

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Comments of Safer Chemicals Healthy Families, et. al. on Proposed User Fees for the Administration of the Amended Toxic Substances Control Act

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Docket ID EPA-HQ-OPPT-2016-0401

Introduction and Summary

These comments on EPA's proposed rule requiring user fees to support implementation of the Toxic Substances Control Act (TSCA) are submitted by Safer Chemicals Healthy Families (SCHF), Natural Resources Defense Council (NRDC), Earthjustice, Center for Environmental Health (CEH), and Environmental Health Strategy Center.¹ Our organizations are committed to assuring the safety of chemicals used in our homes, workplaces and in the many products to which our families and children are exposed each day.

On June 22, 2016, President Obama signed into law the Frank R. Lautenberg Chemical Safety for the 21st Century Act (LCSA) which in key respects improves and strengthens TSCA, the nation's primary chemicals management law. The undersigned organizations took a leadership role during the LCSA legislative process, advocating the most protective legislation possible to reduce the risks of toxic chemicals in use today. We are now participating actively in all phases of LCSA implementation in order to better assure that the new law achieves its purpose of increasing evaluation, testing and regulation of chemicals that may pose unreasonable risks to human health and the environment.

In enacting LCSA, Congress recognized that effective implementation of the new law would require additional resources and that a significant portion of these increased costs should be underwritten by the regulated community. Section 26(b) of amended TSCA therefore imposes new requirements for the payment of "user fees" by manufacturers and processors subject to the Act. The goal of these requirements is to assure that 25 percent of the costs EPA incurs in carrying out sections 4, 5, 6 and 14 is contributed by industry.

EPA is facing a steadily increasing workload under TSCA in 2018 and later years and OPPT managers are already voicing concern about the "stresses" that resource limitations are placing on its ability to deliver on TSCA's mandates. Because of budget constraints, resources are being shifted to the TSCA program from other programs (like Safer Choice) essential to protecting public health, enabling sound purchasing decisions and encouraging innovation in green chemistries. These troubling developments underscore the importance of designing the TSCA fees rule to produce the maximum amount of revenue allowable under the law and establish an efficient and effective collection mechanism that prevents a shortfall in payments. The rule must also allocate responsibility for fees across industry in proportion to the relative contribution of specific chemicals to the potential risks EPA seeks to evaluate and manage under the law and the resource requirements for addressing these risks.

¹ 83 Federal Register 8212 (Feb, 26, 2018)

We believe the February 26 proposal does not achieve these objectives and must be strengthened on several counts. As we discuss in these comments:

- Under the law, EPA must collect fees that defray 25 percent of the total costs of implementing section 4, 5 and 6 and processing CBI claims under section 14. The proposal estimates that these costs will be in the range of \$80 million annually during FY 19-21 and therefore would require industry to pay fees of \$20 million per year. We believe EPA has likely underestimated TSCA implementation costs significantly and that a more realistic analysis would require substantially larger industry fees.
- EPA has also likely underestimated the costs of conducting manufacturer-requested risk evaluations. The result may be that industry gets a “bargain” on these risk evaluations and that the taxpayer subsidizes them despite the intent of Congress to require industry to bear their costs. In addition, if EPA fails to recover all its costs, it could do a low-quality evaluation that is overly favorable to the chemical and its manufacturers in order to save money.
- According to the proposal, at industry’s urging, the fees for section 4 testing orders, rules or consent agreements would be a small fraction of EPA’s actual costs. This would create disincentives for EPA’s use of section 4 because the Agency would have to absorb nearly all of the costs of issuing test rules, consent agreements and orders.
- EPA proposes that fees for PMNs will be the same regardless of the number of CBI claims made by the submitter. EPA should instead increase fees from the base level to reflect the number of CBI claims since these claims will add to the costs of reviewing the PMN. If submitters are charged for CBI claims, they will likely be more judicious in the claims they assert.
- Although the law requires EPA to allocate fees between manufacturers and processors, it proposes to assess fees only on manufacturers and to exempt processors. This will give processors a free ride even where their products (i.e. NMP and MC paint removers) account for a major portion of the risk attributable to a chemical.
- As the proposal is structured, a set fee will be assessed on manufacturers of chemicals undergoing risk evaluations, regardless of whether the chemical is determined to present an unreasonable risk. From a policy standpoint, such chemicals should be subject to an additional fee when they enter rulemaking under section 6(a) since the rulemaking will impose sizable additional costs on EPA directly related to the risks of the regulated chemical.
- EPA should rely on multiple sources in addition to CDR reports to identify companies obligated to pay fees. CDR requirements contain several exemptions and exclusions and compliance is uneven. Because CDR reports are submitted at four-year intervals, they may also lag in identifying changes in a chemical’s manufacturers and importers. Unless EPA

accesses multiple databases, the universe of companies subject to fees will thus be incomplete and some manufacturers will avoid fee payments required by law.

- Although EPA says it intends to collect fees for activities occurring in FY19, its mechanism for fee collection would exempt manufacturers of the 10 chemicals subject to ongoing risk evaluations, despite the high costs these evaluations are placing on the Agency.
- EPA proposes to raise the revenue cap for small businesses to \$91 million per year and then to reduce fees by 80 percent for all small businesses. This is an undue accommodation that fails to recognize that companies with revenues of this magnitude will in fact be able to afford the same fees as larger companies and in many cases may be a substantial manufacturer or processor of a chemical that presents significant risks.
- When EPA reviews fees in 2021, it should not simply make adjustments to account for inflation. Instead, to assure that it is complying with section 26(b), it must reexamine the costs of effective implementation of sections 4, 5, 6 and 14 and assess how well the current fee structure is performing in practice. This assessment may require changes in the fee rule to assure that it is actually recovering 25 percent of the Agency's costs, as required by section 26(b). EPA's review of the fees rule should engage all stakeholders, not just industry.

I. EPA's Proposal Underestimates Likely Costs of Implementing Sections 4, 5, 6 and 14 of TSCA

The law provides that EPA must collect fees that recover 25 percent of the total costs of implementing section 4, 5 and 6 and processing Confidential Business Information (CBI) claims under section 14. The EPA proposal projects that these costs will be \$80.2 million per year and therefore would require industry to pay annual fees of \$20.05 million. 83 Fed. Reg. 8216. Our analysis indicates that EPA has significantly underestimated likely TSCA implementation costs by failing to account fully for the activities and related expenditures necessary for effective implementation of the law. A more realistic and defensible projection of likely implementation costs would be above \$100 million, resulting in greater user fee revenues and more EPA resources with which to accomplish the goals of the law and meet its requirements.

Examples of EPA's underestimation of likely implementation costs include the following:

- The Agency assumes that risk evaluations conducted under section 6(b) will cost an average of \$3.9 million to complete. However, this assumption is based on the costs of risk assessments on Work Plan chemicals under the old law. 83 Fed. Reg. 8218-19. These assessments were narrow in scope, typically focusing on a few chemical uses and a subset of health and environmental end-points. Risk evaluations under the new law will be more comprehensive and encompass both a broader array of uses and the entire set of health and environmental effects attributable to the chemical. Thus, EPA will be required to obtain and examine much more toxicology and exposure data and conduct considerably more analysis. As a result, the costs per evaluation will be significantly higher than EPA assumes.

- EPA assumes that annual costs for risk management under section 6 will be \$6,584,000. 83 Fed. Reg. 8219. Yet the Agency elsewhere indicates that the three section 6 rulemakings for Work Plan chemicals that EPA initiated under the new law have to date incurred average costs of \$2,485,000 per chemical.² Because these rulemakings are not yet complete, their estimated costs are understated. Moreover, given the greater breadth of risk evaluations under section 6(b), subsequent section 6(a) rules are likely to encompass a wider range of uses and end-points than the Work Plan rulemakings, resulting in greater complexity and higher costs. For example, if seven of the 10 chemicals now being evaluated by EPA are determined to present unreasonable risks and rulemakings on these chemicals cost an average of \$4 million, the resulting costs will likely substantially exceed its \$6.5 estimate for all risk management activities under section 6. Moreover, over the next three years, EPA is required by section 6(h) to issue rules reducing exposure to five PBTs and is already in the process of collecting and analyzing data to support these rulemakings. These rulemakings will impose costs equal to if not greater than the costs of rulemakings resulting from the initial risk evaluations. Finally, EPA will continue to devote significant resources to implementing the PCB requirements in TSCA section 6(e) and, as section 6(a) rules become final, will incur costs to act on use exemptions under section 6(g).
- EPA estimates that prioritization under section 6(b) will cost \$2,573,000 annually and require 5.1 Full Time Equivalents (FTEs).³ These estimates greatly understate the level of effort necessary to comply with the requirements of the law. To identify prioritization candidates, EPA must screen a large number of chemicals, EPA must then designate at least 20 high-priority chemicals and 20 low-priority chemicals by the end of 2019 and will likely start evaluating an additional group of prioritization candidates in 2021. For each chemical, EPA must collect information on hazard and exposure from internal databases and public sources. Section 6(b)(1)(C) requires a 9-12 month prioritization process with two rounds of public comment. Thus, EPA will also need to review the information submitted by the public and respond to comments. Moreover, candidates for low-priority listing must be shown by sufficient information to lack the potential for unreasonable risk to health and the environment, requiring a comprehensive analysis of hazard, exposure and risk under the chemical's conditions of use. Assuming 20 high-priority and 20 low-priority designations, EPA's overall cost estimate for prioritization translates into a cost of \$64,000 per priority listing, plainly well short of the resources required to complete the many steps in priority-setting under the law.
- EPA has reduced the total costs of reviewing premanufacture notices (PMNs) under section 5 by 20 percent to reflect an assumed decline in the number of PMN filings based on the increase in fees per submission. However, the only basis provided for the 20 percent reduction is EPA's estimate of a 10 percent decline in PMNs when it initially imposed fees on submitters in 1987. 83 Fed. Reg. 8226. EPA provides no retrospective analysis of the impact of the 1987 fees rules on the actual number of PMN submissions in subsequent years. Nor does it provide any economic rationale for why 20 percent of would-be submitters would decide against filing PMNs under the new fee rule. In the absence of a defensible rationale for assuming a decline in PMN filings, it would be imprudent to rely on this decline to lower

² EPA Technical Background Document for TSCA Fees, December 2017, at 3.

³ *Id.* at 8.

the fees charged industry and jeopardize the Agency's ability to maximize recovery of its TSCA costs. Given EPA's projected cost of \$55,343 per submission, if the number of PMNs did not decline but continued at 2016 levels in future years, EPA's annual section 5 review costs would be \$6,353,060 more than estimated in its rule.

- Adding to this underestimate of the costs of section 5 implementation is EPA's assumption that development of section 5(e) orders and Significant New Use Rules (SNURs) will cost \$1,648,162 and \$1,552,609, respectively.⁴ To date, EPA has issued 399 section 5(e) orders under the new law. <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/statistics-new-chemicals-review> This would translate into a per order cost of \$4,130, an amount that would seem to greatly understate the time and effort required for order development. Moreover, under section 5(f)(4) of the new law, EPA must promulgate SNURs for all 5(e) chemicals or justify its decision not to do. Assuming SNURs are promulgated for 90 percent of section 5(e) orders, the costs per SNUR under EPA's analysis would be \$4,374, likewise an absurdly low amount in light of the considerable level of effort required for SNUR rulemakings. Finally, EPA is planning a number of complex existing chemical SNURs (for example on PFAS substances and asbestos), but their costs do not appear to be reflected in EPA's calculation of section 5 implementation costs.
- EPA's calculation of section 4 costs assumes that EPA will issue 10 testing orders each year and one test rule and testing consent agreement every two years. 83 Fed. Reg. 8217. LCSEA's streamlining of section 4 was intended to increase the amount of testing required under TSCA. We believe that EPA's assumed activity level under section 4 is much too low to meet Congressional expectations for a ramp up in data development under the law and that EPA's fee rule should plan for a significantly greater workload for testing orders, rules and consent agreements. In addition, EPA's cost estimates do not reflect the Agency's new responsibilities for implementing the animal testing provisions of section 4(h). The resources necessary to evaluate the reliability, relevance and equivalence of non-animal test methods in lieu of animal studies will be significant and should be factored into the calculation of section 4 implementation costs.
- EPA assumes that implementing the expanded CBI requirements in section 14 will cost \$3,531,000 per year. 83 Fed. Reg. 8219. EPA has not provided a detailed explanation of this estimate. However, we believe it likely fails to reflect the significantly enhanced level of effort necessary to meet the new requirements. The higher level of activity under the new law likely means submission of more information by industry and a larger number of CBI claims. EPA must now require information submitters to substantiate most of their CBI claims. Thus, it must address what elements this substantiation must contain and review industry submissions to assure that it is provided. For the first time, all CBI claims for chemical identity and 25 percent of all other claims must be evaluated within 90 days and accepted or denied. CBI information can now be shared with states and health professionals. Moreover, since section 26(b) fees must cover CBI-related costs under all provisions of the statute, submissions under section 8, 12 and 13 must be considered in determining the level of fees required. Notably, the new law will greatly increase EPA's workload for CBI claims under both the Chemical Data Reporting (CDR) and the "active

⁴ Id., at 7.

Inventory” reporting rules under section 8. Moreover, the CBI costs subject to fees include not just EPA staff involved in CBI reviews but the costs of establishing and updating CBI management and handling systems. To date, EPA has been swamped by the new CBI requirements and is struggling to carry out its increased responsibilities under 14. Meeting the law’s requirements – which is essential for transparency and public access to data – will likely entail a much greater commitment of resources than the proposed rule assumes.

In finalizing its fees rule, EPA should reexamine these and other estimates of TSCA implementation costs. We believe that, properly quantified, these costs would likely exceed \$100 million per year, perhaps significantly. More realistic estimates of the level of effort and funding required to successfully carry out the law will assure that industry makes the full contribution to EPA costs required by Congress and that a shortfall in fee revenues does not compromise effective TSCA implementation.

II. EPA Has Underestimated the Costs of Industry-Requested Risk Evaluations

EPA’s proposed rule assumes that risk evaluations conducted in response to industry requests will cost \$2.6 million, well below the \$3.8 million projected for risk evaluations on high-priority chemicals. 83 Fed. Reg. 8219. To justify this lower number, EPA claims that because manufacturers must provide data on the chemical subject to their request, it will need to expend fewer resources on information collection to support these risk evaluations. Yet the provisions of its risk evaluation rule (40 C.F.R. 702.37) that EPA cites were in fact pared back significantly from the proposal and would limit the manufacturer’s obligations to information on the specific uses it proposes for assessment and data in its immediate possession and control. Moreover, industry will have strong incentives to provide information on chemicals selected for evaluation by the Agency so it seems doubtful that the resource savings for industry-nominated chemicals would be significant. Nor is there any reason to believe – as EPA claims – that “manufacturers are more likely to request risk evaluations on chemicals that are low hazard or low exposure, or are otherwise relatively straightforward to analyze.” *Id.* In fact, the opposite may be the case; industry may believe that an EPA assessment of a chemical of perceived concern will be more influential in the marketplace than any assessment it might conduct on its own.

For these reasons, EPA’s rationale for assuming lower costs for manufacturer-requested evaluations is purely speculative. If it proves wrong in practice, the Agency would be forced to absorb substantial costs that Congress required industry to bear. EPA should assign the same costs to industry-requested evaluations that it assigns to evaluations of high-priority chemicals – and as shown above, the cost estimates for these evaluations in its proposal are understated and need to be adjusted upward.

III. There is No Legal or Policy Basis For Greatly Reducing Industry Fees for Section 4 Implementation

The proposed rule provides that fees for section 4 implementation would represent a minuscule share of EPA costs to develop and administer testing orders, rules and consent agreements. For example, EPA estimates costs of \$279,000 per testing order but proposes to require fees of only

\$9,800 (or 3.5 percent). 83 Fed. Reg. 8222. According to the proposed rule, EPA bases this approach on industry's strong opposition to paying fees for section 4 activities. 83 Fed. Reg. 8221. However, the proposal does not explain the rationale for industry's position or otherwise justify recovering a much smaller share of EPA costs under section 4 than under sections 5 and 6. Moreover, it is hard to square greatly reduced fees under section 4 with EPA's general recognition that it "should charge fees that are proportional to the EPA costs for undertaking the activities" which the fees will support. 83 Fed. Reg. 8215.

An unequal distribution of fees across EPA programs could have the perverse result of disincentivizing the Agency from implementing those aspects of TSCA that will receive the smallest share of fees. Thus, the Agency might well deemphasize activities (like issuing section 4 testing orders) that it must fund almost entirely from its own coffers and focus on those with a higher level of cost recovery. This could well inhibit use of the section 4 testing authorities, which EPA is already failing to utilize despite the new tools in the law to streamline testing requirements and increase development of data. We thus recommend that EPA increase fees for section 4 activities and support EPA's "Alternative A", which would bring these fees more in line with the fees for section 5 and 6 activities. See 83 Fed. Reg. 8223.

IV. Fees for Section 5 and Other Submissions Should Reflect the Number of CBI Claims Made by the Submitter

Section 26(b)(1) provides that one purpose of user fees is to "defray the cost of collecting, processing, reviewing and providing access to and protecting from disclosure" information that is subject to the confidentiality provisions of TSCA section 14. Nonetheless, EPA proposes that fees for PMNs and other submissions will be the same regardless of the number of CBI claims made by the submitter. 83 Fed. Reg. 8220. Given the additional time and effort EPA must expend to process CBI claims and safeguard CBI, there is no doubt that the costs it incurs to review PMNs and other submissions will vary in relation to whether the submitter seeks CBI protection for information in the submission and how many CBI claims it makes. Considering these costs in setting fee levels would thus help assure proportionality between fees and the Agency activities they support, consistent with the statutory goal of defraying the costs of implementing section 14 protections. It would also encourage submitters to exercise discipline in making CBI claims and reduce the number of claims that are unjustified: submitters will be less likely to make frivolous CBI claims if these claims result in increased fees.

We recommend that EPA develop a system of "surcharges" that are added to the base fees charged under section 5 and other TSCA provisions in proportion to the number of CBI claims that the submitter asserts.

V. EPA Should Not Fully Exempt Processors from Fee Obligations

Under its proposal, EPA has chosen to limit fee obligations under sections 4 and 6 to manufacturers/importers and to exempt processors. 83 Fed. Reg. 8216. This approach is contrary to TSCA section 26(b)(4)(C), which directs that EPA's fee rule must "reflect an appropriate balance in the assessment of fees between manufacturers and processors." There will be occasions where processing activities contribute significantly to the risks that EPA seeks to address under section 4

and 6; examples include the recent proposed section 6(a) rules for methylene chloride and N-methylpyrrolidone paint removers, which are formulated products that were put into the stream of commerce by processors. In these cases, processors should not get a free ride on TSCA implementation costs that are largely attributable to their products.

We agree with EPA that where a consortium is formed to assume responsibility for paying fees for a section 4 or section 6 activity, there would be no need for the Agency to require fee payments directly by processors. But if no consortium is formed or if a chemical's manufacturers are unwilling to cover required fees in their entirety and cannot reach a fee sharing agreement with processors, it would be prudent if EPA had the ability to assess fees on processors where appropriate. We recommend that the rule include a mechanism – to be triggered if necessary – by which significant processors can be identified and required to pay fees for section 4 and 6 activities. This mechanism would assure that EPA is not without recourse in those cases where processor fee payments are warranted for reasons of equity or to assure full recovery of the industry share of EPA's costs.

VI. EPA's Rule Should Require Additional Fee Payments Where a Chemical Advances to Section 6(a) Rulemaking after an Unreasonable Risk determination Under Section 6(b)

Under the rule as proposed, manufacturers of a chemical subject to a risk evaluation under section 6(b) would pay the same level of fees whether or not the evaluation results in a determination of unreasonable risk under section 6(b)(4)(A) that triggers rulemaking under section 6(a). EPA seeks comment in the proposal preamble on its "decision to not include a fee category for risk management under section 6(a)." 83 Fed. Reg. 8227.

Rulemaking under section 6(a) will incur significant costs in addition to those attributable to EPA's risk evaluation. Because these additional costs will be a function of EPA's determinations of unreasonable risk, it is appropriate to differentiate between chemicals that advance to risk management and those that are found not to pose an unreasonable risk following a risk evaluation. EPA's rule should recognize these differences: fees should be greater for chemicals that undergo rulemaking under section 6(a) because they pose higher risks and require a greater investment of Agency resources for risk management. This would follow the well-established principle that companies whose products contribute the most to endangering health or the environment should bear the largest share of the costs of protecting society from harm.

To implement this principle, EPA's rule should assess fees on manufacturers of high-priority chemicals at two action points under section 6. First, they should pay fees at the time a risk evaluation is initiated based on the costs of conducting that evaluation. Second, when EPA's evaluation concludes that a chemical presents an unreasonable risk of injury, manufacturers of that chemical should pay additional fees that reflect the costs of rulemaking and risk management under section 6(a).

VII. EPA Should Rely on Multiple Sources in addition to CDR Reports to Identify Companies Obligated to Pay Fees

The proposal preamble indicates that EPA plans to rely on reports filed under its Chemical Data Reporting (CDR) rule to identify manufacturers and importers subject to fees under sections 4 and

6. 83 Fed. 8216. We are concerned that this approach will be inadequate to identify the full universe of manufacturers and importers obligated to pay fees.

The CDR rule (40 C.F.R. Part 711) contains numerous exemptions from reporting for manufacturing activities and specific chemicals. It also applies only to persons manufacturing or importing a chemical at a single site during the principal reporting year in quantities of 25,000 pounds or above. Furthermore, our experience is that compliance with CDR requirements is uneven, particularly by importers of bulk chemical shipments or chemical-containing articles. And because CDR reporting is required at four year intervals, reports may not be current and up-to-date at the point in time where fees are payable. Thus, CDR reports will likely fail to provide a comprehensive picture of manufacturers and importers whose activities are significant, either because of the volumes they account for or their contribution to exposure and risk. This may not have practical consequences where a consortium of companies has agreed to pay the entire fee for a covered activity under sections 4 and 6. However, where a consortium is either not formed or is only prepared to pay a portion of the required fees, EPA's fee collections may fall short of the targets in its rule unless all manufacturers and importers of the subject chemical are known to the Agency and it has the means to compel compliance with fee obligations.

It is therefore essential for EPA to rely on a variety of databases to identify companies subject to fees. Reports under the "active" Inventory reporting rule, for example, would provide a more complete listing of current manufacturers and importers than CDR reports. Moreover, other databases like Panjiva comprehensively document import shipments and thus can be used to identify companies who failed to file reports under EPA rules. EPA should aggressively search these sources and then publish a preliminary list of manufacturers and importers responsible for paying fees with a request for additions to or deletions from the list. Although we agree that firms who fail to pay fees should be subject to sizable penalties, this may not be sufficient to assure a high level of compliance. Thus, EPA should also notify each known manufacturer and importer of its fee obligations.⁵

VIII. EPA Must Revise Its Rule to Assure that Manufacturers and Importers of the 10 Chemicals Now Undergoing Risk Evaluations are Subject to Fees

Under EPA's proposal, industry would begin to incur fee obligations on October 1, 2018, the start of FY19. 83 Fed. Reg. 8225. Since risk evaluations on the initial 10 chemicals will be underway throughout FY19 and into FY20, the costs of conducting these evaluations should thus be subject to fees. However, EPA's proposal also provides that the triggering event for fee payments for EPA-initiated risk evaluations will be the publication of the final risk evaluation scope. Scoping documents for the 10 chemicals were released in June 2017 (and may be modified in problem formulation documents that are expected shortly). Taken literally, this could mean that no fees are required for the ongoing risk evaluations because the scoping documents were finalized before October 1, 2018. However, this would be an untenable result that would deprive EPA of any cost recovery for activities that are plainly within the scope of fee requirements under TSCA section 26(b)(1). The resulting loss of revenues to EPA would be substantial: the proposal would require

⁵ Where a consortium does not take responsibility for allocating fees among manufacturers and importers, EPA would have to make such an allocation itself in order to notify companies of the precise amounts they must pay. The proposed rule contemplates a *pro rata* division of fees, with each company paying the same amount, but this may not necessarily be the most equitable approach.

fees of \$1,350,000 for each risk evaluation, totaling \$13,500,000 for the 10 chemicals. To avoid lost revenues of this magnitude, EPA should revise the final rule so that it requires payment of fees for risk evaluations underway on October 1, 2018, notwithstanding the date of final scoping documents. Manufacturers and importers of the chemicals being evaluated should have 90 days to remit the applicable fees to the Agency.

IX. EPA’s Proposal Provides Unjustified and Excessive Relief from Fees to “Small Businesses” as Defined in the Proposal

Although EPA is in the process of evaluating changes to its “small business” definition under TSCA section 8,⁶ the proposed rule preempts this effort and grants broad relief to small businesses from fee obligations under section 26(b). 83 Fed. Reg. 8224. Under the proposal, the upper limit for small business status would be raised to \$91 million in annual revenues from the current \$40 million limit in the 1987 PMN fees rule. Applicability of this cutoff would be determined on the basis of average sales revenues over the three year period preceding a submission under section 4, 5 and 6 triggering fee payments. Once a manufacturer or importer qualifies as a small business under this standard, applicable fees would be reduced by 80 percent.

EPA explains that the new \$91 million revenue cutoff is the result of adjusting the 1987 small business definition to account for inflation. 83 Fed. Reg. 8224. However, while changes in the Producer Price Index (PPI) are relevant, other factors are also important; these include “ability to pay,” a consideration highlighted in section 26(b)(1)’s instructions to EPA on how to set fees. EPA has conducted no analysis demonstrating that the fee levels in its proposal will place hardships on businesses with annual revenues of \$91 million or under.⁷ Indeed, the proposed PMN fee of \$16,000 represents .002 percent of EPA’s proposed revenue cap, a *de minimis* amount for businesses of this size. Nor has EPA provided any basis for reducing fees payable by small businesses by 80 percent. There is no analysis, for example, indicating that a smaller fee reduction – say, 35 or 40 percent – would not be effective in cushioning small businesses from adverse financial impacts.

New chemicals commercialized by small businesses can result in significant PMN review costs where the new substance is to be produced in substantial volumes, will have substantial exposure or release or is likely to be toxic to humans or aquatic species. In such cases, a deep reduction in fees would fail to reflect the increased Agency resources required to review and manage the substance and its significant health or environmental footprint. A sliding scale for fees charged to small businesses that takes these factors into account would be better aligned with the purposes of section 26(b). As one approach, the 1988 small business standards under TSCA section 8 reflect a two-tier structure: a revenue cutoff of \$40 million is used to define a small business except for chemicals produced in substantial quantities, to which a revenue limit of \$4 million applies. 40 CFR 704.3 Following this approach, EPA’s fee rule might include a lower revenue limit and/or a smaller

⁶ 82 Fed. Reg. 56824 (November 30, 2017).

⁷ While we oppose raising the revenue cap to \$91 million per year, we believe annual revenues are a better measure of small business status than number of employees, an alternative approach that EPA is considering. 83 Fed. Reg. 8224. There is no meaningful correlation between a firm’s ability to pay fees and the number of employees it has. For example, a U.S. importer of chemicals may have few employees because it is not engaged in manufacturing but could be distributing chemicals in this country in large volumes that support substantial fee payments.

fee reduction for chemicals produced in substantial quantities or with other characteristics indicative of potential exposure and hazard.

An 80 percent fee reduction would also be unjustified in the case where all manufacturers of a chemical selected for testing under section 4 or risk evaluation under section 6 are small businesses. 83 Fed. Reg. 8224. The effect of this fee reduction – which EPA’s proposal would require – is that the Agency would recover only a small fraction of the costs it incurs in carrying out these actions. For example, small business fees for an EPA-initiated risk evaluation would only be \$270,000, 7 percent of EPA’s estimated costs for conducting the evaluation. Given that section 4 and section 6 actions apply to chemicals raising significant risk concerns, there is no policy or economic basis for providing small business relief to the companies responsible for their manufacture and distribution and shifting to EPA the bulk of the costs incurred to address and manage their risks. Thus, EPA should revise the final rule so that, where the only manufacturers/importers of chemicals subject to section 4 and 6 actions are small businesses, no fee reduction will be granted.

X. When EPA Reviews Fees in 2021, It Should Reexamine the Costs of Effective Implementation of Sections 4, 5, 6 and 14 and Assess How Well the Current Fee Structure is Working

Consistent with section 26(b), the proposed fee rule will only be in effect for FY2018-2021. Under section 26(b)(4)(E), EPA must increase or decrease fees every three years as necessary to adjust for inflation and to assure that the fees are sufficient to defray 25 percent of the costs of carrying out sections 4, 5, 6 and 14 of the Act. Despite this broad requirement, the proposed rule (83 Fed. Reg. 8231) suggests that, in 2021, EPA may only modify the fees in its rule to account for inflation and may consult only with industry about the need for further changes in the fee structure. We believe EPA should go further and commit to a full public review of the costs of implementing the law and the effectiveness of the rule in meeting statutory cost recovery targets.

The TSCA program will evolve significantly in the next few years and EPA will have actual data (as opposed to estimates) documenting its resource needs to meet its responsibilities under the law. It may turn out the scope of TSCA implementation activities is broader than EPA now envisions and that the resulting costs are significantly greater than EPA now assumes. (Indeed, as discussed above, we believe that the cost estimates in the proposed rule are likely understated by a substantial amount). It may also be the case that fee revenues under the rule are falling short of targets, requiring EPA to absorb more costs than the law requires, or that the current fee structure is having unintended consequences that detract from the law’s policy goals. A full examination of these issues is necessary to assure that industry fees are in fact covering 25 percent of EPA’s implementation costs and that the fee rule is operating effectively and efficiently. Engaging the public in this process is essential because of the importance of industry fees in fulfilling the risk prevention and reduction objectives of Congress.

We appreciate the opportunity to comment on the proposed fee rule and urge EPA to adopt our recommendations. Please contact Bob Sussman, SCHF counsel, with any questions or feedback at bobsussman1@comcast.net.

Respectfully submitted,

Liz Hitchcock
Acting Director
Safer Chemicals, Healthy Families

Ansje Miller
Director of Policy and Partnership
Center for Environmental Health

Eve C. Gartner
Staff Attorney
Earthjustice

Patrick MacRoy
Deputy Director
Environmental Health Strategy Center

Daniel Rosenberg
Senior Attorney
Natural Resources Defense Council (NRDC)