

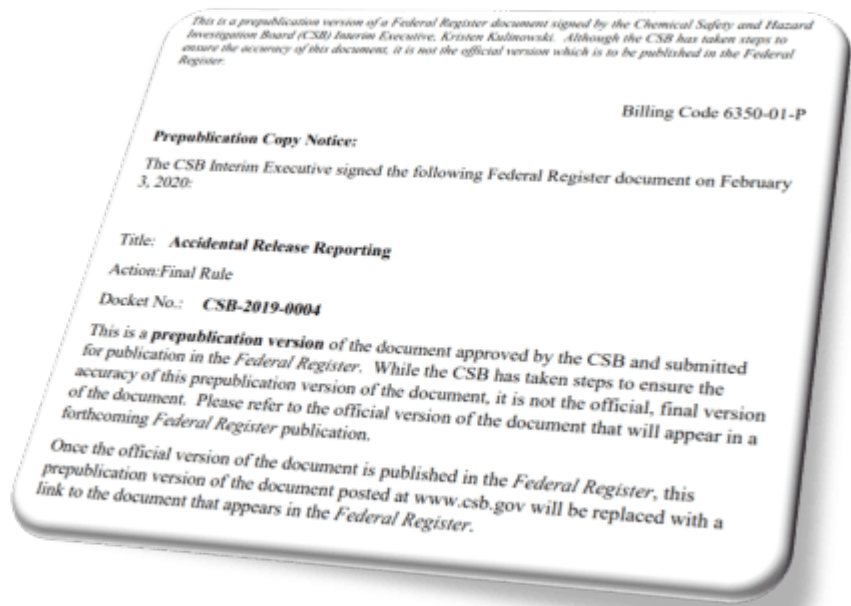
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# BREAKING – CSB Issues Final Accidental Release Reporting Rule

By [Eric J. Conn](#) and [Beeta Lashkari](#)

Last week, on the day of a federal district court-mandated deadline — Wednesday, February 5, 2020 — the Chemical Safety and Hazard Investigation Board (the CSB) announced its [Final Rule on Accidental Release Reporting](#). The CSB posted a [prepublication version](#) of the Final Rule last week, on February 5th. The official version should be published in the Federal Register within the next few days.

As we [previously reported](#), on December 12, 2019, the CSB issued a [Notice of Proposed Rulemaking](#) for its new reporting rule, which set out the circumstances when facility owners and operators are required to file reports with the CSB about certain accidental chemical releases and what must be communicated in the reports.



**As stated in the NPRM, the purpose of the rule is “to ensure that the CSB receives rapid, accurate reports of any accidental release that meets established statutory criteria.”**

The rule requires owners and operators of stationary sources to report accidental releases that result in a fatality,

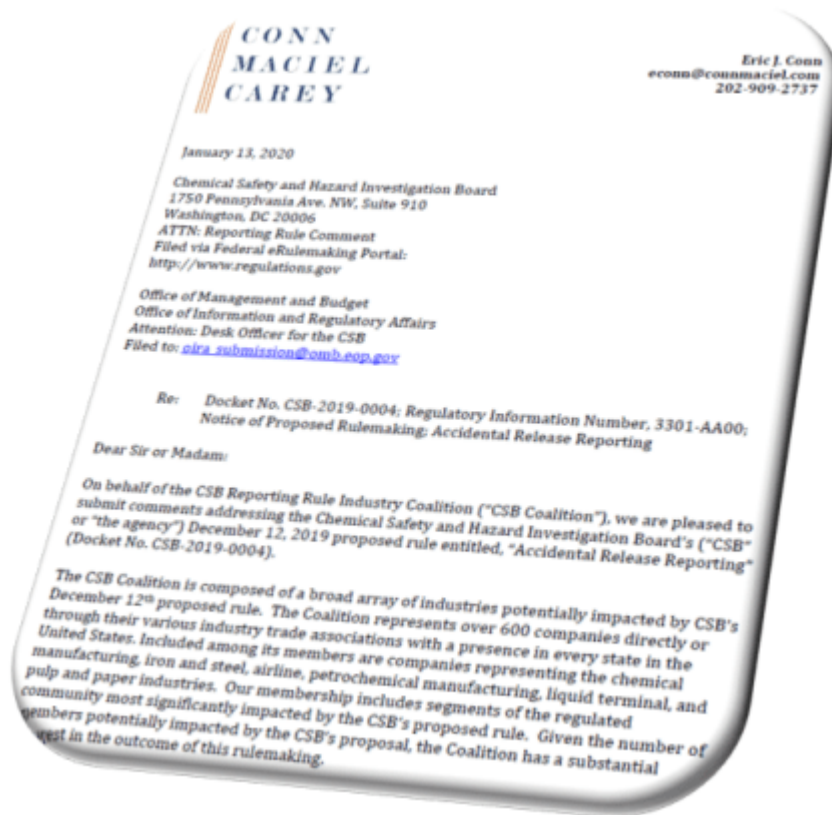
a serious injury, or substantial property damage to the CSB within eight hours. The specific information required to be provided in the accidental release report includes:

1. A brief description of the accidental release;
2. Whether the release resulted in a fire, explosion, death, serious injury, or property damage;
3. The number of fatalities and/or serious injuries, and the estimated property damage at or outside the stationary source;
4. The name of the material involved;
5. The amount of the release; and
6. Whether the accidental release resulted in an evacuation order impacting members of the general public and other details associated with the evacuation.

Issuance of the CSB's reporting rule has been a long time coming. Although the CSB did not become operational until 1998, its enabling legislation – the Clean Air Act Amendments – was enacted in 1990. That statute, from nearly thirty years ago, expressly required the agency to issue a rule governing the reporting of accidental releases to the CSB. Although the CSB submitted an Advanced Notice of Proposed Rulemaking for Chemical Release Reporting in 2009, that effort died on the vine. Accordingly, the CSB has never had its own reporting rule, relying instead on other sources to receive incident information. In February 2019, however, in a case brought by environmental activists, [\*Air Alliance Houston, et al., v. U.S. Chemical and Safety Hazard Investigation Board, 17-cv-02608 \(D.D.C. 2019\)\*](#), a federal district court judge of the U.S. District Court for the District of Columbia lambasted the CSB for what he characterized as “an egregious abdication of a statutory obligation” to promulgate reporting regulations under the Clean Air Act Amendments, and ultimately ordered the CSB to promulgate a final reporting rule within 12 months of the district court's ruling — i.e., by February 5, 2020. With the CSB's announcement last week, it just met the court-ordered deadline, and has finally fulfilled its statutory obligation under the Clean Air Act Amendments.

Conn Maciel Carey's [national OSHA • Workplace Safety Practice Group](#) coordinated an ad hoc coalition of employers and trade associations to submit [a set of comments](#) to the CSB, and submitted [the Coalition's](#)

[comments](#) on January 13, 2020. The good news is that the CSB heeded many of our comments, and improved the rule from how it was proposed.



So, what changes were made to the proposed rule, and what stayed the same? Here is a summary of the changes from the proposed rule:

- Consistent with our comments, the CSB amended its proposed definition of “**serious injury**” in a way that significantly reduces the scope of reportable events. Whereas the proposed rule covered more injuries than would even have to be recorded on an OSHA 300 log, the final rule more closely tracks OSHA’s *reporting* requirements – fatalities and in-patient hospitalizations.
  - **Proposed version:** “any injury if it results in any of the following: (1) Death; one or more days away from work; restricted work or transfer to another job; medical treatment beyond first aid; loss of consciousness; or (2) Any injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness”
  - **Final version:** “any injury or illness that results in death or in-patient hospitalization,” where “in-patient hospitalization” is defined as “a formal admission to the inpatient service of a hospital or clinic for care.”
- The final rule also doubled the **reporting deadline** from 4 hours to 8 hours, consistent with our comments that the reporting deadline should at least parallel the amount of time allowed under OSHA’s reporting rule for fatalities.
- The CSB added specificity to the amount of time owners/operators have to **report NRC identification numbers** to CSB after already reporting to NRC, changing the requirement from “immediately” to “within 30

minutes.”

- The CSB added a new subsection to clarify reporting options when there are **multiple owners/operators**, stating that multiple owner/operators may agree in advance or at the time of release to a single, consolidated report, but that any such report should include information from/about all relevant owners/operators.
- The CSB added a provision that allows owners/operators to submit **revised or updated reports** to the CSB within 90 days if the submitter can reasonably explain why the revision or update could not have been made within 30 days.
- The CSB prepared a screen fillable PDF **form** for reporting purposes.

Unfortunately, the CSB did not make changes in other areas, but that was foreseeable given the tight court-ordered deadline to issue a final rule. Below are the provisions of the rule that stayed the same, and CSB’s rationale for keeping them:

- The CSB did not change the requirement that, if an NRC report is made, the owner/operator must report the NRC identification number to the CSB, arguing that, despite language in the Clean Air Act Amendments clearly indicating such a requirement is unauthorized (as we highlighted in our comments), the CSB’s enabling legislation does not mandate that all reports be filed with NRC, the submission of a report to the NRC under other laws does not satisfy the CSB’s reporting requirement, and the CSB included the option of providing an NRC identification number in an effort to avoid duplicative reporting.
- The CSB said it carefully considered various suggestions to avoid duplication of existing reporting requirements, including reliance on NRC reports only and information from other agencies that collect similar information pursuant to other laws, but rejected those suggestions as it found reliance on those sources would not capture all of the incidents within its jurisdiction.
- The CSB further explained its rationale for defining “ambient air” to include air inside of buildings, despite EPA’s definition of “ambient air” in its NAAQS standard and associated case law to air external of buildings, making clear that “[t]he purpose of the CSB’s enabling legislation is to serve the safety interests of members of the general public *and* workers.”
- The CSB decided to retain its definition of “extremely hazardous substances,” explaining that limiting “extremely hazardous substances” to regulated substances would “frustrate a major purpose of [the Clean Air Act Amendments]. A key function of the CSB is to make recommendations to the EPA about improving the rules designed to prevent chemical accidents. Such recommendations would include CSB suggestions to the Administrator to list new substances. Thus, the CSB was established specifically to look past established statutory criteria and already understood hazards. The hazard investigation function of the CSB includes identifying new, previously unknown hazards, even those caused by substances not yet discovered or in widespread use. A narrow definition of ‘extremely hazardous substance’ based on previously established lists or narrow criteria would completely frustrate a key objective of the statute.”
- The CSB kept its definition of “property damage,” including its application to “loss of use” of equipment, explaining that “[i]f property sustains enough damage so that it cannot be properly used, that clearly amounts to damages—just as the complete destruction amounts to damages.”
- The CSB retained its \$1 million threshold for “substantial property damage,” most likely because it received comments in all directions: (1) in support of the threshold; (2) against the threshold for being too high; and (3) against the threshold for being too low.
- The CSB did not change its definition of “stationary source,” despite a comment suggesting that it be limited

to stationary sources that are regularly staffed, reasoning that “[t]he CSB believes that if an accidental release occurs in a spread-out facility or even in a part of a source that is not regularly staffed, it still should be reported as soon as the owner/operator learns about it. With the increase in the reporting time to eight hours, the owner/operator should have ample time to learn about such a release even in a remote part of the source.”

- The final rule does not change any part of the required content of reports because, the CSB reasoned, the content requirements are minimal and much of the information need not be reported if unknown.
- The CSB kept its enforcement provision as proposed, saying that it will retain discretion to refer violations, and rejecting that the provision would “pose [a] threat to the special place the CSB has historically held with industry and other stakeholders as a non-regulatory and non-enforcement agency.”
- The CSB did not make any changes to the public availability of records provision, which allows reports to be made available through FOIA, despite one commenter’s suggestion that the reports be made automatically public (to which the CSB responded that the rule is a reporting rule, not a disclosure rule).

Additionally, as many commenters had compliance concerns, the CSB said it would consider issuing guidance on a variety of topics, including:

- whether an explosion is a *per se* accidental release;
- whether serious injuries that result from an intentional release (e.g., an approved and controlled discharge) are reportable; and
- clarification of the definition of “extremely hazardous substances.”

The rule takes effect 30 days after publication in the Federal Register. As it offered in its proposed rule, for one year following the effective date of the rule, the CSB will refrain from referring violations for enforcement, unless there is a knowing failure to report, to allow adequate time for compliance education and to address any other compliance issues raised in the comments. Clearly, the next year will be very informative as to the clarity and effectiveness of the CSB’s final accidental release reporting rule.

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For more information about the CSB’s Accidental Release Reporting Rule, and to learn about potential legal challenges to the new rule, join us for a webinar on Monday, February, 24, 2020 at 1 PM EST. [Click here](#) for more information about the webinar and to register for the complimentary event.



## CSB's Accidental Release Reporting Rule

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