

June 12, 2020

Via Regulations.gov and Email

Alexandra Dunn
Assistant Administrator for
Chemical Safety and Pollution Prevention
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460-0001

Re: TSCA Fees Rule Preliminary Manufacturers List; EPA-HQ-OPPT-2019-0677

Dear Ms. Dunn:

I am writing on behalf of the Chemical Users Coalition (CUC)¹ in advance of the second extension of the comment period on the Preliminary Lists Identifying Manufacturers Subject to Fee Obligations for EPA-Initiated Risk Evaluations under Section 6 of the Toxic Substances Control Act (TSCA), 85 Fed. Reg. 32,036 (May 28, 2020). CUC writes to express our members' appreciation for the measures taken by the Agency to issue the March 24, 2020 No Action Assurance providing temporary relief for importers of articles containing High Priority Substances, and who otherwise might have been subject to the "Self-Identification" requirements of the Fees Rule. CUC also writes to request that EPA expediently undertake a rulemaking to amend the Fees Rule at 40 CFR § 700.45 to codify specific exemptions that will permanently resolve this issue.²

Immediately following the publication of the first notice announcing the preliminary manufacturer lists for the TSCA Fees Rule, 85 Fed. Reg. 4,661 (January 27, 2020), CUC submitted the enclosed comments to request that EPA clarify that the term "manufacturers," as interpreted for purposes of the final Fees Rule, does not include importers of articles containing a High-Priority Substance.³ CUC members continue to believe that EPA's inclusion of importers of articles is inconsistent with the explicit language of the Fees Rule and that importers of articles were not properly consulted or provided adequate notice of this interpretation of the Fees Rule as required by TSCA. In addition, if obliged to do so, compliance with the Self-Identification requirements by CUC's members would be difficult, if not impossible, given the global nature and complexity of their supply chains, which involve importing innumerable complex pieces

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.

² CUC recommends that when proposing and codifying the specific exemptions, the provision is phrased and positioned in a manner to make clear that entities exempted are not subject to any fee sharing obligations under the amended regulation, as opposed to merely being exempt from "self-identification" under 40 CFR § 700.45(b).

³ The enclosed comments were submitted via email and overnight service directly to Assistant Administrator Alexandra Dunn on January 29, 2020, and subsequently submitted to the regulations.gov docket on March 9, 2020 (EPA-HQ-OPPT-2019-0677-0059).

Alexandra Dunn

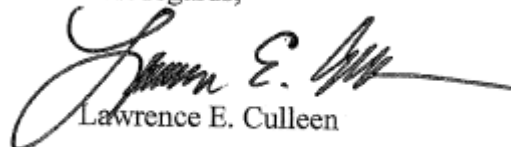
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of equipment potentially containing countless finished articles supplied by international companies that are not directly subject to EPA regulation.

CUC members appreciate that EPA quickly responded to the concerns raised by CUC and others through issuance of the No Action Assurance.⁴ Based on this No Action Assurance, we understand that EPA will not pursue enforcement action against the CUC members and other parties for their failure to self-identify in three capacities, including as: (1) importers of an “article” containing a High-Priority Substance, (2) producers of High-Priority Substances as a “byproduct,” and (3) producers or importers of High-Priority Substances as an “impurity.” Based on EPA’s April 19, 2020 Conference Call on TSCA Fees,⁵ CUC members also understand that EPA is not expecting any action by parties affected by the No Action Assurance that are not included in the preliminary list and that had not already self-identified in the Central Data Exchange system.

CUC members understand, however, that the No Action Assurance is intended to only be a “bridge to the final revised rule,”⁶ and that EPA has committed to initiating a rulemaking this year to revise the TSCA Fees Rule.⁷ Accordingly, CUC members enthusiastically endorse EPA’s commitment to expressly exempt the three groups affected by the No Action Assurance from any obligations under the TSCA Fees Rule. We strongly encourage EPA to undertake and complete this non-controversial amendment to the TSCA Fees Rule on an expedited basis to provide certainty to the regulated community as soon as possible.

Best regards,

Lawrence E. Culleen

Enclosure

cc: Mark Hartman, Deputy Office Director, OPPT

⁴ Memorandum from Susan Parker Bodine to Alexandra Dapolito Dunn, No Action Assurance Regarding Self-Identification Requirement for Certain “Manufacturers” Subject to the TSCA Fees Rule (Mar. 24, 2020), https://www.epa.gov/sites/production/files/2020-03/documents/no_action_assurance_regarding_self-identification_requirement_for_certain_manufacturers_subject_to_the_tscfa_fees_rule_march_24_2020.pdf.pdf.

⁵ EPA, Materials for the April 16, 2020 Call on TSCA Fees, <https://www.epa.gov/tscfa-fees/materials-april-16-2020-call-tscfa-fees>.

⁶ *No Action Assurance Memorandum*, *supra* note 4.

⁷ EPA, EPA Announces Plan to Reduce TSCA Fees Burden for Stakeholders (Mar. 25, 2020), <https://www.epa.gov/newsreleases/epa-announces-plan-reduce-tscfa-fees-burden-stakeholders>

ENCLOSURE:

**Comments Submitted to Assistant Administrator
Alexandra Dunn January 29, 2020**

January 29, 2020

Via Email and Overnight Service

Assistant Administrator Alexandra Dunn
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code: 7101M
Washington, DC 20460


Dear Assistant Administrator Dunn,

I am writing on behalf of the Chemical Users Coalition (CUC)¹ to request your assistance in addressing as soon as possible an important issue that will affect CUC members and countless other enterprises that import manufactured articles in the US. We are asking that the Agency issue a clarification to its recent Federal Register notice announcing the Preliminary Lists Identifying Manufacturers Subject to Fee Obligations for 20 upcoming EPA-Initiated Risk Evaluations Under Section 6 of the Toxic Substances Control Act (TSCA). 85 Fed. Reg. 4661 (January 27, 2020). Specifically, CUC Members request that the Agency advise importers of manufactured articles that contain a High Priority Substance that they are not required to “self-identify” under the procedures established by the final Fees Rule for Administration of TSCA. 40 CFR § 700.45(b)(5).

In the Agency’s January 27, 2020 Federal Register notice announcing the availability of 20 preliminary lists of companies that it considers to be “manufacturers” of 20 recently-designated High Priority Substances, EPA stated its interpretation that importers of manufactured articles that contain any High Priority Substances are subject to the Fees Rule.² Although requests that EPA provide an exemption from such fees for importers of articles was a frequent topic among entities submitting public comments on the Fees Rule proposal, this subject was not addressed in the discourse included in the preamble to the final rule.³ Unfortunately, EPA’s decision not to grant the requests for such an exemption was noted at that time only in the somewhat difficult to find “responses to comment” document appearing in the rulemaking docket.⁴

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.

² Preliminary Lists Identifying Manufacturers Subject to Fee Obligations; 85 Fed. Reg. 4661, 4663 (Jan. 27, 2020).

³ 83 Fed. Reg. 52694 (Oct. 17, 2018).

⁴ EPA, Response to Public Comments on the Proposed Rule: Fees for the Administration of the Toxic Substances Control Act, https://www.epa.gov/sites/production/files/2018-09/documents/final_clean_fees_rtc.pdf. More recently, this interpretation was eventually discussed during a late 2019 webinar hosted by EPA; and the Agency has added the topic to its online list of frequently asked questions. <https://www.epa.gov/tsca-fees/frequent-questions-about-tsca-administration-fees>.

The interpretation that importers of articles that contain a High Priority Substance are subject to the Fees Rule presents considerable difficulties for CUC members and other enterprises that are importers of manufactured components and the finished articles they comprise (e.g., cell phones, computers, printers, TVs, automobiles). CUC's members include US enterprises that operate on a global scale and for manufacturing operations in the US they may rely on affiliated companies and independent suppliers abroad. Consequently, the US-based entities are likely to be importers of numerous complex pieces of equipment that may contain a multitude of components, each of which are finished articles themselves. CUC's members and similar enterprises are very unlikely to have the critical information they would need from their various suppliers concerning the chemical composition of each component in an imported piece of equipment or finished product to be able to determine whether the goods imported might contain a High Priority Substance. The complexities would be extraordinary and daunting if EPA were to insist that importers seek assurances from each supplier throughout the value chain for every specific component of an imported manufactured article (e.g., an automobile) that the supplied components do not contain any one of the 20 High Priority Substances (many of which at this time do not appear on other countries or international bodies' regulatory lists). Nevertheless, the Agency's recent Federal Register notice makes clear that importers of such articles could find themselves in "violation" of TSCA if they fail to "self-identify" as an importer of such substances in "articles."⁵

Not only is compliance with such an obligation difficult if not an impossible undertaking for CUC members and similarly situated businesses, the Agency is likely to lack the resources and the mechanisms required to monitor and enforce the "self-identifying" requirements for importers of manufactured articles. This is because the Agency interprets its TSCA Section 13 Import Certification requirements not to apply to chemicals that are a part of articles (unless such a Certification is specifically required by an existing regulation under TSCA).⁶ Thus, EPA is not likely to have reliable information on the composition of complex imported finished articles and their many component parts.

Although the 2016 Amendments to TSCA contemplate that the Agency might seek to regulate manufactured articles on the basis of concerns about exposures to a chemical substance of concern which might occur (e.g., from releases of the substance from an article), in such

⁵ The Agency's January 27, 2020 Federal Register notice states, "All manufacturers (including importers) of these chemical substances, including those who import the chemical as part of an article, or manufacture (including import) chemical substances that are considered an impurity or byproduct, or in small amounts are subject to the Fees Rule requirements. . . [and] Manufacturers (including importers) who fail to identify themselves as manufacturers subject to fee obligations, as required by the Fees Rule[], may be subject to a penalty under TSCA Section 16. Each day of failed self-identification by a manufacturer (including importer) past the payment due date is a separate TSCA violation subject to penalty." 85 Fed. Reg. 4661, 4663 (Jan. 27, 2020).

⁶ See the implementing regulations developed by the U.S. Customs and Border Protection, in consultation with EPA, at 19 CFR 12.118 through 12.127 http://www.ecfr.gov/cgi-bin/text-idx?node=pt19.1.12#se19.1.12_1118 and EPA's interpretive guidance at <https://www.epa.gov/tsc-import-export-requirements/tsc-requirements-importing-chemicals>.

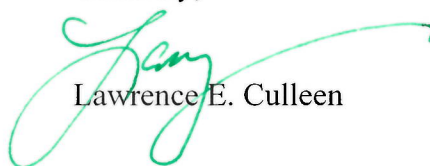
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circumstances, Congress required the Agency to make certain affirmative findings about such concerns before doing so.⁷ At this time, EPA has expressed no such concerns about releases of the 20 High Priority Substance from articles. Until such time, it would be both reasonable and sound public policy for EPA to offer a clear statement that it does not expect US importers of finished articles to “self-identify” as manufacturers of a High Priority Substance.

CUC considers it appropriate for EPA to express such an interpretation and clarification of its Fees Rule because doing so would reflect EPA’s awareness of the practicalities faced in the regulated community and the nature of the Agency’s own information sources and its resource limitations. This position also would be consistent with numerous other TSCA requirements which do not apply to manufactured articles (e.g., new chemicals Premanufacture Notification, Chemical Data Reporting requirements, Significant New Use Rules). CUC understands the amended statute (and EPA’s enforcement discretion policies) provides such authority. Moreover, in making such a clarification, the Agency would not be conceding that it does not, at a later date, have the authority in the scoping documents that must be issued for each Risk Evaluation to express concerns it may have about the presence of High Priority Substances in manufactured articles, and to eventually regulate such products if it makes the findings required under Section 6.

CUC would be pleased to provide additional background information and would like to do so in a meeting with you or your designee in which we can discuss practical solutions to addressing the concerns presented by the recent Federal Register notice. We look forward to working with you on a resolution as soon as possible.

Sincerely,



Lawrence E. Culleen

cc: Mark Hartman

⁷ EPA must find there is a “reasonable potential for exposure to the chemical substance through the article” when issuing a Significant New User Rule pertaining to such an article (*See* Section 5(a)(5) of TSCA), and to limit a Section 6 rule pertaining to articles to only those restrictions “necessary to address the identified risk from exposure to the chemical substance or mixture from the article” (*See* Section 6(c)(1)(E) of the Act).