

August 10, 2018

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National Center for Environmental Economics  
Office of Policy  
1200 Pennsylvania Avenue, NW  
Mail Code 1809T  
Washington, DC 20460  
Via Electronic Filing at <http://www.regulations.gov>

**RE: Increasing Consistency and Transparency in Considering Costs and Benefits In the Rulemaking Process, Advanced Notice of Proposed Rulemaking, Docket No. EPA-HQ-OA-2018-0107 (June 13, 2018)**

Dear Ms. Kopits:

The National Association of Chemical Distributors (NACD) submits the following comments in response to the advanced notice of proposed rulemaking published by the U.S. Environmental Protection Agency (EPA) regarding docket no. EPA-HQ-OA-2018-0107, Increasing Consistency and Transparency in Considering Costs and Benefits In the Rulemaking Process.

#### 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 family owned and multi-generational.

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 Supports EPA's Initiative to Improve Consistency and Transparency in Considering Costs and Benefits

NACD is strongly supportive of EPA's advanced notice of proposed rulemaking (ANPRM) regarding a potential standard, guidance, or regulation on how EPA conducts cost-benefit analyses. There is a strong need for consistent application of how costs and benefits are calculated within EPA. Our responses to EPA's questions within the ANPRM follow.

NACD Responses to EPA's Questions

**A. The Nature of Potential Concerns Regarding Perceived Inconsistency and Lack of Transparency**

1. EPA requests more information about the nature and extent of the concerns relating to possible inconsistency and lack of transparency in considering costs and benefits in the rulemaking process. The most helpful comments would provide specific examples with context and specify relevant statutory provisions. What impact could greater consistency or transparency have on regulated entities, states, tribes, and localities, and the public?

A good example of how EPA rushed a significant rulemaking through the process and did not weigh costs fully against potential benefits was the Risk Management Program (RMP) Amendments rulemaking, which culminated with the release of a final rule January 13, 2017, in the last week of a presidential administration. EPA convened a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel on the RMP Amendments in late 2015, but this process was flawed. Two NACD members participated as small entity representatives (SERs) and reported that the process wasn't a typical SBREFA panel. EPA established a compressed meeting and call schedule and subsequently moved the first meeting up by two weeks, which precluded some SERs, including one of NACD's members, from participating. In addition, EPA provided confusing cost estimate information to the panel and did not provide adequate time for the SERs, who have their own full-time jobs, to digest it. EPA then sent the proposed rule to the White House Office of Management and Budget (OMB) for review before the SBREFA panel issued its report.

After OMB review, EPA published the RMP proposed rule on March 14, 2016, and provided only 60 days for comment on a complex proposal that would have had a major impact on regulated facilities. In the proposed rule, EPA sought comments on more than 70 explicit topics. In addition, there were more than 300 supporting documents, including a 147-page regulatory impact analysis. EPA denied numerous requests for an extension of the comment period, including NACD's. All these activities gave the impression that the agency considered its self-imposed deadline to publish a rule more important than a full consideration of the costs and benefits for small businesses.

The RMP rulemaking, which is now rightfully under reconsideration, is just one example of EPA rushing through the regulatory process in a manner that was inappropriate. Another example, as discussed in numerous other NACD comments to the agency, is that the definition of 'small business' or 'small manufacturer' is not consistent across EPA rules. Overall, greater consistency would have a significant impact upon regulated entities and ensure the agency meets its statutory obligation to consider the impact upon small businesses.

**B. Potential Approaches for Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process**

1. What would increased consistency look like?

EPA should hold itself accountable, to the extent that it can, for the consistency with which it applies the regulations it promulgates. EPA should also be held accountable by Congress and by the public for the quality and consistency of the rulemaking. Our industry greatly values the rulemaking process, which is why consistency in rulemaking is so

important. One way EPA could increase consistency would be to be more receptive in considering cost estimates provided by industry that are based on real data.

2. What would improved transparency look like?

EPA should document how the agency has reviewed the requirements of a regulation and determined that they are not overlapping or inconsistent with other regulations. EPA should also document how the agency verified that the information the agency wishes to collect from a group of respondents is not already collected elsewhere within EPA or is not easily accessible from the public records of other agencies, such as the U.S. Census Bureau or Customs and Border Protection. Additionally, EPA must provide ample time for industry and other stakeholders to review any document, rulemaking, or information request for which EPA has established a need.

3. To what extent would requiring a systematic retrospective review element in new regulations help to provide ongoing consistency and transparency in how regulatory decision making will adapt over time to new information?

NACD cautiously agrees that a systematic retrospective review element in new regulations could provide ongoing feedback to help the agency adapt over time to current information. EPA should carefully consider such a mechanism and allow ample time for industry and other stakeholders to review the benefits and drawbacks of this new element. If EPA considers this method, the agency should refer to prior rulemakings when conducting a retrospective review, and specifically the preambles to rules which identify the need or cause of the rule. EPA should also review the comments and responses associated with the rule to understand better industry's perspective. Only after doing this will EPA be able to understand the cause and expected effects of any current rulemaking and determine if a change is warranted.

**C. Potential for Issuing Regulations To Govern EPA's Approach for Future Regulations**

1. What are the most pressing economic or legal considerations that should be taken into account when deciding the appropriate level of specificity (all activities, by statute, by specific statutory provision) at which to formulate regulations?

EPA as well as other agencies should consider all the cost impacts of a rule upon industry as well as the cost impact to downstream stakeholders. Currently, regulatory costs are based on very conservative estimates with no examination of the larger impact of how costs are accumulated.

2. What are the opportunities and challenges with issuing regulations to govern EPA's practice when statutory provisions do not mention costs or imply these are factors to be considered alongside benefits and other factors when setting pollution standards?

There is an opportunity for agency, industry, and other stakeholders to work together to determine how costs should be considered. In order to do this, EPA must listen to industry and establish rules that fairly consider industry concerns.

3. How can EPA best promote more consistency and predictability while still leaving room for consideration of regulatory context and for flexibility to adapt to new information and methodological advances?

NACD recommends that the goal of increased consistency and transparency should be an ongoing process and not end abruptly with the promulgation of a rule or the release of guidance. Whether the result is a new guidance or regulation, EPA should consistently strive to provide better information about how the agency conducts cost-benefit analysis.

Further, the agency should remain aware that the establishment of a new standard will be a process that requires significant public input and considerable time on the part of commenters. EPA should allow 90-day comment periods for the review of any guidance or regulations resulting from this ANPRM.

4. In cases where current EPA practice reflects prior judicial decisions, a change in course may come with significant burden to the agency. Is there a way to address this concern in regulations governing the consideration of costs and benefits?

In the event that the agency must implement rules due to judicial decisions, EPA must be required to go through the rulemaking process as normal. Any accelerated timeline would likely result in unacceptable compromises by either the agency or industry.

5. Are there ways to improve consistency and transparency using methods other than a regulatory approach (e.g., additional guidance)? What are the opportunities and challenges associated with these approaches?

NACD recommends EPA strive to improve consistency and transparency through guidance in lieu of regulation. In this case, EPA is seeking to establish new standards for its own internal rulemaking and it would be difficult for an agency to self-regulate. Additionally, the agency should consider the role the Government Accountability Office or EPA's Office of Inspector General could have in reviewing EPA's consistent application of its cost-benefit standards in the development of rules.

6. Are any of the opportunities and challenges identified above specific to a particular statute or statutes?

SBREFA requires covered agencies, including the EPA, to conduct a Small Business Advocacy Review Panel for most proposed rules unless the agency can certify that a rule will not have a significant economic impact on a substantial number of small entities (SISNOS). The panel, commonly known as an SBREFA panel, provides an opportunity for small entities to provide advice and recommendations to ensure EPA considers small business concerns. As EPA is aware, regulatory cost is a huge concern for small businesses, which links the SBREFA statute closely with EPA's new cost-benefit initiative. Although EPA is only required to conduct a panel when there is SISNOS, the actual evaluation of whether SISNOS could occur is left up to EPA. Therefore, EPA itself determines if the agency needs to take one additional step prior to the publication of a proposed rule.

NACD recommends that EPA could outsource the step of determining SISNOS outside the agency and into the Small Business Administration (SBA). SBA has the capability to conduct such an analysis, and this removes the incentive from EPA to make a finding that reduces EPA's own administrative burden. SBA could conduct an objective analysis to determine if SISNOS is met and then pass the results on to EPA. Although the final decision of SISNOS rests with EPA per the SBREFA statute, EPA could make SBA's analysis publicly available and thereby dramatically increase accountability at EPA.

NACD also strongly suggests that whenever an EPA rule involves the administration of fees, such as the recent User Fees for the Administration of the Toxic Substances Control Act proposed rule, the agency should automatically conduct an SBREFA panel, regardless of SISNOS. Any fee collection has a direct and substantial cost impact upon businesses large and small.

### Conclusion

NACD thanks EPA for addressing the need for consistent cost-benefit analysis in regulations. EPA should continue to obtain further industry input to help create a cost-benefit standard that is workable, sensitive to small businesses, and transparent. NACD recommends EPA continue to request public input as the agency develops any new standard.

Finally, NACD especially urges EPA to continue working closely with SBA throughout the rulemaking process (should a new rule be proposed) as EPA is developing a new cost-benefit standard, given SBA's expertise with small businesses and the disproportionate impact that regulations have upon small entities. We look forward to the development of guidance or a regulation that creates a more consistent and transparent cost-benefit standard for EPA regulations.

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

Sincerely,



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