements.

*What Comments Pertaining to the Interim Exclusion and Waivers Were Received in Response to the October 17, 2001 Rule? What Final Action Is DEA Taking Regarding the Exclusion and Waivers?*

Two comments were received in response to the exclusion from the definition of regulated transaction of domestic transactions involving red phosphorus and white phosphorus which are return shipments of residual quantities (from customer to producer) in rail cars and intermodal tank containers which conform to International Standards Organization specifications (with capacities greater than or equal to 2500 gallons in a single container). These two comments requested that the exclusion and waiver from registration be expanded to include domestic and international shipments.

DEA does not believe that such international shipments pose a more substantial risk of diversion than domestic transactions. Therefore, in response to these comments, DEA is expanding the exclusion and waiver in 21 CFR 1309.24(g) and 21 CFR 1310.08(j) to include domestic and international transactions involving red phosphorus and white phosphorus which are return shipments of residual quantities (from customer to producer) in rail cars and intermodal tank containers which conform to International Standards Organization

specifications (with capacities greater than or equal to 2500 gallons in a single container). The registration requirement for persons engaged in such activity will also be waived.

The proposed regulatory language in 21 CFR 1309.24(g) and 21 CFR 1310.08(j) utilized the term "isotainer." It is DEA's understanding that an isotainer is an intermodal tank container which conforms to International Standards Organization specifications. Therefore DEA has chosen to modify 21 CFR 1309.24(g) and 21 CFR 1310.08(j) to clarify that the provisions pertain to "intermodal tank containers which conform to International Standards Organization specifications." This change does not modify the intended meaning of these paragraphs.

Each of these two comments also requested clarification regarding the term "residual quantities." In response to these comments, DEA understands that when a customer purchases rail cars and intermodal tank containers of red phosphorus and white phosphorus, it is not possible to remove 100 percent of the material during the unloading operation. Therefore, these "emptied" containers, in fact, contain residual quantities of phosphorus. The term "residual quantities" refers to those quantities of phosphorus routinely remaining in "emptied" rail cars and intermodal tank containers under normal industry unloading procedures and consistent with normal industry practice.

One commentator wanted to ensure that DEA understands that return shipments of "emptied" rail cars and intermodal tank containers holding "residual quantities" of phosphorus, also contain widely varying amounts of water and/or nitrogen which are added to these rail cars and intermodal tank containers as a safety precaution since the phosphorus is spontaneously combustible when exposed to air. In response to this comment, DEA acknowledges that it understands that this is normal industry practice.

One commentator also stated that the phrase "whose distribution of red and white phosphorus is limited solely to residual quantities of chemicals returned to the producer" could be misinterpreted to mean that the waiver does not apply if the person meets all the conditions but also is involved in other types of distributions which qualify for a waiver of registration (*i.e.* disposal or intra-company transfers).

As clarification, DEA wishes to make it clear that if the registration requirement has been waived for each and every activity in which a person is engaged, then that person is not

required to register. 21 CFR 1309.24(f) waives the registration requirement for any person whose activities with respect to List I chemicals are limited to the distribution of red phosphorus, white phosphorus, or hypophosphorous acid (and its salts) to: Another location operated by the same firm solely for internal end-use; or an EPA or State licensed waste treatment or disposal firm for the purpose of waste treatment or disposal. 21 CFR 1309.24(g) waives the registration requirement for any person whose distribution of red phosphorus or white phosphorus is limited solely to residual quantities of chemical returned to the producer, in reusable rail cars and intermodal tank containers which conform to International Standards Organization specifications (with capacities greater than or equal to 2,500 gallons in a single container). In providing these waivers, DEA intended to waive the registration requirement for persons engaged in any of these waived activities, as long as they do not engage in other regulated activities which require registration. 21 CFR 1309.24(i) clarifies that "If any person exempted under paragraph (b), (c), (d), (e), (f) or (g) of this section also engages in the distribution, importation or exportation of a List I chemical, other than as described in such paragraph, the person shall obtain a registration for such activities, as required by Section 1309.21 of this part."

One commentator also requested that DEA omit the term "residual quantities" completely and therefore provide an exclusion/waiver in the case that "a partial shipment be returned from the customer back to the producer." DEA wishes to be clear on this point. The exclusion and waiver are not intended to exempt any partial shipments from customer back to producer. The undocumented transfer of such material poses a diversion risk. These transactions shall therefore be subject to all chemical regulatory control provisions of the CSA.

DEA did not receive any comments relating specifically to the interim waiver from the registration requirement (as specified in 21 CFR 1309.24(f)) for any person whose activities with respect to List I chemicals are limited to the distribution of red phosphorus, white phosphorus, or hypophosphorous acid (and its salts) to: Another location operated by the same firm solely for internal end-use; or an EPA or State licensed waste treatment or disposal firm for the purpose of waste treatment or disposal. Since no comments regarding this waiver were received, this waiver is being adopted as originally