

March 25, 2021

Marc Edmonds
Office of Pollution Prevention & Toxics
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460
Via Electronic Filing at <http://www.regulations.gov>

RE: Fees for the Administration of the Toxic Substances Control Act, Docket ID No. EPA-HQ-OPPT-2020-0493

Dear Mr. Edmonds:

The National Association of Chemical Distributors (NACD) submits the following comments in response to the proposed rule published by the U.S. Environmental Protection Agency (EPA) regarding Docket No. EPA-HQ-OPPT-2020-0493, Fees for the Administration of the Toxic Substances Control Act.

About NACD

NACD is an international association of nearly 440 chemical distributors and their supply-chain partners. NACD members represent more than 85% of the chemical distribution capacity in the nation and generate 93% of the industry's gross revenue. NACD members, operating in all 50 states through nearly 1,800 facilities, are responsible for more than 155,000 direct and indirect jobs in the United States. NACD members are predominantly small regional businesses, many of which are multi-generational and family owned.

NACD members meet the highest standards in safety and performance through mandatory participation in NACD Responsible Distribution®, the association's third-party-verified environmental, health, safety, and security program. Through Responsible Distribution, NACD members demonstrate their commitment to continuous performance improvement in every phase of chemical storage, handling, transportation, and disposal operations.

NACD Engagement and Recommendations for TSCA User Fees

NACD is pleased to share our recommendations relating to the fee administration portion of the Frank R. Lautenberg Chemical Safety for the 21st Century Act (LCSA) proposed by EPA in the proposed rule "Fees for the Administration of the Toxic Substances Control Act" ("proposed rule"). NACD supported the passage of the LCSA and worked closely in Congress to revise the Toxic Substances Control Act (TSCA) for over a decade. In May 2018, NACD submitted comments to the EPA on the proposed rule "User Fees for the Administration of the Toxics Substances Control Act" and remains engaged on the implementation of the LCSA.

Unfortunately, NACD has substantial concerns with EPA's new proposed rule because it proposes to double the cost of risk evaluations unjustifiably, add three unnecessary new fee categories for EPA activities, and does not provide information on EPA's cost increases. EPA states that these changes are "based upon over two years of TSCA fee implementation" but fails to explain adequately the cost increases in the proposed rule or in the supplemental document, Economic Analysis of the Proposed Rule for the Administration of the Toxic Substances Control Act ("Economic Analysis").

Legislative History of Costs Under the Toxic Substances Control Act

When TSCA was first being negotiated, the business community supported fee payments as an effective and fair way to support the EPA's activities within reasonable limits. It was very important to industry, however, that the fees be properly justified, the agency's costs be transparent, and the fees be used to match resources with needs. A Report from the U.S. House of Representatives Committee on Energy and Commerce regarding the TSCA Modernization Act of 2015 notes, "The Committee is sympathetic to claims that EPA needs an updated fee structure reflective of today's marketplace in order to operate a modernized TSCA. *The Committee expects EPA to act prudently with this new authority* [emphasis added]. The Committee believes this new authority strikes the right balance for matching resources to needs."

The intent of Congress was not for EPA to nickel-and-dime the industry with new fee categories at every opportunity nor to increase fees by significant amounts without justification. Congress also did not intend for EPA to wield this new authority to administer fees as a race to justify up to \$25 million in fees from the industry, but as a method for EPA to thoughtfully and appropriately apply fees to support EPA activities.

As EPA's cost estimates and the resulting fees increase, the precedents set by this proposed rule are very concerning. It is concerning that EPA's costs are not adequately justified. It is concerning that EPA is adding three new fee categories in only one proposed rule. Finally, it is concerning that the agency is not acting prudently or considering the impacts of how fees could change the market or unduly harm small chemical manufacturers and distributors.

NACD is sympathetic that EPA is attempting to ramp up and meet its statutory responsibilities under LCSEA, but we believe it should not be at the cost of companies going out of business or charging a fee for every possible interaction with the agency. To begin, we would like to share some provisions in the proposed rule that NACD does support.

NACD Supports the Payment of Section 6 Risk Evaluation Fees in Installments

For EPA-initiated risk evaluations, full payment is currently due within 120 days of EPA publishing the final scope of a chemical risk evaluation. EPA is proposing to extend that first payment timeline to 180 days and to provide for payment to be made in two installments instead of one. EPA proposes that the first payment of 50% be due 180 days after EPA publishes the final scope of a chemical risk evaluation and the second payment be due not later than 545 days after EPA publishes the final scope of a chemical risk evaluation. NACD supports the installment plan proposed and recommends EPA consider splitting up the

payment into three or four payments in a future rulemaking for further flexibility to businesses.

NACD Supports the De Minimis Exemption for Section 6 Risk Evaluation Fees

EPA is proposing an exemption from EPA-initiated risk evaluation fees and associated regulatory requirements for entities that manufacture (including import) a chemical substance in quantities not to exceed 2,500 lbs. EPA notes that if all manufacturers of a chemical substance import or manufacture in quantities below a 2,500 lb. production volume the exemption does not apply. NACD considers 2,500 lbs. to be appropriate for a “de minimis” exemption and supports this provision.

NACD recommends that EPA modify in the final rule that the 2,500 lb. production volume exemption applies to the annual average production/import volume over the past five years, not that the annual production volume must be below 2,500 lb. This five-year period is consistent with the current criteria under the 2018 TSCA Fees rule for certification of cessation.

NACD Supports the New Various Exemptions for Section 6 Risk Evaluation Fees

EPA is proposing exemptions for manufacturers if the chemical substance is imported in an article, produced as a byproduct, or produced or imported as an impurity. NACD supports the addition of these exemptions to the proposed rule, which would otherwise impose potentially significant burdens upon these three categories of manufacturers.

NACD Supports the Employee-Based Size Standard Definition for Small Businesses

EPA proposes to maintain the employee-based size standard as determined by the Small Business Administration (SBA). The SBA definitions vary by industry and are calculated using a deep analysis of each industry sector, including average firm size, industry concentration, average assets size, distribution of firms by size, industry growth trends, technological change, etc. NACD supports maintaining this standard as it is variable to fit each industry.

NACD Supports the Proposal to Allow for Modification of the Manufacturer List

EPA is proposing added flexibility to allow for potential changes to the list of fee payers after it is finalized. Specifically, EPA is proposing to allow for modification of the list upon receipt of information indicating that such a change is warranted. NACD supports this proposal and recommends that EPA adopt this added flexibility.

The Fees Costs for Section 6 Risk Evaluations Are Increased by 89% Without Justification

EPA proposes to increase the Section 6 Risk Evaluation fee from \$1,350,000 to \$2,560,000. Notably, EPA doesn't provide an explanation for this increase, including how they arrived at the new number within the proposed rule, nor does the agency provide how their costs

justified this increase. NACD requests a detailed explanation of how the agency arrived at 89% increase in fee after only two years, further explanation on which alternative approaches to complete the review were considered, and a detailed explanation of EPA's cost estimates for administering the Section 6 program. Without adequate cost information justifying the Section 6 risk evaluation increase, there's no data for industry to review. Accordingly, NACD recommends that the agency fully explain the Section 6 costs to EPA and provide an explanation for how the agency arrived at an 89% fee increase to cover those costs within the final economic analysis.

In the economic analysis, EPA states that for fiscal years 2022 through 2024, the average fees for a small business affected by a Section 6 action would be \$34,133 per firm. Using the same analysis for the 2018 TSCA Fees rule, the average fees for a small business affected by a Section 6 action would be \$18,000. Small businesses would therefore also expect to see an increase in fees by 89% over only two years.

However, EPA's own analysis does not use its new proposed method of proportional division of the risk evaluation fee by the average annual import/production volume. It's not possible for a small business or EPA to know what the cost will be for their business for the Section 6 risk evaluation fee, if the agency does not use its proposed fee structure in calculating the average fee for a small business. Prior to the graph in the economic analysis that estimates how the fees would be split amongst users using the production volume method, EPA states, "To protect confidential business information, it was necessary to assume that none of the affected firms were small business concerns." However, the agency does not reveal the chemicals used for in the graph nor the names of any of the companies, so there is no concern of CBI being revealed. It is unclear why EPA declined this opportunity to project how the production volume method would impact small businesses.

NACD recommends that EPA recomplete the calculation of fees using the proposed average production volume fee structure and include small businesses. It is important for the agency to consider how the new proposed fee calculation method could impact small businesses.

EPA's Fee Structure Should Prioritize Fiscal Predictability and Protecting Small Businesses

EPA proposes to change the fee structure of the Section 6 risk evaluation fee to base it on average annual production volume. Specifically, EPA would calculate the total fee amount to be split among the total number of small manufacturers, provide an 80% discount, and then distribute it based on each company's percentage of the average annual production volume from the four calendar years prior to the year certification was made. After subtracting the small business fees, EPA would calculate the other business fees in the same manner.

EPA states that under the proposed structure the agency would collect production-based volume data from manufacturers to calculate the fee using the production volume approach. Should EPA proceed with this fee structure, EPA should add an important distinction here between chemicals produced and imported for non-TSCA uses. The volume data collected by the agency should not be the total production volume, but rather the TSCA-use production volume.

EPA does not provide an example of how their production volume approach would result in a more "representative distribution" of fees. NACD recommends the agency map out how

several sample chemicals would be paid for under the current and proposed fee structures. This exercise would allow the agency to see how the fees would be distributed, and account for which businesses will receive small business discounts. Although the agency does not have data on current production volume, past Chemical Data Reporting (CDR) data could be used to see how the production volume approach would have resulted in a different fee distribution from a chemical already invoiced in the first 20 high-priority chemicals. It would have been helpful to have this example included as part of EPA's economic analysis.

NACD urges EPA to keep in mind that the more companies go out of business or simply get out of the market for a particular chemical as the cost of fees and the number of feeable events rise, the higher the fees on the remaining companies in the market will become. NACD is concerned that the significant increase in fee payments and the number of fee categories will have a detrimental overall impact on the chemical market and the number of companies paying fees. It is in EPA's best interest to spread the fees widely across many companies to ensure continued market viability and an adequate number of companies, and therefore collected fees, to support the agency. However, EPA should be wary of creating additional fee categories only to solve this problem. Additional fee categories should be added only as the last possible option to spread fees across the industry.

The 2018 TSCA Fees rule structure and the 2021 proposed rule fee structure both have strengths and weaknesses, yet the one element they have in common is a lack of fiscal predictability. As such, instead of advocating for a particular fee structure, NACD is asking for predictability, flexibility, and protections for small businesses in whichever structure is chosen. NACD recommends EPA expand the timeline for manufacturers to exit the market, enhance predictability of fee payments by providing fee estimates, and establish fee caps for small business concerns.

Adjust the Timeline for Manufacturers to Exit the Market

Under the 2018 TSCA Fees rule, there is no flexibility for manufacturers to exit the market after the Section 6 risk evaluation fee "lookback period" cutoff date occurs. In other words, the cutoff date is the date after which manufacturers are trapped into paying the fee because they have imported or manufactured on or after that date. The 2018 TSCA Fees rule states, "The cutoff date (*i.e.*, the date by which manufacture must have ceased in order to certify out) for an EPA-initiated risk evaluation is the date upon which the prioritization process is initiated for that chemical (*i.e.*, approximately 9-12 months before the risk evaluation begins and 9-12 months before the preliminary list is published)." Subsequently, EPA identified 40 chemicals to prioritize for risk evaluation on March 20, 2019. Therefore, if a company had imported or manufactured one of those chemicals on or after March 20, 2019, they were "trapped" into paying the fee, regardless of their future intentions to import or manufacture the product.

A small business needs to have the opportunity to exit the market if a Section 6 risk evaluation fee would significantly harm their business. NACD recommends EPA change the cutoff date to the date when the agency finalizes the designation of the chemical substance as high or low priority as a part of the prioritization process. Under this cutoff date, manufacturers would have a window after the chemical is announced and the prioritization process is initiated, but before the risk evaluation process begins, to leave the market, should they choose to do so.

Improve Predictability of Fee Payments

NACD is concerned about the unpredictability of how the Section 6 risk evaluation fee has been distributed under the 2018 TSCA Fees structure and would be under the 2021 proposed structure. Businesses, especially small businesses, need fiscal predictability to survive. An unexpectedly large fee can cause irreparable harm to a small business.

There is also a difference between how the fee payments impact chemical manufacturers versus chemical importers, which tend to be much smaller businesses. The reality is that the chemical industry is dynamic and fluctuates rapidly based on demand. Chemical importers especially are beholden to customer demand; thus, the import of a chemical can fluctuate significantly over several years. Whereas chemical manufacturers tend to have more steady production and demand of specific chemicals, and usually ramp up or ramp down production at a slower pace. For example, a chemical importer can import a large amount of a chemical one time in only one year for only one customer but may have an average annual production volume higher than a company that is manufacturing that chemical at a steady amount year over year. Under the 2021 proposed structure, this importer would have an especially difficult time predicting how much their share of the fee would be.

To address these problems, NACD recommends that EPA provide a “fee estimate” simultaneous to when the agency initiates the prioritization process for a chemical. The agency has access to the CDR data that would enable it to provide this estimate, however rough, to industry. Alternatively, the agency can provide a “number of impacted companies estimate” so that companies within the market can make an educated guess about how much of the fee for which they may be responsible, regardless of the fee structure. Combined with the recommended adjusted cutoff date above, companies then could estimate the fee cost to their business and then exit the market should the fee estimate be too much to make the production or importation of that chemical cost-efficient.

Establish Fee Caps for Small Business Concerns

Using the proposed Section 6 \$2.56 million risk evaluation fee and the 2018 TSCA Fees structure or the 2021 proposed rule fee structure, a small business could be responsible for a maximum fee up to \$512,000 for a single chemical. However, should that business happen to import or manufacture two subject chemicals undergoing risk evaluation, it is possible that a small business could be responsible for over \$1 million in fees to the EPA in a single year. This would be a financial burden much too large for a small business to bear.

NACD appreciates that EPA has recognized the need for an overall discount to protect small businesses in the marketplace. However, even an 80% fee discount cannot counteract the impact of the proposed 89% increase in a Section 6 risk evaluation fee.

NACD recommends that EPA establish a Section 6 risk evaluation fee cap for small businesses inclusive of the 80% small business discount. Should EPA proceed with the \$2.56 million risk evaluation fee, it should also establish corresponding Section 6 small business fee caps to protect these companies from future increases and preserve the true intent of the small business concern discount. Small businesses need to pay their

fair share. However, EPA's own economic analysis estimates that most small businesses subject to Section 6 risk evaluation fees are likely to only have median annual sales of \$5,445,000. While a \$500,000 fee is difficult enough for a business of this size, it would be disastrous in the event described above where a small business must pay over \$1,000,000 for two subject chemicals in a single year. NACD recommends that EPA establish a Section 6 risk evaluation small business fee cap of \$500,000 and stands ready to help EPA determine if this is the most appropriate amount.

NACD Opposes Requiring Export-Only Manufacturers to Pay Fees for Risk Evaluations

EPA proposes to require manufacturers and importers of export-only transactions to pay Section 6 risk evaluation fees. As the chemical never enters U.S. commerce, manufacturers of a product for export-only and importers of a product for export-only should not be required to pay into the Section 6 risk evaluation fee. There is precedent for the exemption of export-only chemicals elsewhere in TSCA. For example, under TSCA Section 12(a) a new chemical substance is exempt from a Pre-Manufacture Notice (PMN) if it is manufactured solely for export. NACD recommends that EPA remove the requirement for export-only manufacturers to pay Section 6 risk evaluation fees.

NACD Opposes the Three New Fee Categories for EPA Activities

EPA proposes to add three new fee categories for EPA activities, including a fee for notice of commencements, a fee for bona fide intent requests, and a fee for revised test orders.

A Notice of Commencement from a Business Should Not Trigger an Additional Fee

EPA proposes a new fee category where manufacturers must pay a fee to submit a Notice of Commencement (NOC) to the agency as part of the PMN process. EPA states that "NOC fees will help defray the costs of reviewing, processing, and retaining NOC records and the costs of registering the chemical substance with the Chemical Abstract Service."

Manufacturers and importers typically already register the chemical substance with the Chemical Abstract Service themselves prior to submitting a PMN. EPA should therefore remove the costs of registering the chemical substance with the Chemical Abstract Service from its justification of the costs.

As companies already must pay a fee for PMN, it does not make sense to charge another fee for an NOC, which is a part of the PMN process. The fee already charged for the PMN (\$2,800/\$16,000) is enough that it should already include all aspects of the PMN process, including the receipt and processing of the ultimate NOC.

NACD recommends EPA remove this fee category and rely on the fee categories established in the 2018 TSCA Fees Rule. If that is not possible, the cost of administering an NOC should be rolled into the overall cost for a PMN.

A Bona Fide Notice to Manufacture Should Not Trigger a Fee

EPA proposes a new fee category where companies must pay a fee to obtain written determination from EPA whether a chemical substance is included in the Confidential Inventory, also known as a bona fide notice. EPA is proposing this new fee category to require a fee for bona fide notices to recover the costs of reviewing bona fide notices. NACD strongly disagrees with the establishment of a bona fide fee, as it is simply an additional cost on the good actors in the industry.

Manufacturers and importers rely on the bona fide system to check the Confidential Inventory because EPA can and private industry cannot. Businesses frequently use the bona fide notice to verify their own compliance with TSCA regulations by searching for the conditions under a consent order. Ultimately, EPA should not use fee categories for events where a company is trying to remain in compliance. While NACD members hold themselves to the highest standards and will continue to comply, this fee could create a compliance disincentive for less responsible companies, resulting in a competitive disadvantage for the diligent companies that do pay the fee and comply.

Further, although EPA states that “The costs of the review process for bona fide notices were not recovered under the 2018 Fee Rule,” the agency does not explain what those costs are nor how they arrived at the fees of \$90 fee for small businesses and \$500 fee for other businesses. NACD recommends EPA remove this fee category and rely on the fee categories established in 2018 TSCA Fees rule.

A Revised Test Order Should Not Trigger a Fee

EPA proposes to add a new fee category when a test order “fails to follow terms or conditions in the order, including testing protocols.” NACD understands that EPA is typically given the opportunity to review all test order parameters before they are developed, the agency should take the opportunity to identify any terms or conditions that it deems inappropriate at that point, which will reduce the need for amended test orders.

EPA estimates that the estimated cost of each test order is approximately \$279,000. It is highly unlikely the agency would be required to approach an amended test order with the same cost as a new test order, and as such the proposed cost should be smaller than \$279,000. However, EPA does not provide an estimated cost for each amended test order. NACD recommends EPA provide information on how much the agency expects the review of an amended test order to cost.

NACD recommends EPA remove this fee category and rely on the fee categories established in the 2018 TSCA Fees rule. Should EPA proceed with this fee category, the agency should establish specific parameters around what justifies an amended test order or not. For example, a test order where all the data meets the terms and conditions of the order, including testing protocols, but a few of the sheets were out of order should not trigger an amended test order. It is NACD’s understanding that in most test orders, EPA preapproves of the scope of the testing. If the agency neglects to ask for certain data, or later determines the scope was incorrect even after agency approval, it should not trigger an amended test order. NACD recommends the agency

provide several examples of situations that would and would not justify an amended test order.

The Economic Analysis Does Not Sufficiently Explain EPA's Cost Estimates

In the economic analysis, EPA only generally discusses the agency's costs on pages 3-4 to 3-7, but does not adequately explain the agency's estimated costs, nor how they have increased so much to justify an 89% increase in Section 6 risk evaluation fees and three new fee categories. Most of the economic analysis is focused on the costs to industry. While costs to industry are important to consider, it is the agency's costs that ultimately justify the industry fees; and without knowing how the costs were estimated, commenters cannot respond to whether the cost increases are appropriate.

NACD, therefore, requests that EPA issue a supplemental economic analysis that adequately explains why the costs to industry are expected to increase so significantly. EPA must explain how the fees support 25% of the costs for EPA to administer of Section 4, 5, 6 and 14.

EPA should also provide an explanation of how the agency is leveraging its own knowledge as it gains more experience. As the agency proceeds in gathering fees, there should be greater economies of scale as EPA becomes more efficient, resulting in eventually a flattening of fee increases or even fee decreases as the agency improves its management of the new work.

Of note, EPA reports that the primary industry code affected by the proposed rule would be chemical manufacturers. The petroleum refining industry sector and the chemical and petroleum merchant wholesale industry sectors are "likely to be affected by the proposed rule." EPA did not explain how it arrived at this analysis, but NACD believes that chemical manufacturers and the chemical and petroleum merchant wholesale industry sectors are equally likely to be affected and should both be the primary industry codes affected by the proposed rule. In EPA's economic analysis, EPA anticipates impacts of the rule on 10,451 chemical manufacturing firms and on 11,145 chemical and petroleum merchant wholesalers. It is unclear how EPA arrived at chemical manufacturers as being the primary industry affected when EPA's own analysis shows that more chemical and petroleum merchant wholesalers will ultimately be affected by the rule.

EPA should not include the costs of administering Sections 8 and "Other sections" within the Estimated Annual Costs for EPA. The agency estimates the total cost to the agency at \$87,536,000. The agency states, "Based on these cost estimates, EPA anticipates collecting approximately \$22 million in fees collected from all fee-triggering events, except manufacturer-requested risk evaluations." As explicitly outlined in LCSA, the fees collected are to support the activities of Sections 4, 5, 6, and 14, not Section 8 or "Other sections." NACD recommends the agency remove the \$3,974,522 from Section 8 and the \$1,432,967 from "Other sections." Once the agency has re-completed the economic analysis, with supporting justifications for the increased costs overall, EPA should also decrease the proposed fees accordingly for each fee category to account for the agency's smaller Estimated Annual Cost.

Compared to the 2018 TSCA Fees rule, EPA's projected annual costs to administer the Section 4 program remained \$3,543,000 from 2018 to 2021.¹ EPA's projected annual costs to administer Section 5 increased from \$28,672,000 to \$37,713,248 from 2018 to 2021, an increase of 31%.² Remarkably, EPA's estimated annual costs to administer the Section 6 program decreased from \$43,618,000 to \$41,998,820, a 3% decrease.³ EPA must provide the economic data showing how a 3% Section 6 estimated annual cost decrease for the agency justifies an 89% increase in Section 6 risk evaluation fees to industry. The agency needs to account for how it is distributing its costs across the fees, especially if it is not tying the same section cost increases directly to the corresponding section fees.

In the 2018 TSCA Fees rule, EPA implemented an indirect cost rate of 28.14% to calculate all the indirect costs associated with administering Sections 4, 5, 6, and 14 of TSCA. For calculating the EPA costs for fiscal years 2022 through 2024, EPA added an indirect cost rate of 19.5%. It is not explained how EPA arrived at the new lower indirect cost rate nor how the indirect cost rate was able to be reduced so significantly despite EPA's Estimated Annual Cost increase or the increase in fees. EPA should provide data showing how the indirect cost rate was calculated and how a lower indirect cost rate that accounts for "intramural and extramural costs" decreased from 2018 to 2021 and further explanation for how the indirect cost rate is applied across the EPA's estimated costs.

NACD could understand if EPA's cost estimates have increased, but the agency must show their work demonstrating how the cost estimates were calculated and what work or unexpected costs or processes has caused the cost estimates to increase so much. EPA's Estimated Annual Cost has increased by \$7,358,000. The agency does not provide any data to justify this cost increase. The information is not there.

NACD Does Not Agree with EPA's Decision Not to Hold a SBREFA Panel

NACD was again disappointed in EPA's decision not to hold a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel on the TSCA user fees proposed rule. EPA also decided not to hold a SBREFA panel on the 2018 TSCA Fees rule. The agency would have benefitted from an SBREFA panel to gather further information from small businesses on the structure of this rule, as small businesses, just like EPA, now have two years of experience in managing the new fees and could provide direct feedback on how it has impacted them. The agency also could have gathered useful information on how the production volume fee structure would have affected them ahead of its proposal.

Conclusion

NACD appreciates EPA's efforts to establish a clear and fair system for administering TSCA user fees. We recommend EPA take the steps outlined above to help establish a flexible, predictable, and fair fee system.

¹ Program Cost Estimates and Activity Assumptions. Final Rule. "Fees for the Administration of the Toxic Substances Control Act" 83 CFR 52694 (October 17, 2018)

² Ibid.

³ Ibid.

Thank you for the opportunity to comment on this critical issue. If you have questions or need additional information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Allison Tuszynski".

Allison Tuszynski
Director, Regulatory Affairs
National Association of Chemical Distributors
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