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James J. Jones
Acting Assistant Administrator
Office of Chemical Safety and Pollution Prevention
1200 Pennsylvania Avenue, N.W.
Mail Code: 7101M
Washington, DC 20460

Re: Request to Withdraw Section 8(d) Rule for Cadmium or Cadmium Compounds Pursuant to 40 CFR § 716.105(c); Docket EPA-HQ-OPPT-2011-0363

Dear Mr. Jones,

On behalf of the Chemical Users Coalition ("CUC"), we respectfully request that the U.S. Environmental Protection Agency ("EPA") exercise its authority under 40 CFR § 716.105(c) to withdraw an immediate final rule issued on December 3, 2012 (77 Fed. Reg. 71561) that would impose reporting obligations concerning cadmium or cadmium compounds under Section 8(d) of the Toxic Substances Control Act ("TSCA"). Our concern is that this rule would impose broad obligations on a wide range of industries and would set important precedents in the EPA chemicals program without the benefit of public comment, as required under the Administrative Procedure Act ("APA") at 5 U.S.C. § 553.

The CUC represents a group of companies from diverse industries that are interested in chemical management policy from the perspective of those who use, rather than manufacture, chemical substances.[1] CUC believes in the importance of aligning protection of health and the environment with the pursuit of technological innovation, two goals that can be and must be made compatible if our society is to achieve sustainable economic growth. Aligning these goals is particularly important in the area of chemical management policy, which necessarily involves issues about how core technologies and products should be adapted to address emerging information about health and environmental risk.

[1] CUC members include a range of downstream companies, including Intel Corporation, Procter & Gamble Company, American Honda Motor Corporation, Lockheed Martin Corporation, PPG Industries, Hewlett-Packard Company, and IBM Corporation.

The members of CUC have not been involved in the deliberations that have led up to the issuance of this rule, but the record indicates that this rule is a response to a petition filed on May 28, 2010 with EPA and the Consumer Product Safety Commission ("CPSC") concerning the presence of cadmium in toy jewelry. On August 30, 2010, EPA granted this petition, promising to take two actions.[2] First, EPA said that it would "propose a rule" under Section 8(d) to identify ongoing and completed unpublished health and safety studies on cadmium or cadmium compounds that are reasonably likely to be incorporated into consumer products. The professed purpose of this information was to assist CPSC in their determination "on whether a potential hazard exists and whether a product may be a banned hazardous substance as outlined in CPSC guidelines."[3] Second, EPA indicated that it would consider taking action under Section 6 of TSCA only if its cooperative action with CPSC "does not result in action by CPSC or if EPA concludes that some form of joint action is appropriate."

The question of whether cadmium or cadmium compounds should be the subject of a Section 8(d) rule was also the subject of deliberations of the Interagency Testing Committee ("ITC"), established under Section 4(e) of TSCA. In the ITC's Sixty-Eighth Report for May 2011, it recommended that cadmium and103 specified cadmium compounds be included on the Priority Testing List and be subject to a Section 8(d) rule.[4] EPA took no regulatory action in response to this recommendation. In November 2011, as part of the Sixty-Ninth Report, the ITC recommended that a class of "cadmium compounds" be included on the Priority Testing List and be subject to a Section 8(d) rule.[5] Over a year later, EPA has now issued this immediate final rule that reveals for the first time the intended scope of its Section 8(d) rule on this topic, but has provided commenters only 14 days to request a withdrawal of the rule.

The record of this rule clearly indicates that the primary motivation for issuing a Section 8(d) rule for cadmium health and safety studies has been to address possible exposure of children to cadmium in toys.[6] It is puzzling that EPA would issue such a rule at this time since CPSC has

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[2] Letter from Stephen A. Owens, Assistant Administrator, EPA, to Ed Hopkins, Sierra Club (August 30, 2010).

[3] The May 28 petition requested action initially by CPSC, requesting action by EPA "if CPSC does not act."

[4] See 76 Fed. Reg. 46174 (August 1, 2011)

[5] See 77 Fed. Reg. 30856 (May 23, 2012). As part of this Report, the ITC removed from the Priority Testing List the set of 103 cadmium compounds that had been added in the Sixty-Eighth Report.

[6] There are references more generally to "consumer products" containing cadmium in the record, but the only specific examples cited are toys.

recently terminated its inquiry into the cadmium in toys issue.[7] In an August 9, 2012 letter sent to the original petitioners on this matter, CPSC carefully explained that two standards are now in place (ASTM F2923-11, *Standard Specification for Consumer Product Safety for Children's Jewelry;* and ASTM F963-11, *Standard Consumer Safety Specification for Toy Safety*) that will provide adequate protection to children from cadmium exposures. The latter standard, ASTM F963-11, is particularly significant because it was made a mandatory standard under Section 106 of the Consumer Product Safety Improvement Act of 2008, and this standard would apply to a broader universe of toys besides toy jewelry. The CPSC letter further reported that their ongoing sampling and monitoring program had found good rates of compliance with these standards.

The members of CUC are not in the primary business of manufacturing, selling or distributing toys. Under the terms of this rule, however, our members appear to face an obligation to review their files to search for information on cadmium or cadmium compounds because this Section 8(d) rule has a huge scope that extends well beyond toy manufacturing. The rule applies to manufacturers and importers of substances, mixtures and articles containing "any measureable content" of cadmium or cadmium compounds if those chemicals are reasonably likely to be incorporated into a product "that is sold or made available to consumers for their use in or around a permanent or temporary household or residence, in or around a school, or in or around recreational areas."

While we certainly support actions by EPA and CPSC to address significant threats to children from cadmium or any other substance in toys, EPA has not yet articulated a clear rationale for issuing an extremely broad Section 8(d) rule for cadmium or cadmium compounds at this time, and certainly not a rationale that meets the "good cause" test in the APA for suspension of normal notice and comment rulemaking. Based on the CPSC's recent conclusions, there is no imminent risk to children that would necessitate expedited information-collection activities under TSCA. In addition, the terms defining the scope of this rule are laced with ambiguity that will need further clarification before this rule can be effectively implemented. Finally, certain elements of this rule, and interpretations of the rule provided in the preamble, raise important precedential questions about how EPA will implement its chemicals program. At a minimum, these considerations should compel EPA to withdraw this final rule and provide an opportunity for public comment.

More specifically, CUC believes that EPA should explain its views and offer an opportunity for comment on the following matters:

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[7] Letter from Todd A. Stevenson, Secretary for the Commission, CPSC, to Judy Braiman, Empire State Consumer Project, Ed Hopkins, Sierra Club, Caroline Cox, Center for Environmental Health, and Audrey Newcom, Rochesterians Against the Misuse of Pesticides (August 9, 2012)

1. *Cadmium Compounds Covered*

As noted above, in the ITC Sixty-Ninth Report, the ITC shifted the scope of its information collection request from a list of 103 specific compounds, identified by CAS numbers, to a cadmium and cadmium compounds category that would include any unique chemical that includes cadmium "as part of that chemical's structure", a formulation that carried forward into this Section 8(d) rule. In addition, the rule specifies that "studies showing any measureable content of cadmium or cadmium compounds in such products must be reported."

There will inevitably be significant technical questions about what sampling and analytical methods are reliable and generally available for purposes of making determinations about whether cadmium or cadmium compounds are present at "measureable" levels in a particular product. This question is particularly challenging given that the rule covers substances, mixtures and articles, which will present a wide variety of material matrices, parts and sub-assemblies that might need to be considered.

2. *Scope of Consumer Product Definition*

The rule applies to persons who have manufactured or imported cadmium or cadmium compounds that have been, or are reasonably likely to be, incorporated into consumer products. A "consumer product" is defined as "any product that is sold or made available to consumers for their use in or around a permanent or temporary household or residence, in or around a school, or in or around recreational areas." Clearly this defines a wide scope of products, and therefore this rule applies to a broad range of industries and companies that manufacture and distribute more than toys.

Cadmium is a substance that has many applications, and thus a large and diverse set of products containing cadmium would be present in channels of trade that might lead to their presence in residences, schools and recreation areas. Common examples, identified by a simple online search of applications of cadmium, would include items such as batteries, televisions, telephones, certain vehicle parts, glass and porcelain products, electrical cables, hardware, solar panels and other materials that could be viewed as "consumer products" given the expansive definition that EPA has included in this rule.

EPA needs to provide much clearer guidance on its view of the scope of this definition in a proposed rule. At a minimum, this is needed so that issues concerning the definition can be clarified through the public comment process. In addition, this discussion will allow EPA to consider more carefully what scope of reporting is appropriate to address its primary interests in cadmium risk, which are now unclear in light of the CPSC's actions on children's toys.

3. *Scope of "Health and Safety Studies" under Section 8(d)*

This rule calls for the reporting of all "health and safety studies", as defined in 40 CFR § 716.3, on cadmium and cadmium compounds. This definition is quite broad. It includes conventional animal toxicity and epidemiology studies, but also includes exposure information, environmental monitoring, fate and transport data, and chemical-physical properties of these substances.

The preamble to the rule, however, also indicates that EPA expects parties covered by the rule to provide "data related to the product formulations, and function of the cadmium", and to "discuss the function or use of cadmium or cadmium compounds in a product, material or component including typical concentration." (emphasis added) These categories of information would relate to the technology involved in making specific products. Such information would not be "health and safety studies", even under EPA's broad definition of this term. Classifying information about the technological function of a chemical substance in a product as "health and safety studies" has implications for a company's ability to protect critical trade secret information under Section 14 of TSCA. Thus, it is important for EPA to clarify its intent in this area and provide an opportunity for comment on what is a very precedential Agency interpretation of the scope of Section 8(d).

4. *Scale of Rule Compared to Targeted Risk*

One of the central problems with this rule is that it is requiring reporting from a wide range of industries and companies that have no role in the manufacture, import or distribution of children's toys, the product category that was the initial target for the rule. The Agency's approach in this regard is particularly baffling when compared to the actions it previously took to address lead in children's jewelry.

In 2008, EPA issued an immediate final Section 8(d) rule to collect information in support of CPSC actions regarding lead in children's jewelry. This rule, however, identified specific chemical substances by CAS name. In addition, the rule only applied to manufacturers and importers of "consumer products intended for use by children who also manufacture (including import) lead or lead compounds." The information required was limited to (a) information on the lead content of consumer products intended for use by children; and (b) studies that assess children's exposure to lead from such products, including studies on bioavailability. In short, EPA issued a targeted rule that tracked its specific concerns about lead in children's toys.

Before undertaking a very broad request for data on cadmium or cadmium compounds in products, EPA should provide an explanation in a proposed rule for why this information collection request extends well beyond the risk concern (children's toys) that has been the central focus of its actions in response to the 2010 petition, and in the deliberations of the ITC.

5. *Justification of this Rule under the APA "Good Cause" Exemption*

Under § 553 of the APA, notice and comment is the general procedure that agencies must follow when issuing a rule. There is a limited exemption to this general rule "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." EPA has invoked this provision for this rule, citing as its only justification that notice and comment is "unnecessary" because of a rule that the Agency issued in 1985 to authorize itself to issue "immediate final" Section 8(d) rules when the ITC "recommended" or "designated" a chemical for the Priority Testing List.

A 1985 procedural rule, however, cannot serve as a "good cause" justification for a specific EPA regulatory action taken twenty-seven years later. Past court decisions, notably *Utility Solid Waste Activities Group (USWAG), et al. v. Environmental Protection Agency, 236 F. 3d 749 (D.C. Cir 2001)*, which explicitly addressed the use of the "good cause" exemption under TSCA, have made it clear that the scope of this exemption should be narrowly construed. The *USWAG* decision rejected EPA's attempt to make a "technical correction" in the Agency's PCB regulations, which EPA had promulgated under the theory that notice and comment was "unnecessary" for such a change. The court rejected EPA's determination that the technical correction would have insignificant impact with little public interest. If a technical correction such as this one addressed in the *USWAG* decision did not meet the APA "good cause" criteria, then this 8(d) rule for cadmium or cadmium compounds, which imposes new and unclear reporting obligation on a wide swath of industries and companies, would not meet the test. The affected industries will have an interest in providing comments on such a rule.

In addition, notice and comment would not be "impractical" for EPA in performing its functions. As explained above, the immediate concerns about cadmium in children's jewelry have been addressed through a series of action by CPSC over the last two years. Moreover, as EPA is aware, the Agency faces no statutory deadlines in this matter. Under Section 4(e), EPA's obligation to take action within a year once the ITC places a chemical on the Priority Testing List only applies to those chemicals that have been "designated" by the ITC. Cadmium and cadmium compounds have been "recommended", but not "designated", by the ITC. Moreover, Section 4(e) allows EPA to take a longer time to respond to the inclusion of a chemical on the Priority Testing List by issuing an explanation of that decision in the Federal Register.[8]

[8] It is worth noting in this regard that EPA has been working with the ITC on the identification of a set of cadmium compounds for a Section 8(d) rule since at least the early part of 2011. EPA took no regulatory action in response to the inclusion of cadmium compounds in the ITC's Sixty-Eighth Report in May 2011. In its Sixty-Ninth Report, in November 2011, the ITC recommended a Section 8(d) rule for a category of cadmium and cadmium compounds. EPA waited over a year to issue this immediate final rule to address this Report. Given this history, it seems clear

Finally, there is no basis for concluding that suspension of normal notice and comment procedures would be "in the public interest." This element of the exemption has usually been limited to narrow circumstances, such as a situation where public notice of an agency's intent might prompt parties to take steps to avoid the rule (e.g., financial manipulations) and thereby harm the public interest. Such circumstances are not present here.

For all the reasons noted above, CUC requests that EPA act under 40 CFR § 716.105(c) to withdraw the Section 8(d) rule for cadmium or cadmium compounds and allow an opportunity for public comment. Thank you for your attention to this matter.

Respectfully submitted,

Mark A. Greenwood

On behalf of the Chemical Users Coalition

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that EPA had an opportunity to seek public comment on the scope of its Section 8(d) rule for these substances, but chose not to do so.