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Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460-0001

RE: DOCKET NO. EPA-HQ-OPPT-2009-0187

The National Association of Chemical Distributors (NACD) is pleased to provide the following input regarding the Proposed Rulemaking by the U.S. Environmental Protection Agency (EPA) on Toxic Substances Control Act (TSCA) Inventory Update Reporting (IUR) Modifications, docket identification number EPA-HQ-OPPT-2009-0187.

NACD represents more than 250 chemical distribution companies throughout North America. These companies operate approximately 1,500 facilities and employ more than 20,500 people. NACD members represent between 80% to 90% of the chemical distribution facilities in the nation and over 90% of the industry's gross revenue. The membership includes many small businesses as well as regional and national companies. Handling, storing, repackaging, and transporting hazardous substances are integral parts of the chemical distribution business.

NACD member companies have established themselves as leaders in health, safety, security, and environmental performance through implementation of Responsible Distribution, established in 1991 as a condition of membership in NACD. Responsible Distribution is a third-party verified management practice. Among the Guiding Principles of Responsible Distribution, under which each NACD member pledges to manage their businesses, is a commitment to operate their facilities in a manner that protects the health and safety of their employees, the public, and the environment. Additionally, each member pledges to work with customers, in accordance with manufacturer recommendations, on product stewardship including handling, use, transportation, and disposal of chemicals.

An example of the success of Responsible Distribution is the track record of NACD members in the area toxic releases. Under EPA's annual Toxics Release Inventory report, NACD's chemical distributor members consistently outperform non-NACD distributor members in toxic releases to the environment. Another example of the success of Responsible Distribution is in the area of workplace safety. According to OSHA's annual data on workplace injuries and illnesses, chemical distribution is one of the safest industries in wholesale trade. Similar data annually

collected by NACD show positive results in our members' health and safety performance. NACD publicly reports its membership's aggregate data at www.ResponsibleDistribution.com.

NACD supports and has worked with other stakeholders toward implementation of a modernized, effective, and workable chemicals management system under TSCA. The IUR is a key element of this system. While NACD supports some of the concepts in EPA's August 13 proposed rule, there are several areas that could present difficulties to chemical distribution companies, many of which are classified as small businesses. We request that EPA review the feasibility and conduct a more realistic analysis of the costs associated with the proposed changes in the IUR. In addition, we request that EPA begin implementation of the new IUR requirements *after* the 2011 reporting period to allow adequate time to set up systems and procedures and to collect accurate data.

NACD is pleased to provide comment on the following elements of the August 13 proposed rule:

Method of Submission

NACD supports the concept of electronic reporting and has no major objection to this being mandatory as long as it is user-friendly and adequate time is allowed to learn the new system. NACD members who used the e-IUR web reporting software during the 2006 IUR submission have reported that this was easy to utilize. However, for the 2011 IUR reports, NACD is concerned about the timing. Because EPA is making several enhancements and changing the format to Internet submission through CDX, users will need time to familiarize themselves with the format and to make sure it is compatible with their company systems. In addition, all of the additional data that would be required under the proposed rule would make the submissions much more complicated.

EPA will not be able to release the revised eIUR tool until after the final rule is published because the agency will need to include all of the final data elements in the rule. Because EPA plans to finalize the rule in Spring 2011 and require reports to be submitted by September 2011, there will not be adequate time for companies to learn the new system and test its compatibility with their systems, particularly while they are busy compiling all of the new information required in the 2011 reports. This will be especially burdensome for small businesses, including many NACD members, where the individual responsible for data collection is the same one who must also learn the new system, while at the same time meeting all other federal, state, and local regulatory requirements.

NACD also urges EPA to offer training sessions to review the new requirements and electronic reporting system as early as possible, including Webinars and in-person training in multiple locations throughout the country.

Modifications to Selected Definitions – Requirements for Toll Manufacturers

EPA is proposing to clarify the reporting relationship between contracting companies and toll manufacturers as follows: "The contracting company is primarily responsible for the IUR reporting, but in the event the contracting company does not report, the toll manufacturer must report. Both the contracting company and the toll manufacturer are liable if no report is made.

Note that the contracting company and the toll manufacturer should confer with each other to avoid duplicate reporting.”

Several NACD members act as toll manufacturers. NACD would prefer that the final rule designate the contracting company, rather than the toll manufacturer, as the party responsible for completion of the IUR report. This would better align the rule with other importing requirements such as stipulations attached to the importer of record. In addition, as EPA itself recognizes, placing the obligation on both parties could lead to duplicate reporting.

Modifications to Reporting Thresholds

NACD opposes the elimination of the 300,000 lb. threshold for processing and use information. Elimination of this threshold will significantly increase the number of substances covered and the number of entities who must submit information. This will have a severe impact on smaller companies, many of whom have not been required to report under the higher threshold. This will be exacerbated by the fact that lower volume substances tend to have more specialty uses, which will make the reporting much more complex. For many NACD members, the most important part of their business is to source specific chemicals for their customers, who then use them for their specialized products. Therefore, chemical distributors engaged in importing, many of which are small businesses, will be disproportionately impacted by the elimination of the threshold. This situation will be made even worse because of the additional information EPA is proposing to require under this proposal. It will be extremely difficult and time consuming to collect the information, particularly for small businesses low volume importers who have not previously been subject to the requirements.

Eliminating the 300,000 lb. threshold in the 2011 reporting cycle along with all of the other changes in the proposed rule would create an unfathomable burden for companies, including many NACD members. By the time the rule is finalized, the 2010 reporting year will be over, and companies will not have had the opportunity to establish systems for collecting the information for chemicals in the 25,000 – 300,000 lb. range. For those companies that had not previously met the 300,000 lb. threshold, this would essentially be a brand new retroactive requirement. Had companies known that the new requirements would be effective immediately, they would have been able to establish systems to address them or even make different business decisions.

NACD requests that EPA maintain the 300,000 lb. threshold for processing and use information.

Modifications to Reportable Data Elements

Chemical Identity

NACD has serious concerns about EPA’s proposed amendment to 40 CFR 710.52(c)(3)(i) (proposed 40 CFR 711.15 (b)(3)(i)) stating that the importer must have the supplier of a confidential chemical substance directly provide EPA with the correct chemical identity, in a joint submission with the manufacturer (importer). Compliance from the foreign suppliers with joint submissions as stated within the proposed rule will be extremely difficult to implement in many cases. Because foreign suppliers are not subject to the same Federal regulations as U.S. companies, compliance with U.S. regulations is not their top priority; and in some cases these

parties are slow to comply with these measures. NACD requests an explanation from EPA on who would be held liable in cases where a foreign supplier refuses to provide applicable information to complete the joint submission. This is even more problematic for the 2011 reports as the IUR rule will not be finalized until 2011, and information will be reported for activities in past years, either 2010 or 2006-2010, if the final rule is consistent with the proposed rule. Companies do not currently have contractual language with foreign suppliers to agree to jointly provide identity information to EPA in a joint submission. In the absence of contractual requirements in this area, NACD believes that the chances of foreign suppliers agreeing to provide the information for past purchases is slim to none.

Production Volume

NACD supports the concept of requiring covered entities to report production volume for each of the years since the last principle reporting year; however, this requirement should *not* be imposed retroactively as proposed for the 2011 IUR reports. Under the current proposal and EPA's 2011 reporting timeline, companies would be forced to figure out a way to determine production volumes without having had a system in place for tracking this information. The IUR has typically involved reporting of production/import volume for a single year; therefore, companies have been preparing and keeping records for 2011 reporting based on 2010 only. Systems were not in place to capture this data for prior years. Companies that do not have highly sophisticated automated systems would have to manually go back to previous year's data.

The problem with reporting on past years in the 2011 reporting cycle is most severe for importers. These companies would not only have to obtain and analyze complex records from import brokers, but also locate and retrieve composition data for all of the mixtures imported during the last five 5 years and break the volumes down to individual component substances based on percentages in the mixtures. Many product mixtures are imports that require reporting on individual components if the aggregate amount exceeds the threshold. For most products, companies must aggregate all shipments to determine which exceed the threshold. Aggregating these components is extremely time consuming. It would be a tremendous challenge to do this retrospectively. Collecting information on imports is far more time consuming than gathering data for products produced in the U.S., and it is unlikely that companies would be able to assemble all of the import data for the additional past years, even if they had adequate time to do it.

For all of the reasons above, NACD requests that EPA **not** require reporting on production volumes for years prior to 2010. It is reasonable for EPA to require this information for multiple years, but *not retroactively*. For example, if EPA finalizes the rule in 2011 to require reporting every four years, and the next reporting period is 2015, it is doable to report for years 2011, 2012, 2013, and 2014. This will give companies notice to put systems in place to accurately track the information.

Identify Whether a Chemical Substance is to be Recycled, Remanufactured, Reprocessed, Reused, or Reworked

NACD also has major concerns with the proposed requirement for reporting on whether a chemical substance is to be recycled, remanufactured, reprocessed, reused or reworked. Many companies routinely recycle and reuse products. This not only improves overall operating costs,

but it is positive for the environment as the products are being reused and kept in the cycle rather than discarded as waste. In many cases, these recycling and reuse processes also increase a company's competitive advantage, and, as such are highly proprietary. Divulging these practices could decrease competitive advantage and jeopardize confidential business information. This could discourage companies from continuing these practices, which would ultimately have a negative impact on the environment.

Industrial Processing and Use Information Reporting

NACD has several concerns about the proposals under this section. The replacement of the NAICS codes with the new codes so close to the time when 2011 reports are due will result in yet another data collection and manipulation project for covered companies. It will take time to assign products to the new codes.

In general, without conducting complete and thorough customer use surveys, the information required in this section is difficult to ascertain with any degree of accuracy. In many cases, customers will not provide certain information to chemical distributors. When companies cannot obtain this information, or for customers who do not fit within a specific listed category, these companies have utilized "other" in past IUR submittals. Providing a description for "other" will be challenging and may not provide useful information because of the lack of information from the downstream customers. Providing detailed descriptions under the "other" selection would require additional man-hours to investigate those potential customer outliers.

Number of Commercial Workers Reasonably Likely to be Exposed

NACD strongly opposes the proposed requirement to report the total number of commercial workers, including those at sites not under the submitter's control, that are reasonably likely to be exposed while using the chemical substance. While companies can estimate the number of workers exposed to substances at their own sites, it is completely unrealistic to expect them to know how many are exposed once they have been passed downstream. This information cannot be gathered with any degree of accuracy. At best, it would be an educated guess that would call into question the reliability of utilizing the data for any analytical purposes. In order to provide an accurate figure, all reporting companies would have to fully understand their customers' processes, how the chemicals are handled, the total number of locations within the facility where the chemical is utilized, and the total number of employees working at the applicable facility. It would be extremely difficult, if not impossible, for chemical distributors to obtain this information from their customers.

Changes to Standard for the Reporting of Processing and Use Information

NACD opposes EPA's proposal to replace the "readily obtainable" reporting standard to the standard "known to or reasonably ascertainable by" for processing and use information. EPA has not clearly defined the meaning of "known to or reasonably ascertainable by," nor how this standard could possibly be enforced. To a certain degree, any information can be reasonably ascertained and is extremely subjective based upon one's interpretation. EPA has stated in several meetings that its intention is not to require companies to survey their customers. NACD requests that EPA clarify this in writing because of the subjectivity of the "reasonably ascertainable" concept.

In reference to *Federal Register* page 49672, the agency states, “EPA believes the “readily obtainable” reporting standard was a major reason for the small amount of reporting processing and use data.” The reality is that reason behind a vast majority of submitters utilizing the not “readily obtainable” (NRO) option within applicable reporting data elements in 2006 is simply due to the fact that an accurate answer, or any answer, was not known. Depending on how EPA enforces the “reasonably ascertainable” proposal, accuracy of information submitted will be questionable at best.

NACD believes that EPA should limit IUR reporting to information that is in the possession of the submitter, or at most, maintain the “readily obtainable” standard. Limiting reporting to information in the possession of the submitter is not only a matter of regulatory burden, but of data quality. EPA should not require companies to report information that they do not have as attempts to do so are likely to result in submission of poor quality information.

Amendments to Requirements Concerning CBI

NACD also has concerns about the confidential business information (CBI) proposals. Upfront substantiation requirements for processing and use information, combined with replacement of the “readily obtainable” standard with the “known to or reasonably ascertainable by” standard would substantially increase reporting burden. The processing and use information has the potential to be CBI in many circumstances, and submitters need to exercise a high level of caution so as not to reveal data considered confidential by customers. Requiring written explanations to claim this information to be CBI would be onerous, especially for the multiple scenarios that may be reported in Part III.

EPA’s proposed change at 711.15(b)(3)(i)(A) that would require suppliers of materials with identities claimed CBI to provide chemicals identity information jointly to EPA using e-IURweb and CDX, is cause for concern similar that outlined under the *Chemical Identity* section of these comments. Again, this is a particular issue for imports since reporting is proposed for activities in the past years of 2006-2010. Companies currently have no contractual language in place requiring foreign suppliers to agree to provide confidential identity information via e-IURweb and CDX. In the absence of contractual requirements to this end with suppliers, it will be difficult to convince foreign suppliers to do this for past purchases.

Change to Reporting Frequency

NACD has no objection to EPA’s proposal to change the reporting cycle from every five years to every four years. In fact, some NACD members recommend that the agency adopt a reporting frequency of every two years. This would be a similar reporting frequency as currently required by EPA for Hazardous Waste Generator Biennial Reporting.

Request for Comment on Possible Future Proposals

NACD has comment on the following items under Section V of the proposed rule:

NACD opposes the proposal to lower the reporting threshold from 25,000 to 10,000 lbs. Lowering this threshold would pull in many additional small businesses and substantially increase burdens on these companies for questionable benefit.

NACD believes that the requested data contained in Table 5 could be reasonably ascertained for facilities under the direct control of individual companies. However, if this requirement is extended to customer facilities and end users of chemicals, data collection will be difficult and reasonably un-ascertainable. Given the numerous customers and end-users that NACD members supply, accurate data collection will be virtually impossible. If EPA were to require chemical distributors to collect data on customer facilities and end-users as specified within Table 5, the costs associated with this data collection would put undue burden on both large and small chemical distributors to comply.

Under this section, the agency states “EPA could use currently available assessment tools and methodologies to develop screening-level estimates of chemical substance environmental releases and concentrations to various environmental media (including air, water and land)” and exposures to the potentially exposed populations.” NACD recommends that that EPA reduce the reporting burden under TSCA by utilizing the current available data already reported by facilities under the Emergency Planning and Community Right to Know Act (EPCRA) Section 313 requirements.

Cost Estimates

If EPA adopts the changes to the IUR requirements as proposed, the regulated community would experience substantial new costs. In the proposed rule, EPA has significantly underestimated the effort required in collecting, organizing, verifying and reporting IUR data, including the new programs that would need to be designed and implemented. Estimating burden on a per report basis does not capture all of the chemicals that need to be tracked, calculated, and screened. Countless man-hours would be required to meet these obligations. NACD requests that EPA conduct a more thorough economic analysis that includes cost per hour of labor associated with implementation.

Some examples of increased costs are:

One small business NACD member estimated that the cost to implement electronic reporting alone would be \$5,000 per site.

One non-small business NACD member estimated that the average cost increase *per site* to comply with all of the new requirements would be \$100,000 during the first reporting cycle and \$40,000 during each additional reporting cycle.

Implementation

NACD believes that it is simply not feasible to implement the proposed new IUR requirements in time for the 2011 reporting deadline. EPA is proposing sweeping changes to IUR reporting. It is already ten months into the final collection year for 2011 reports, and making significant changes at this point are not realistic. Requiring the collection of data in every year since the last IUR in 2006, eliminating the 300,000 lb. threshold for use and exposure data, and changing the standard from “readily obtainable” to “reasonably ascertainable” with no relief in timeframes is unreasonable. To make matters even worse, EPA expects to promulgate the final rule in Spring 2011, and reports will be due in September 2011 rather than December, which leaves three months less time to prepare.

Unless EPA quickly announces a change to the reporting deadline or major changes in the proposed requirements, companies will have to collect all of the data in the proposed rule or risk not being able to comply with final reporting requirement and deadline.

NACD recommends that EPA implement final rule after 2011 reporting period, and require compliance with any new requirements beginning with next cycle.

Thank you for the opportunity to comment on this proposed rule. If you have any questions, or need any additional information, please do not hesitate to contact me at 703/527-6223.

Sincerely,

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