National Association of Chemical Distributors

Advancing **Stewardship,** Creating **Connections**™

May 24, 2018

Mark Hartman
Office of Pollution Prevention & Toxics
Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460
Via Electronic Filing at http://www.regulations.gov

RE: User Fees for the Administration of the Toxic Substances Control Act; Proposed Rule, Docket ID No. EPA-HQ-OPPT-2016-0401

Dear Mr. Hartman:

The National Association of Chemical Distributors (NACD) submits the following comments in response to the notice published by the U.S. Environmental Protection Agency (EPA) regarding Docket No. EPA-HQ-OPPT-2016-0401, User 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 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). NACD supported the passage of LCSA and worked closely in Congress to revise the Toxic Substances Control Act (TSCA) for over a decade.

NACD Agrees with EPA's Decision to Exclude Processors from Fee Collection Activities on Section 6

Within the proposed rule, EPA has determined processors must only pay fees when they submit a Significant New Use Notice (SNUN) under Section 5 or when a Section 4 activity is tied to an SNUN submission by a processor. EPA stated that the agency believes that to identify a representative group of processors for the other fee-triggering actions would be "overly burdensome and expects many processors would be missed." While NACD does not necessarily agree that identifying processors would be prohibitively difficult for EPA, we can accept the exclusion of processors from fee collection on Section 6 activities.

NACD Supports EPA's Decision Not to Include a Fee Category for Risk Management Under Section 6

EPA proposes not to include a fee category for risk management actions under TSCA Section 6. It is not clear how EPA would have included a fee category for risk management, should the agency have chosen to do so. Unlike the other fee categories, EPA would not have to take on any additional activities or incur costs for risk management, as the burden would solely be on the manufacturers or importers. For the other fee-able activities, EPA itself must analyze and collect data, so it is unclear how the agency could have justified charging a fee for risk management actions in the first place. If EPA had chosen to charge a fee for each company that takes a risk management action, such as passing information on to customers, significant fees down the supply chain as a chemical is sold could have resulted. Therefore, NACD supports EPA's decision not to charge a fee for risk management.

NACD Supports EPA Using CDR Data to Identify Manufacturers and Importers Subject to Section 6 Fees

EPA states that the agency plans to look at Chemical Data Report (CDR) submissions to identify the entities required to pay Section 6 risk evaluation fees. However, the agency states that "failure by EPA to identify companies subject to a fee does not remove their obligation to pay." EPA also states that the agency will use other sources, including Toxics Release Inventory data and notice of commencement submissions under the new chemical review program.

NACD is supportive of EPA using data that the agency already has available to identify the entities responsible for payment. We suggest that EPA use its own resources wherever possible to identify the companies responsible for Section 6 fees. Additionally, EPA should make significant and repeated efforts to notify companies once they have been identified. A single voicemail or email to one person will not be adequate. EPA must make a genuine effort to reach out to the affected companies, and the agency must do their own due diligence to identify and reach out to these companies by all methods and sources.

NACD is strongly opposed to a process that solely requires companies to monitor constantly an EPA database, the *Federal Register*, or other continually updated program/database to see if they or a chemical that they import or manufacture is named. EPA must proactively notify the appropriate companies.

EPA Should Clarify How It Will Determine Which Companies Must Pay Fees

It is unclear from the rule how EPA will initially identify the companies that must pay Section 4 and Section 6 fees and under what parameters. EPA should add language and clarity to the rule around which companies will be identified as participants. If EPA will primarily use the CDR to determine which companies to include on the proposed list of firms, the agency will be looking at data about manufacturing and importing that is up to four years old. EPA has not defined how it will determine the time period during which the agency will start including companies for a Section 4 or 6 fee. NACD requests that EPA provide additional guidance and opportunity for public input on the "look-back period" during which EPA will include firms in Section 4 and 6 fees if they have held, manufactured, or imported a certain chemical.

NACD suggests EPA use a "look-back period" of four years, or one CDR cycle. This would allow companies to have reasonable certainty if they can expect to be included on the proposed list of firms when a chemical is announced for Section 4 or 6 activities.

Furthermore, EPA should allow for a "de minimis" exemption on Section 4 or 6 fees. If a company has imported or manufactured a chemical that is undergoing a risk evaluation or testing, but the amount is so small as to be negligible in general or to their overall business, then they should be exempt from paying the fees. The CDR already has existing threshold limits of 25,000 lbs., and NACD recommends EPA consider these limits to be appropriate for a "de minimis" exemption.

EPA Should Release Additional Language on the Management of Consortia and Fees

EPA states that the agency will calculate the individual fee for each consortium member if the consortium cannot agree on a split of the costs. EPA states that it will divide the cost of the fee by the number of members of the consortium and allow all small businesses within the consortium an 80% discount. There is some uncertainty as to how the fee split among consortium members will function in the event that EPA does not determine the fee split. For example, there may be cases where a chemical has been imported only once by Company A, whereas Company B manufactures the same chemical and it comprises 50% of its total business.

Although it is reasonable that both companies should pay part of the fee on a Section 4 or 6 activity, it would not necessarily make sense for each of those companies to pay the same amount. However, NACD recommends EPA leave it up to businesses to determine how to pay fees but suggests EPA include language in the final rule encouraging cooperation and fairness amongst the members of a consortium. If the companies in a consortium cannot reach a decision after 30 days, NACD agrees that EPA should calculate the fee for each consortium member by dividing the total fee by the number of members. Small businesses should be afforded an 80% discount, while the remaining consortium members will be required to cover the remaining fee in equal amounts.

EPA Should Significantly Increase the Fee Timelines for Each Section

EPA proposes that payment for fee categories under TSCA Section 4 and Section 6 will be due within 60 days of the effective date of the order, rule, or final scope. However, EPA also states

elsewhere within the rule that consortia formed under Section 4 and Section 6 have up to 30 days to decide how to split a fee payment after the effective date. If it takes up to 30 days to decide how to split a fee, that leaves only 30 days for businesses to process and remit payment. Further, the cost of the fees is so substantial, it is difficult to expect the fee to be paid within such a short deadline. NACD suggests EPA extend the payment deadline to at least 120 days after the effective date of the rule to allow for additional time for consortia discussion and internal business review. NACD recommends EPA establish a clear timeline of how the fees will function alongside other EPA activities.

EPA should also allow for a fee payment schedule. It is possible that, as EPA is selecting new chemicals to undergo risk evaluations, the agency could select eight new chemicals in a year for risk evaluation and one firm could have business with every one of those chemicals. Given this possibility, or even the possibility of one company being expected to pay for more than one risk evaluation at a time, EPA should modify its expectations concerning payment and establish a process for payment schedules.

EPA Should Clarify the Fee Reimbursement Process

EPA states that the agency can only offer fee reimbursements for Section 5 fees; however, the agency does not elaborate on how this process will function. EPA should offer further clarity on when, how, and under what circumstances the agency will provide refunds for Section 5 fees.

NACD Strongly Opposes EPA's Penalties for Late Fee Payment

In the proposed rule, EPA implies that if one company within a consortium has not paid their apportionment of the fee by the established deadline, then every company within the consortium will be held responsible for penalties up to the maximum statutory amount per day. This is grossly inappropriate and should not be included in the final rule. Companies cannot control the actions of the other members in the consortium, and each company should only be individually responsible for ensuring their portion of the payment is submitted on time. EPA should not punish the good actors in the marketplace for the actions of other companies. In effect, EPA is attempting to outsource its own enforcement by forcing others in the marketplace to police and verify the actions of other companies. EPA's actions have the potential to increase animosity and decrease cooperation amongst the supply chain. NACD strongly recommends EPA revise the proposed rule to state that each company will only be individually responsible for late fees as necessary within a consortium.

EPA Should Address Late Entrants or Free-Riders to Consortia

As consortia are formed around Sections 4 and 6 fees, the regulated community will be required to pay substantial fees. EPA should acknowledge that there is a possibility of free-riders that will either slip under the radar or enter the market after the fee has been paid. EPA should make all best efforts to prevent the bad actors in the market from capitalizing upon the fees paid by others. EPA will already be aware of the members and fees paid by the consortia when that information is filed within CDX. NACD recommends EPA function as a consortia manager or authorize a third party to fill this role so they can accept and manage

payments and refunds within a consortium. If a late entrant wishes to conduct business with a chemical that has already been "paid for" through a fee, they can pay their proportion of the fee to the consortia manager. The manager will accept these "late" payments and then distribute refunds to the parties that had paid the initial fee.

The period in which late entrants or free-riders must pay back members of the consortia should also have a sunset period. New entrants to a market should not be forced to pay indefinitely to the consortia members. Given that the "look-back period" is four years, we also recommend that the sunset period in which new entrants must pay also be four years from the date of publication of the risk evaluation or risk management rule.

NACD Supports EPA's Decision to Include the Costs of Section 14 CBI in Sections 4, 5, and 6

As set forth in the proposed rule, EPA will collect fees for actions under Sections 4, 5, and 6, and not collect fees for Section 14 activities. The agency is instead including the cost of covering EPA Section 14 activities within the Sections 4, 5, and 6 fees. NACD agrees that Confidential Business Information activities do not need a separate fee.

EPA Should Revise Its Economic Analysis of the Proposed Rule

Employment Impacts

In the Economic Analysis of the proposed rule, EPA states that it expects there will be no short- or long-term employment impacts associated with the proposed rule. According to a study by John Dunham & Associates commissioned by NACD, the proposed rule as is will result in 14,042 tons of reduced sales, which equates to a reduction of about 0.02 percent in chemical sales. While this may not seem like a lot, lower volumes will result in lost jobs as chemical distributors need fewer truck drivers, clerks, and warehouse staff. NACD estimates about 10 chemical distributor jobs could be lost because of the fees proposed. Although small, this would lead to a total of nearly 50 lost jobs in the industry overall, once the impacts are felt on those who depend on re-spending by supplier and other trading partner employees.

Paperwork/Hourly Burden Impacts

EPA estimates the burden for rule familiarization and fee payment to be 0.5 hours each for all firms and that a portion of firms will spend an additional 0.5 hours reviewing the "small business concern" size definition. An estimate of 0.5 hours for rule familiarization is wildly underestimated. The rule itself is 24 pages in the *Federal Register*, and this is the first time EPA is charging fees for Section 4 and Section 6 activities. EPA seems to assume businesses aren't looking closely at new fees charged by the government, some of which are upwards of one million dollars. NACD estimates that approximately two hours is the minimum time necessary for rule familiarization.

Further, EPA lumps together rule familiarization and fee payment in the same category, which is also underestimated. EPA does not attempt to explain its estimate of how much the fee payment could be or how many times the firm might be expected to make a payment. It is expected some firms will have to make multiple payments

throughout the year; however, this is not included in EPA's economic analysis. NACD estimates that fee payment would take approximately 0.5 hour per payment with an initial set-up time of two hours per firm.

Cost Impacts (not associated with user fees)

EPA estimates the total industry costs annually (not including the cost of fees) for TSCA Sections 4, 5, and 6 to be $59,456. This is calculated by adding together the Section 4 Industry Burden estimate of $25,362, the Section 5 Industry Burden estimate of $30,232, and the Section 6 Industry Burden estimate of $3,862. This estimate does not include the costs of organizing and maintaining consortia, which is an inherent requirement of the rule and should be included in the agency cost estimates. NACD recommends EPA review the cost impact estimate to include other activities that will impact the cost to firms.

NACD Supports an Employee-Based Standard for The Small Business Concern Definition

EPA is required under LCSA to evaluate the definition of small manufacturer and consult with the Small Business Administration (SBA) on an update to the definition. EPA is also required to establish lower fees for small businesses. EPA has chosen to suggest a definition for "small business concern" within the TSCA fees rule but has not yet proposed an updated definition for "small manufacturer" as its relates to the TSCA Section 8(a) reporting regulations. In the proposed rule, EPA has requested feedback on whether a receipts-based or employee-based definition is more appropriate and suggests the two definitions could be harmonized in subsequent rulemaking.

NACD is concerned by this line of thought for several reasons. First, EPA is making a straightforward process unnecessarily complicated. EPA should have proposed the updated definition for small manufacturer for TSCA Section 8(a) prior to the proposal of the TSCA user fees rule or simultaneously with the rule. Then the agency could have used that definition and the comments on the definition to inform their establishment and research into the small business fees that would be appropriate to charge under TSCA user fees rule. The agency could also have had a better understanding of how many businesses would qualify for the definition of "small business concern." Then EPA could have used the revised definition in its projections of how much revenue the agency could collect, how many applications to expect, etc.

Instead, EPA has proposed yet another definition relating to small businesses under TSCA to apply to fee collection activities. It is unclear why EPA thinks that multiple different definitions of "small business," each pertaining to a different portion of TSCA, could be helpful to small businesses already struggling to understand the regulations. To reiterate, in NACD's comments to EPA on TSCA user fees April 7, 2016, we stated, "These two issues are inextricably linked, and EPA should revise the definition of small manufacturer synchronously when determining a fee structure for small businesses."

EPA has proposed to define a small business concern as any company with average annual sales over three years of less than $91 million, when combined with the parent company. The agency also published a Supplemental Analysis of Alternative Small Business Size Standard Definitions and their Effect on TSCA User Fee Collection (Analysis). The Analysis primarily compares the use of the SBA's variable employee-based definitions based on the NAICS code

and EPA's receipts-based $91 million definition. SBA's variable employee-based definitions have different figures for the potentially affected 33 NAICS codes that could be included under the rule. For example, NAICS Code 424690 - Other Chemical and Allied Product Merchant Wholesalers would qualify under the definition if those firms have less than 150 employees. NAICS Code 424710 - Petroleum Bulk Stations and Terminals would qualify under the definition if those firms have less than 200 employees. The analysis also compares a general SBA fixed employee-based definition of less than 500 employees for all affected NAICS codes.

SBA's variable employee-based definitions are superior in several regards and NACD strongly suggests EPA use the variable SBA employee-based definitions in the TSCA user fees final rule. 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. EPA's receipts-based definition proposes a single $91 million standard that would impact 33 different NAICS industries.

Further, the SBA definition will capture more firms under the small business definition, but not at an amount that should cause EPA to revisit the fees structure proposed under the rule. EPA estimates that if the agency were to switch to the SBA variable definitions, the total annualized fee revenue lost would be $211,000. EPA argues that this loss of $211,000 would be enough that the agency would need to alter the fee structure and/or change the proposed fee amounts. EPA also preemptively argues that the agency would need to raise Section 5 fees (where it expects to lose the most) for Pre-Manufacture Notice/Microbial Commercial Activity Notice/Significant New User Notice by $413 and the general fee for Exemptions by $122. Although it is the opinion of NACD that the loss of $211,000 does not necessitate additional fees and that EPA's concerns are exaggerated, NACD is willing to consider these increases should EPA proceed with the SBA employee-based definition.

Finally, EPA consulted with SBA in developing the rule, and SBA recommended EPA consider the employee-based definition. SBA's March 28, 2018, letter to EPA states, "SBA also suggests the EPA, although not subject to section (3)(a)(2)(C) of the Small Business Act, should consider establishing an employee-based size standard for the impacted industries and varying the standard from industry to industry, to the extent possible to reflect differences among the affected industries."

EPA argues that an employee-based standard would require more thorough investigation on EPA's part to confirm the NAICS code and audit employee counts. We think it would be just as difficult for EPA to verify sales totals for a receipts-based standard. Additionally, EPA may already have data that it can use to estimate employee numbers from the Emergency Planning and Community Right to Know (EPCRA) Tier II reports. EPA should use any data it already has available from EPCRA Tier II reports and other sources to corroborate data when a company claims that it is a small business concern for TSCA purposes.

Additionally, EPA suggests harmonization of the Section 8(a) definition of small manufacturer and the user fees definition of small business concern could take place in the next three-year cycle of FY2022-2025, when it should happen much sooner. EPA does not offer reasoning for using the next three-year cycle of FY2022-2025 to harmonize the definitions; therefore, NACD recommends EPA immediately release the proposed definition on TSCA Section 8(a) and begin the harmonization process now instead of waiting three or four years. NACD strongly supports

the SBA variable employee-based size standard for both the small manufacturer definition and the small business concern definition.

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

NACD was disappointed in EPA's decision not to hold a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel on the TSCA user fees rule. Although EPA has established small business fees and consulted with SBA as appropriate during the development of this rule, the agency would have significantly benefitted from an SBREFA panel to gather further information from small businesses on the structure of this rule.

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 transparent and fair fee system.

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,

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