Before the United States
Environmental Protection Agency
Addition of Certain Per- and Polyfluoroalkyl Substances; Community Right-to-Know Toxic Chemical Release Reporting
84 Fed. Reg. 66,369 (Nov. 7, 2019); Docket EPA-HQ-OPPT-2019-0236

Comments of the Chemical Users Coalition

The Chemical Users Coalition ("CUC") appreciates the opportunity to provide these comments regarding the U.S. Environmental Protection Agency's ("EPA" or the "Agency") Advance Notice of Proposed Rulemaking: Addition of Certain Per- and Polyfluoroalkyl Substances; Community Right-to-Know Toxic Chemical Release Reporting.

CUC is an association of companies from diverse industries interested in chemical regulatory policy from the perspective of entities that typically acquire and use, rather than manufacture or import, chemical substances.[1] CUC encourages regulators who are developing requirements to protect health and the environment to do so in a manner that enables the regulated community's ability to pursue technological innovation simultaneously with sustainable economic development in the United States. This is particularly important in the area of chemical regulatory policy, which necessarily addresses how core technologies and products can be adapted to address emerging information about health and environmental risk. The reporting requirements of the Toxics Releases Inventory regulations will affect CUC members and other commercial entities across the U.S. that may "otherwise use" TRI-listed substances.

In sum, CUC's comments focus on the importance of ensuring that any additions of per- and polyfluoroalkyl substances ("PFAS") to the Toxics Release Inventory ("TRI") are made in consideration of the substantial challenges that will be imposed by the listing of at least 160 PFAS to the reporting requirements by virtue of Section 7321 of the recently-enacted National Defense Authorization Act for Fiscal Year 2020 ("NDAA"). Prior to considering expanding the new TRI listings beyond those substances which NDAA directs EPA to include without consideration of the existing statutory criteria, the Agency should first assemble and review the data available regarding each additional candidate substance. This will enable EPA to determine that there is an adequate body of scientific evidence to support the addition of additional PFAS to the TRI pursuant to the criteria outlined in the Emergency Planning and Community Right-to-Know Act ("EPCRA"). Additionally, CUC urges EPA to ensure that an accepted methodology exists for measuring the presence of a listed substance in formulated products and the media in which it might be released before requiring reporting on the substance. CUC further recommends that EPA make clear its intent that all available TRI exemptions (including the *de minimis* exemption) pertain to each PFAS added to the reporting rule. Finally, CUC requests that EPA engage with downstream users of PFAS-containing products to address the unique

[1] The members of CUC are Airbus S.A.S., The Boeing Company, HP Incorporated, IBM Company, Intel Corporation, Lockheed Martin Corporation, and United Technologies Corporation.

challenges that these users could face when seeking to comply with the TRI reporting requirements of 40 CFR Part 372.

I. The EPCRA Statutory Criteria Should Be Applied to the Addition of Each Individual PFAS to the TRI

Section 7321(b) of the NDAA requires EPA to list certain PFAS for "immediate inclusion" in the TRI reporting requirements. EPA has announced recently that its considers these requirements to pertain to 160 chemicals EPA has determined are within scope of the Section 7321(b) requirement.[2] The NDAA directs EPA to make additional TRI listings pursuant to NDAA Sections 7321(c) ("inclusion following assessment") and 7321(d) ("inclusion following determination"). The NDAA makes clear that EPA must apply the EPCRA Section 313(d) criteria when considering new TRI additions of PFAS made as "inclusions following determination." However, CUC urges EPA to carefully apply the statutory criteria of Section 313(d) of EPCRA when considering *any* further additions of PFAS to the TRI, including those made as "inclusions following assessment."

Significant structural differences exist among the substances considered to be PFAS (defined broadly by EPA in the ANPRM as substances that "contain an alkyl carbon chain on which the hydrogen atoms have been partially or completely replaced by fluorine atoms").[3] These differences will influence potential toxicity and environmental fate and effects. As EPA itself has noted, "[d]ifferences in mobility, fate and persistence in the environment, as well as treatability in environmental media across the complex family of PFAS contribute to differences in potential exposure and resulting health risks in humans."[4] In the ANPRM, the Agency has estimated that approximately 600 different PFAS are currently manufactured and used in the United States.[5] Of these, EPA identified only two that have been studied "extensively"—perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonate ("PFOS")—and acknowledged that information about health and environmental concerns related to other PFAS is less readily available.[6] CUC urges EPA not to disregard these complexities when adding any other PFAS to the TRI.

When adding substances to the TRI pursuant to Sections 7321(c) or 7321(d) of the NDAA, EPA should determine that the listing meets at least one of the statutory criteria outlined in EPCRA Section 313(d). For a substance to be added to the TRI, the substance must be known to cause (or be reasonably anticipated to cause) significant adverse effects to human health or the environment.[7] Such a determination should be based on an adequate body of scientific evidence. CUC recognizes EPA's desire to collect information about releases of PFAS to the environment. However, if a PFAS does not meet one of the statutory criteria of EPCRA Section 313(d)—either

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[2] *Addition of Certain PFAS to the TRI by the National Defense Authorization Act*, U.S. Envtl. Protection Agency (Jan. 16, 2020), https://www.epa.gov/toxics-release-inventory-tri-program/addition-certain-pfas-tri-national-defense-authorization-act.
[3] 84 Fed. Reg. at 66,370.
[4] U.S. Envtl. Protection Agency, *EPA's Per- and Polyfluoroalkyl Substances (PFAS) Action Plan* (Feb. 2019), https://www.epa.gov/sites/production/files/2019-02/documents/pfas_action_plan_021319_508compliant_1.pdf ("PFAS Action Plan").
[5] 84 Fed. Reg. at 66,371.
[6] *Id.* at 66,372.
[7] *See* 42 U.S.C. § 11023(d)(2).

because the data show no adverse effects to human health or the environment or because there is insufficient data about a substance—that substance should not be added to the TRI.

CUC is encouraged by EPA's recently issued list of 160 substances that apparently will be listed individually by CAS Registry Number on the TRI pursuant to Section 7321(b) of the NDAA. This approach provides certainty and apparently eliminates the ambiguity created by the expansive definitions embedded in the two Significant New Use Rules ("SNURs") cross-referenced in the Section 7321(b)(1)(E) of the NDAA.[8]

On a going forward basis, in implementing the remaining terms of the NDAA, EPA should consider and list individual PFAS based only on whether each substance meets the statutory criteria of Section 313(d) of EPCRA. Additionally, CUC encourages EPA, when listing PFAS within Section 372.65 of the TRI rule, to make clear (through symbols or footnotes or in groupings) the basis for listing each substance added to the TRI pursuant to the NDAA; specifically, because the substance is: (1) named in the legislation with specificity, (2) subject to a SNUR at 40 CFR §§ 721.9582 or 721.10536, or (3) identified as active on the current TSCA Inventory and meets the statutory criteria outlined in EPCRA Section 313(d). If a PFAS has been listed on the TRI because it falls into one of these categories, but the PFAS does not meet one of the statutory criteria outlined in EPCRA Section 313(d), CUC urges EPA to exercise its statutory authority under Section 313(d)(1) of EPCRA to remove the substance from the TRI.[9]

II. EPA Must Ensure that Validated Analytical Methods Exist to Measure PFAS Added to the TRI

EPA must ensure that there is an agreed upon scientific method for detecting and measuring a substance before adding it to the TRI. As EPA has acknowledged, while there are validated analytical methods for the measurement of certain PFAS like PFOA and PFOS, validated analytical methods do not exist for hundreds of other PFAS.[10] It would be unreasonable to ask industry to measure and provide reporting on substances for which no scientifically accepted method of measurement exists. Thus, prior to adding any PFAS to the TRI, EPA should ensure that a validated analytical method exists to detect and measure the substance.

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[8] Section 7321(b)(1)(E) includes by reference the SNUR at 40 C.F.R. § 721.10536 which also covers the following long-chain perfluoroalkyl carboxylate chemical substances, where $5 < n < 21$ or $6 < m < 21$:

i. $CF_3(CF_2)_n$-COO-M, where M = H^- or any other group where a formal dissociation can be made;
ii. $CF_3(CF_2)_n$-CH = CH_2;
iii. $CF_3(CF_2)_n$-C(= O)-X, where X is any chemical moiety;
iv. $CF_3(CF_2)_m$-CH2-X, where X is any chemical moiety; and
v. $CF_3(CF_2)_m$-Y-X, where Y = non-S, non-N heteroatom and where X is any chemical moiety.

[9] 42 U.S.C. § 11023(d)(1) ("The Administrator may by rule add or delete a chemical from the list described in subsection (c) at any time."). Additionally, EPA should consider the Section 313(d) criteria when conducting the required review of the reporting thresholds for PFAS listed on the TRI pursuant to the NDAA. *See* NDAA, Section 7321(b)(2)(B).

[10] PFAS Action Plan at 10.

III. Exemptions Should Be Available for All PFAS Added to the TRI

When determining whether the TRI reporting threshold has been met, TRI regulations permit the exclusion of a chemical substance from the calculation if the substance is present in a mixture in a concentration below one percent (*de minimis* exemption).[11] The TRI regulations also provide certain other exemptions, for example where a chemical is present in an article or is used as a structural component of a facility.[12] Such exemptions are of critical importance to the purchasers and users of chemical formulations in which PFAS may be presents in very low concentrations as well as to the importers of manufactured articles in which such chemicals might be present (intentionally or otherwise). Accordingly, CUC is pleased that EPA has announced its intent to apply the TRI exemptions to PFAS added to the TRI in accordance with the FY2020 NDAA.[13] CUC encourages EPA to continue to ensure that all of these exemptions (including specifically the applicable *de minimis* level) will be available for the initial 160 PFAS identified in EPA's recent public announcements, those PFAS to be added in accordance with the provisions of the NDAA to be implemented in subsequent years, as well as any other PFAS being considered pursuant to the ANPRM for addition to the TRI requirements.

Additionally, for PFAS automatically added to the TRI in accordance with the NDAA as a result of being covered by one of the two identified SNURs, CUC requests that EPA make clear that a substance which would be exempt from the TSCA Section 5 notification requirements under the terms of the pertinent SNUR also would be exempt from the TRI reporting requirements if it is used at the reporting facility in such an exempt manner.

IV. EPA Should Clarify the TRI Reporting Responsibilities of Downstream Users

Finally, CUC encourages EPA to engage with users (in addition to manufacturers) of PFAS substances when considering whether to add additional PFAS to the TRI requirements. Manufacturers (and importers) of PFAS-containing products that supply chemical users like CUC's members often do not provide to the users of these products information about the exact chemical composition of the products. Notwithstanding the notification requirements in Subpart C of the Part 372 regulations, CUC expects that these manufacturers will continue to want to protect the formulations of their products as confidential, making it difficult for users of PFAS-containing products to determine whether they are subject to TRI reporting requirements. When deciding whether to list a PFAS on the TRI, EPA should solicit public comments on the challenges that downstream users would face in complying with the TRI reporting requirements.

Conclusion

CUC thanks EPA for its engagement with stakeholders on this complex issue and urges EPA to solicit additional feedback as the Agency considers specific PFAS for addition to the TRI. CUC would be pleased to meet with EPA personnel to discuss the addition of PFAS to the TRI and the unique burden that could be imposed on users of chemical substances.

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[11] 40 C.F.R. § 372.38(a).
[12] *Id.* § 372.38.
[13] *Addition of Certain PFAS to the TRI by the National Defense Authorization Act*, U.S. Envtl. Protection Agency (Jan. 16, 2020), https://www.epa.gov/toxics-release-inventory-tri-program/addition-certain-pfas-tri-national-defense-authorization-act.