Via electronic delivery

June 24, 2019

Alexandra Dapolito Dunn, Assistant Administrator
Office of Chemical Safety and Pollution Prevention
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460–0001

Re: TSCA Chemical Data Reporting Revisions and Small Manufacturer Definition Update for Reporting and Recordkeeping Requirements under TSCA Section 8(a) (EPA-HQ-OPPT-2018-0321)

Dear Assistant Administrator Dunn,

The Institute of Scrap Recycling Industries, Inc. (ISRI) would like to submit the following comments in response to EPA's notice for public comment on its proposed rule, "TSCA Chemical Data Reporting Revisions and Small Manufacturer Definition Update for Reporting and Recordkeeping Requirements under TSCA Section 8(a)" (EPA-HQ-OPPT-2018-0321) (84 Fed. Reg. 17692–17727, April 25, 2019; henceforth, "the Proposal").

ISRI is the "Voice of the Recycling Industry". With headquarters in Washington, DC and 21 chapters nationwide, ISRI represents approximately 1,300 companies operating in nearly 4,000 locations in the U.S. and 41 countries worldwide that process, broker, and consume scrap commodities, including metals, paper, plastics, glass, rubber, electronics, and textiles. ISRI provides education, advocacy, safety and compliance training, and promotes public awareness of the vital role recycling plays in the U.S. economy, global trade, the environment and sustainable development. Producing more than $117 billion in U.S. economic activity in 2017, the scrap recycling industry provides nearly half a million Americans with good jobs.

ISRI's comments below address reporting of imported scrap metal, reporting of metal-melting byproducts that are chemically converted back to their original metallic state, and the revised definition of "small manufacturer".

Background

Effective February 6, 2003[1], EPA revoked the full exemption for inorganic chemical substances from then-Inventory Update Rule (IUR) reporting (now Chemical Data Reporting (CDR)). At that time, some ISRI member companies suddenly became subject to the reporting requirements of IUR/CDR only because they imported for recycling 25,000 pounds or more of scrap metal by metal type (e.g., steel, aluminum, or copper) to one of their U.S. facilities (maybe only facility) during a calendar year.

Under the CDR definition of "manufacture" in 40 CFR §711.3, importing scrap metal for recycling constitutes manufacturing while recycling of domestically sourced scrap metal by mechanical, physical, or manual processes does not for lack of chemical reaction during the recycling process. With chemical reaction being the determinant of manufacturing (besides importing), any facility has the potential to be a chemical manufacturer for CDR purposes, regardless of whether the facility is actually in the chemical manufacturing industry by NAICS or SIC Code.

Importing is the main, but not only, reason why an ISRI member company would be considered a manufacturer for CDR purposes and be required to report. For recyclers of scrap metal, the annual facility threshold of 25,000 pounds (12.5 tons) is effectively zero (henceforth, it is assumed that this reporting threshold has been exceeded). Small recycling facilities can receive 25,000 pounds of scrap metal in one (partial) truckload and process it in less than one day.

In many (if not most) cases, imported scrap metal is composed of articles that have reached their end of use or life (e.g., aluminum cans, vehicles, and appliances). If those articles had first been imported into the U.S., they would have been exempt from reporting at 40 CFR §711.10(b). These unreported imported articles would eventually become domestically sourced scrap metal at their end of use or life. Their subsequent recycling in the U.S. by mechanical, physical, or manual processes (namely, without chemical reaction) would produce specification-grade scrap-metal commodities available for purchase by consuming facilities (e.g., electric arc furnaces) for use as feedstock to produce "new" metal products. These specification-grade scrap-metal commodities would not be reportable under CDR because their production does not constitute manufacturing for CDR purposes (no chemical reaction). When consuming facilities melt down these feedstock scrap-metal commodities to produce "new" metal products, these products are also not reportable because melting metal does not constitute manufacturing for CDR purposes (also no chemical reaction).

[1] 68 Fed. Reg. 847-906, January 7, 2003.

It makes no sense that importing scrap metal is the only reportable activity under CDR related to recycling of scrap metal. ISRI has requested in previous comment submissions to EPA[2,3,4] that importing of scrap metal be provided an exemption from reporting under CDR. Reporting of imported scrap metal is a regulatory accident, provides no useful information to EPA, and is of low priority to EPA.

In the case of consuming facilities, some of which are owned by ISRI members, CDR also creates a nonsensical situation when byproducts are formed during the metal-melting process. If the process also produces an inadvertent metal-oxide byproduct, its creation constitutes manufacturing for CDR purposes because it involves chemical reaction. After its separation from the "new" metal (main) product, chemical conversion of the metal-oxide byproduct back to metal also constitutes manufacturing for CDR purposes. Both the metal-oxide byproduct and the metal derived from the metal-oxide byproduct are reportable under CDR while the "new" metal (main) product is not reportable. However, the net process here is feedstock metal to "new" metal product, as the metal-oxide byproduct no longer exists after chemical conversion back to metal.

In this byproduct situation for consuming facilities, CDR requires reporting of two chemical substances: the metal-oxide byproduct derived from the feedstock metal and the feedstock metal that was chemically liberated from the metal-oxide byproduct. Yet the same net process—feedstock metal directly to "new" metal (main) product—does not require reporting.

However, if the metal-oxide byproduct is sent to a landfill for disposal instead of being chemically converted back to metal, reporting of the byproduct is not required under CDR because of an exemption at 40 CFR §720.30(g) via 40 CFR §711.10(c). Thus, CDR favors disposal of a byproduct over its chemical conversion back to its original state and penalizes the latter via a reporting obligation.

This CDR situation for metal-melting byproducts also makes no sense. ISRI previously submitted comments on this[5] and was later invited to participate in the CDR Inorganic Byproducts Negotiated Rulemaking Committee pursuant to TSCA Section 8(a), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act.

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[2] ISRI's Comments on "TSCA Inventory Update Reporting Modifications, Proposed Rule", October 12, 2010; EPA-HQ-OPPT-2009-0187-0351.
[3] ISRI's Comments on "Notice of Intent to Negotiate— Chemical Data Reporting Requirements for Inorganic Byproduct Chemical Substances", January 17, 2017; EPA-HQ-OPPT-2016-0597-0022.
[4] ISRI's Comments on "Evaluation of Existing Regulations", May 15, 2017; EPA-HQ-OA-2017-0190-56238.
[5] ISRI's Comments on "Notice of Intent to Negotiate— Chemical Data Reporting Requirements for Inorganic Byproduct Chemical Substances", January 17, 2017; EPA-HQ-OPPT-2016-0597-0022.

While imported scrap metal and metal-melting byproducts have been reportable under CDR since 2003, CDR does offers an exemption from reporting at 40 CFR §711.9 to any person that qualifies as a "small manufacturer" as defined in 40 CFR §704.3. However, ISRI member companies do not usually meet the applicable CDR definition of "small manufacturer or importer" at 40 CFR §704.3, despite often qualifying as a "small business" under the Small Business Administration's definition for NAICS 423930 (Recyclable Material Merchant Wholesalers) at 13 CFR §121.201 (i.e., up to 100 employees). The "small manufacturer or importer" criteria—either annual company sales less than $40M with a 100,000-pound limit on annual facility quantity or annual company sales less than $4M without any annual limit on facility quantity—are simply too low to provide regulatory relief from reporting to small recyclers of scrap metal. ISRI previously submitted comments on this[6], requesting increases in the above dollar and quantity thresholds.

Comments

Following the background above, ISRI's comments below focus most heavily on the reporting of imported scrap metal. ISRI also offers comments on the reporting of metal-melting byproducts that are chemically converted back to their original metallic state and the revised definition of "small manufacturer".

1. **EPA must establish and make effective before the 2020 reporting period for CDR a reporting exemption for an imported chemical substance if the same domestic chemical substance under the same circumstances is not reportable or is exempt from reporting because EPA has been misapplying for CDR purposes the definition of "manufacture" respecting "import", of which required reporting of imported scrap metal is a prime example.**

First, ISRI is disappointed that EPA did not address at all in the Proposal the existing problem with required reporting of imported scrap metal, despite ISRI's recent requests for regulatory relief from reporting of imported scrap metal[7,8]. EPA had the ability to do so in the Proposal. EPA's failure to address it is arbitrary, if not capricious.

[6] ISRI's Comments on "TSCA Reporting and Recordkeeping Requirements—Standards for Small Manufacturers and Processors", January 17, 2017; EPA-HQ-OPPT-2016-0675.
[7] ISRI's Comments on "Evaluation of Existing Regulations", May 15, 2017; EPA-HQ-OA-2017-0190-56238.
[8] EO 12866 Meeting 2070-AK33, February 26, 2019.

As it stands, the existing reporting situation for imported scrap metal results from TSCA's definition of "manufacture" at 15 USC §2602(9):

> *(9) The term "manufacture" means to import into the customs territory of the United States (as defined in general headnote 2 of the Tariff Schedules of the United States), produce, or manufacture.*

The CDR definition of "manufacture" in 40 CFR §711.3 is similar:

> Manufacture *means to manufacture, produce, or import, for commercial purposes. Manufacture includes the extraction, for commercial purposes, of a component chemical substance from a previously existing chemical substance or complex combination of chemical substances.*

Either definition of "manufacture" is a curious because "import" is very different than "produce" or "manufacture". Why was "import" included in the definition?

Logically, the reason for the inclusion of "import" in the definition of "manufacture" cannot be related to some kind of national "mass balance" on a chemical substance. If that were the case, the definition would also have included "export" and "consumption". With these terms added to the definition, a current national inventory on a chemical substance could be maintained by accounting annually for imports (+/in), exports (-/out), production/manufacturing (+/in), and consumption (-/out), given an initial chemical-substance inventory in a base year. The reason for including "import" in the definition must be something else.

The history of TSCA's definition of "manufacture" is instructive. An early definition of "manufacturer" can be found in a bill "[t]o amend, the Federal Hazardous Substances Act, as amended, and for other purposes" to create an "Act [that] may be cited as the Toxic Substances Control Act of 1971"[9]. In "Title II—Toxic Substances" of the pending TSCA of 1971, the following definition was provided:

> *(c) 'Manufacturer' means any person engaged in the production or manufacture of chemical substances for purposes of sale or distribution in commercial quantities, or an importer thereof.*

[9] "The Toxic Substances Control Act of 1971 and Amendment: Hearings Before the Subcommittee on the Environment of the Committee on Commerce, United States Senate, Ninety-Second Congress, First Session on S. 1478, To Amend the Federal Hazardous Substances Act, as Amended, and for Other Purposes"; August 3, 4. 5; October 4, and November 5, 1971; Part 1 of 3 Parts, Toxic Substances, Serial No. 92-50.

It is interesting that in this early definition, "importer" came at the end in its own set-off phrase, as if subordinate to "production or manufacture". Witness testimony before the Subcommittee on the Environment of the Senate Committee on Commerce is clarifying.

Russell E. Train, then-Chairman of the Council on Environmental Quality and then-future EPA Administrator, "testified in support of S. 1478, the Toxic Substances Control Act of 1971" and had the following exchange with Senator Spong, a member of the Subcommittee on the Environment[10] (emphasis added):

> *Senator SPONG. Under S. 1478 and the amendment exports are excluded from coverage unless the substance exported presents a hazard to people of this country. Many have said that we ought not to inflict hazards on others that we would not accept ourselves. How do you answer that argument? I am referring to section 211(a) in your bill and 213 (a) in my amendment.*
>
> *Mr. TRAIN. I am glad you agree with the administration's bill.*
>
> *Senator SPONG. I do. We have it in there for discussion today.*
>
> ***Mr. TRAIN. I think that this certainly is a subject of considerable debate. We have as a general rule tried to avoid any impression that the setting of standards in this country—environmental standards—constitutes a hidden trade barrier. So I think we tend to avoid where possible the imposition of restrictions on the free flow of trade as a result of environmental factors.***
>
> ***Of course, on the import side the very nature of the public policy would be negated if you permitted imports to come in which did not meet our standards while our own manufacturers had to meet those standards. That reason does not apply to exports. What we are trying to do here is meet a public policy desire on the part of the American people—other peoples may—this is a somewhat philosophical approach—other peoples may have different standards that they are interested in, and I think there is a considerable feeling that we should not impose our standards on others.***

This exchange clearly demonstrates that the purpose of including "import" in the definition of "manufacture" is to maintain a balance of TSCA requirements across the U.S. border[11]. If a TSCA requirement applies to a chemical substance produced in the U.S., then that TSCA

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[10] *Id.* at 73.

[11] U.S. border here means the boundary of "the customs territory of the United States (as defined in general headnote 2 of the Tariff Schedules of the United States)", as defined in 15 USC §2602(9).

requirement also applies to imports of that same chemical substance produced by a non-U.S. manufacturer. The converse would also be true, especially given the desire to "avoid where possible the imposition of restrictions on the free flow of trade": If a TSCA requirement does not apply to a chemical substance produced by a U.S. manufacturer, that same TSCA requirement does not apply to imports of the same chemical substance produced by a non-U.S. manufacturer.

The exchange also explains why "exports" are not included in definition of "manufacture". Exports do not entail, as imports do, the issue of balance of TSCA requirements across the U.S. border. This exchange further rules out a mass-balance rationale for the definition of "manufacture".

Maintaining a balance of TSCA requirements across the U.S. border by imposing or not imposing requirements on imports is completely reasonable. Such reasonability fits within the EPA Administrator's discretion under TSCA Section 8 respecting promulgation of reporting rules "as the Administrator may reasonably require"[12].

However, EPA does not seem to understand this purpose for "import" being included in the CDR definition of "manufacture" and thus does not apply this definition in the intended manner. EPA simply sees that the definition of "manufacture" includes "import" and applies CDR from there.

EPA's automatic application of reporting to imported chemical substances under CDR is incorrect. Because the intended principle regarding imports is balance of TSCA (including CDR) requirements across the U.S. border, the proper application of CDR to an imported chemical substance hinges on whether the same domestic chemical substance in the same circumstances has CDR requirements. Because recycling of domestically sourced scrap metal is not reportable under CDR, importing scrap metal for recycling should also not be reportable under CDR. EPA's error in applying CDR automatically to imports alone explains the CDR oddity that imported scrap metal is reportable under CDR but not the recycling of domestically sourced scrap metal. This outcome is wrong and inconsistent with the intent of TSCA respecting imports.

Given that the original purpose of "import" being included in the definition of "manufacture" is to maintain balance of TSCA requirements across the U.S. border and given the EPA Administrator's discretion for reporting rules in TSCA Section 8, EPA must create a CDR exemption from reporting for an imported chemical substance if the same domestic chemical substance in the same circumstances is not reportable or is exempt from reporting. This new exemption must take effect before the 2020 reporting period for CDR.

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[12] 15 USC §2607(a)(1)(A).

2. EPA should establish and make effective before the 2020 reporting period for CDR exemptions from reporting for both metal-melting byproducts that are converted back to their original metallic state and the resulting metal derived from these byproducts.

First, ISRI is disappointed that EPA did not address at all in the Proposal the existing reporting situation for metal-melting byproducts. ISRI participated in the CDR Inorganic Byproducts Negotiated Rulemaking Committee for the purpose of seeking regulatory relief from reporting. EPA had the ability to provide relief in the Proposal even as it provided relief for some of the other inorganic byproducts represented in the Committee. EPA's failure to do so in the Proposal seems arbitrary.

As it stands, metal-melting byproducts are reportable under CDR if chemically converted back to the metal from which they originated in the metal-melting process by inadvertent chemical reaction. However, these same byproducts are not reportable if instead sent to a landfill for disposal under an exemption at 40 CFR §720.30(g) via 40 CFR §711.10(c). Here, CDR provides a perverse disincentive to conserving natural resources by imposing CDR requirements on an activity that conserves natural resources but imposing no requirements on an activity that wastes natural resources. This situation should concern EPA from a policy perspective.

Both the metal-melting byproducts and the metal derived from them are reportable even though the net process for these is feedstock metal to "new" metal product. The byproducts no longer exist and are effectively intermediates, consistent with the definition at 40 CFR §720.3(n). At the same time, melting of feedstock scrap-metal commodities into "new" metal (main) product—the same net process—requires no reporting because it does not constitute manufacturing for CDR purposes for lack of chemical reaction. Therefore, it is reasonable that no reporting should be required for both melting feedstock metal to "new" metal (main) product (currently not reportable) and chemically converting inadvertent metal-melting byproducts back to their original metallic state (currently twice reportable, byproducts and resulting metal).

For these reasons, ISRI believes that EPA should provide CDR exemptions from reporting for both metal-melting byproducts that are converted back to their original metallic state and the resulting metal derived from these byproducts. These new exemptions should take effect before the 2020 reporting period for CDR. ISRI's request is reasonable given the similarity of these requested exemptions to the current exemption for any nonisolated intermediate at 40 CFR §720.30(h)(8) via 40 CFR §711.10(c) and the proposed new exemptions in 40 CFR §711.10(c)(3) for byproducts produced in certain equipment not integral to the chemical manufacturing process.

3. While ISRI appreciates EPA's proposal to increase nearly threefold the annual company sales thresholds for a "small manufacturer", these proposed increases, coupled with no change in the existing 100,000-pound limit on annual facility quantity, are unlikely to provide regulatory relief from reporting to small scrap metal recyclers.

In previous comments about the definition of "small manufacturer or importer"[13], ISRI requested that EPA increase both the outdated dollar thresholds of $40M and $4M for annual company sales and the annual facility quantity limit of 100,000 pounds.

As ISRI noted in early comments[14], the original IUR/CDR regulations were almost certainly developed for production of organic chemicals, rather than inorganic chemicals, which were exempt from reporting under IUR/CDR until 2003. Thus, the definition of "small manufacturer or importer" likely reflected the attributes of manufacturers of organic chemicals. These dollar and quantity thresholds presumably reflected and favored industries that manufacture small volumes of many different organic chemicals.

In contrast, these thresholds are not favorable to ISRI member companies that recycle scrap metal. Scrap metal recyclers annually process high volumes of relatively few types (by element) of scrap metal, which is much denser than organic chemicals, and have small operating margins. Processing high volumes of scrap metal annually tends to create larger annual company sales even as annual company profits are relatively small due to small margins. The proposed (and existing) annual facility quantity limit of 100,000 pounds is inconsistent with high-volume industries, such as scrap metal recycling. From a delivery perspective, 100,000 pounds (50 tons) of scrap metal can be delivered to a small facility in one day in several truckloads. For scrap metal recycling, 100,000 pounds is not meaningful operationally.

As above regarding the definition of "manufacture", the history of TSCA is instructive regarding the definition of "small manufacturer or importer". The following excerpts come from testimony provided by different chemical manufacturing companies during Senate hearings in 1975 on pending TSCA legislation (emphasis added)[15]:

> *We are a relatively large company in the specialty field. We employ over 2,300 people in 24 manufacturing locations and research locations in the United States and the world.*

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[13] ISRI's Comments on "TSCA Reporting and Recordkeeping Requirements—Standards for Small Manufacturers and Processors", January 17, 2017; EPA-HQ-OPPT-2016-0675.
[14] ISRI's Comments on "TSCA Inventory Update Reporting Modifications, Proposed Rule", October 12, 2010; EPA-HQ-OPPT-2009-0187-0351.
[15] "Toxic Substances Control Act: Hearing Before the Subcommittee on the Environment of the Committee on Commerce, United States Senate, Ninety-Fourth Congress, First Session on S. 776 to Regulate Commerce and Protect Human Health and the Environment by Requiring Testing and Necessary Use Restrictions on Certain Chemical Substances and for Other Purposes"; October 24, 1975; Part 2, Serial No. 94-24.

> *We have come up with about 130 new products per year, only five of which are sold in large volume.* ***Large volume is when you get to 800,000 or 900,000 pounds per year. The typical product is well below 100,000 pounds per year volume.*** (p. 118)
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> *We would also request that some definitions be included in the bill which would define* ***the economics that the EPA Administrator is supposed to consider, such as if 100,000 pounds of a product is the maximum to be used*** *and the use were defined, and restricted, that the testing would by definition be limited to such things as the appropriate acute toxicity studies.* (p. 119)
>
> *You have already heard many major chemical manufacturers review the effects of this legislation. Most of these remarks are directed at large volume commodity chemicals. The effect of S. 776 on the specialty chemical company would be even more dramatic.*
>
> ***A specialty chemical manufacturer typically has a wide line of low volume products sold for specific applications. It is not unusual for the majority of such products to be sold in volumes of less than 100,000 pounds per year, as opposed to the commodity chemical producer's high volume products of millions of pounds annually.*** (p. 120)
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> ***A manufacturer of small volume specialty chemicals (those products designed to perform a special function and selling less than 100,000 pounds per year)*** *should be required to perform only the five major acute toxicity studies normally utilized, assuming no problems are revealed by these studies.* (p. 121)

These excerpts demonstrate that the 100,000-pound limit for annual facility quantity in the definition of "small manufacturer or importer" was based on the attributes of specialty organic chemical companies. For such entities, 100,000 pounds of a chemical substance is a meaningful annual operational quantity. In contrast, 100,000 pounds is operationally meaningless to even small scrap metal recyclers. This is a critically important distinction.

While the 100,000-pound limit may have made sense during the time when inorganic chemical substances were exempt from reporting under IUR/CDR (before 2003), that threshold does not make sense today and has not made sense since 2003 when manufacturers and importers of inorganic chemical substances became subject to reporting under IUR/CDR.

For its Proposal, EPA's review of the definition of "small manufacturer" and evaluation of alternative criteria for this definition did not explicitly consider these differences between small manufacturers of organic chemical substances and small manufacturers of inorganic chemical substances, especially scrap metal recyclers. As a result, EPA's proposed revised CDR definition of "small manufacturer" is unlikely to provide significant regulatory relief from reporting to small scrap metal recyclers.

In closing, ISRI thanks EPA for this opportunity to provide comment on its proposed rule, "TSCA Chemical Data Reporting Revisions and Small Manufacturer Definition Update for Reporting and Recordkeeping Requirements under TSCA Section 8(a)", and for its consideration of these comments.

If there are any questions or comments, I can be reached at 202-662-8533 or DWagger@isri.org.

Sincerely,

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