

**Before the United States
Environmental Protection Agency**

**Mercury; Reporting Requirements for
the TSCA Mercury Inventory
(Docket EPA-HQ-OPPT-2017-0421)**

Comments of the Chemical Users Coalition

The U.S. Environmental Protection Agency (“EPA”) recently issued for comment a proposed rule under Section 8 of the Toxic Substances Control Act ("TSCA"), at 82 Fed. Reg. 49,564 (October 26, 2017) to require manufacturers (including importers) of mercury or mercury-added products or persons who otherwise intentionally use mercury in a manufacturing process to comply with certain reporting requirements intended to assist EPA in preparing an “inventory of mercury supply, use, and trade in the United States” (“Mercury Inventory Rule”). The Chemical Users Coalition ("CUC") appreciates the opportunity to provide these comments addressing certain topics for which the Agency requested public input.

CUC is an association of companies from diverse industries interested in chemical regulatory policy from the perspective of entities that typically use, rather than manufacture or import, chemical substances.¹ CUC encourages regulators to ensure requirements intended to protect health and the environment align with the regulated community’s ability to pursue technological innovation (goals that can and must remain compatible to achieve sustainable economic development in the U.S.). This is particularly important in the area of chemical management policy, which necessarily addresses how core technologies and products should be adapted to address emerging information about health and environmental risk.

CUC supports the successful implementation of the 2016 amendments to TSCA in a manner that assures the various TSCA programs are both effective and efficient. CUC’s comments regarding the Mercury Inventory Rule focus on encouraging the Agency’s commitment as stated in the preamble to drawing on information captured by existing mechanisms which are accessible by the Agency to collect and compile the information needed to fulfill the requirements of the amended statute and EPA’s international obligations.

¹ The members of CUC are Airbus S.A.S., The Boeing Company, General Electric Company, HP Incorporated, IBM Company, Intel Corporation, Lockheed Martin Corporation, and United Technologies Corporation.

I. Existing Mechanisms for Collecting Information Regarding Mercury in U.S. Commerce

Prior to enactment of the 2016 amendments, it was EPA’s position that it did not “ma[k]e sense to promulgate a comprehensive information-gathering rule for mercury,”² and that “existing tools, as implemented through [EPA’s existing strategy at that time] are sufficient to gather such data as necessary for the implementation of TSCA.”³ CUC recognizes that the recent amendments to TSCA have given rise to the need to promulgate a rule that will allow EPA to prepare an inventory of the mercury supply, use, and trade in the United States. However, CUC requests that EPA remember the numerous comprehensive data collection mechanisms that the Agency already relies on to collect relevant information before imposing additional requirements on manufacturers and users of mercury and mercury-added products.

CUC appreciates EPA’s efforts to recognize several of the reporting requirements already incumbent on many users of mercury and mercury-added products, and the Agency’s commitment to avoiding duplicative reporting requirements. CUC supports EPA’s proposal to coordinate the reporting requirements of the Mercury Inventory Rule with the existing requirements of the Interstate Mercury Education and Reduction Clearinghouse (“IMERC”), the TSCA Chemical Data Reporting (“CDR”) rule, and the Toxics Release Inventory (“TRI”). To the extent that parties inform EPA about other mercury-related reporting requirements during this comment period, CUC encourages EPA to consider whether it can coordinate those reporting requirements with the requirements of the Mercury Inventory Rule as well. Additionally, as EPA continues to develop an electronic reporting system that will ensure entities will not have to duplicate their reporting efforts, CUC encourages EPA to seek additional feedback from stakeholders on the functionality of the system.

II. Coordination with IMERC Deadlines

EPA should consider methods to modify its proposed reporting deadlines to align EPA deadlines with existing IMERC deadlines. Currently, EPA proposes July 1, 2019 as the reporting deadline for companies to report 2018 data.⁴ However, the next deadline for IMERC reporting is April 2020, and companies are required to report 2019 data to IMERC by this deadline. Coordinating the IMERC and EPA deadlines will allow CUC’s members to collect the data necessary to meet IMERC and EPA requirements at one time. CUC understands that the July 1 deadline coordinates with the reporting deadline under EPA’s TRI program, however many of CUC’s members – and likely many other organizations that will be subject to the reporting requirements of this rule – generally are not required to report under the TRI program. Thus, in order to ensure that EPA meets its stated goal of “harmoniz[ing] to the greatest extent

² 80 Fed. Reg. 60,584, 60,585 (Oct. 7, 2015).

³ *Id.* at 60,587.

⁴ 82 Fed. Reg. 49,564, 49,578 (Oct. 26, 2017). This date was selected to enable EPA to process the data gathered in time to issue an updated inventory by April 1, 2020.

practicable” the IMERC reporting requirements and the reporting requirements of EPA’s proposed rule, EPA should consider revisions to the proposed reporting deadlines (or the periods of time to be covered by the information to be collected) for the Mercury Inventory Rule to align as much as possible with IMERC reporting and deadlines.⁵

Additionally, CUC recommends that EPA amend the proposed 40 CFR § 713.9 to require covered parties to report information under the proposed rule in metric units. Most mercury that is imported in products is tracked in milligrams, and parties report to IMERC in grams and milligrams. Therefore, to ensure compatibility between the IMERC dataset and the data collected by EPA, CUC suggests that EPA require reporting in metric units.

III. Reporting Process

The CUC supports EPA’s commitment as expressed in the preamble to the proposed rule to take into account and integrate data already available to the Agency using the IMERC, CDR and TRI databases with the reporting system to be developed for the TSCA Mercury Inventory. The CUC offers the following suggestions for EPA’s consideration regarding the process for reporting information to EPA pursuant to the Mercury Inventory Rule.

The CUC encourages EPA to consider allowing entities to report collectively – for example, through a trade association. Allowing this collective reporting will reduce confidentiality claims by alleviating concerns about a company divulging its share of a particular market. Additionally, IMERC accepts data through collective reporting.⁶ Thus, some portion of the entities that will likely be subject to the reporting requirements of this rule may rely on collective reporting to comply with IMERC requirements. Since EPA may receive collective data from IMERC for those parties that are required to comply with the IMERC reporting standards, entities not subject to IMERC requirements also should be given the opportunity to collectively report information regarding the volume of mercury manufactured or imported and the volume of mercury intentionally used in manufacturing processes, in order to protect sensitive business information.

IV. Clarification of Activities and Parties Subject to Reporting Requirements

The CUC supports EPA’s goal to ensure that mercury in mercury-added products is only counted once by exempting parties that manufacture products containing mercury-added components from the reporting requirements of the Mercury Inventory Rule.⁷ The CUC offers

⁵ *Id.* at 49,572.

⁶ *See*, IMERC, “Mercury-Added Product Notification Form: Version for Use by Trade Associations that are Reporting for Multiple Manufacturers,” www.newmoa.org/prevention/mercury/imerc/FormMultiple.doc.

⁷ 82 Fed. Reg. at 49,575 (Oct. 26, 2017).

the following recommendations for clarifications and changes to the rule to ensure that the Agency is receiving relevant information from reporting parties.

A. Exempted Mercury-Added Products

Table 2 of the proposed regulations purports to list the categories and subcategories of mercury-added products on which manufacturers and importers of mercury-added products will rely to categorize their products for the purposes of reporting.⁸ Although the proposed regulation and preamble state EPA is exempting from reporting products that contain a component that is a mercury-added product from its reporting requirements, the list provided in Table 2 includes many product categories that also might be products which contain a component that is a mercury-added product. (This could include, for example, measuring instruments, switches, and sensors which themselves are inclusive of mercury-containing batteries and fluorescent lightbulbs.) CUC requests EPA clarify the application of the Table 2 designations to specifically state that among the listing may be products that contain components that are mercury-containing products and which are exempt from reporting when imported, exported, or used in the U.S. in that context.

B. Imports and Exports of Products Containing Mercury-Added Components

The CUC fully supports EPA's efforts to exempt from the proposed reporting requirements imported products that contain mercury-added components.⁹ CUC agrees that importers of products that may contain mercury-added components (such as on-board batteries and lamps) would have difficulty determining whether, and how much, mercury the products contain, and the source of the mercury.

CUC reads the proposed language in 40 CFR § 713.1 to effectively exempt all products that contain mercury-added components from all of the requirements of the proposed regulation, and it is CUC's interpretation that none of the mercury contained in on-board mercury-added components of such products will be subject to reporting. However, CUC requests that EPA amend §§ 713.9, 711.11, and 713.13 to explicitly exempt from the proposed reporting requirements (including the contextual requirements) the import, *export*, and use of manufactured *products that contain mercury-added components*. The language is not sufficiently explicit, especially as it might apply to exporters of manufactured articles that contain mercury-added components. The proposed rule ensures that a domestic producer or an importer of a mercury-added component will already be required to submit information about the amount of mercury contained in the mercury-added component. Thus, requiring exporters to also report information regarding the amount of mercury in a product (e.g., a piece of equipment) which includes such mercury-added components would result in the double-counting of some

⁸ *Id.* at 49,583-84.

⁹ *Id.* at 49,574 - 49,575.

mercury being used or traded in the United States. As noted, both users and exporters of products containing mercury-added components are unlikely to know the amount of mercury contained in a particular component of their product, or the origin of that mercury.

EPA should clarify throughout both the rule and preamble which reporting requirements are applicable to exporters of *products that contain mercury added components* versus persons who export *mercury-added products*. The language of the proposed rule currently suggests that only those entities that manufacture mercury-added products or otherwise intentionally use mercury in a manufacturing process will be required to report information regarding the export of mercury-added products. However, ambiguity is created by certain passages in the proposed rule appearing in the preamble in both the text and tables on pages 49,574 - 49,576. Specifically, such passages fail to sufficiently distinguish between *products* (such as manufactured articles and equipment) which may contain a mercury-added *component* and mercury-added products. To avoid ambiguity and misinterpretation, CUC requests that EPA clarify the language in both the rule and the preamble to explicitly exempt in the final rule entities that import, use, and/or export *products* that contain mercury-added *components*.

In the event it was EPA's intention to require reporting from entities that export manufactured articles that contain a component that is a mercury-added product, the reporting requirement should be minimized and include only information that is reasonably known to an exporter of such products – specifically the destination country of the product.

C. Sale, Distribution, and Export of Mercury-Added Products Previously Manufactured or Imported by Another Person

EPA should clearly exempt from the reporting requirements sale, distribution, and export of mercury-added products that were previously manufactured or imported by another person. Manufacturers of products that contain components which are mercury-added products may sell, distribute, or export these same components as individual spare parts. However, these product manufacturers will typically procure these components directly from the original component manufacturer or importer. When sold, distributed, or exported individually (i.e., as a spare part and not as a component of a larger product), these components could be considered mercury-added products to which the reporting requirements for sale, distribution, and export apply. If so, such reporting will result in duplicative reporting as the mercury associated with these mercury-added products will have been reported by the original component manufacturer or importer. CUC recognizes that proposed § 713.17 exempts from the rule persons who engage in trade and who do not first manufacture or import mercury-added products; however, there are situations when a company does import some quantity of mercury-added products and also sells, distributes, or exports mercury-added products procured from another manufacturer or importer. In these situations, the exemption in proposed § 713.17 does not clearly exempt such persons from the reporting requirements (or sufficiently clarify their respective responsibilities for which

products). To avoid duplicative reporting for such persons, EPA should clearly exempt from the reporting requirements the sale, distribution, and export of mercury-added products previously manufactured *or imported by another person*.

D. Definition of “Impurity”

The CUC also asks EPA to consider clarifying and aligning its use of the term “impurity” in the proposed rule. EPA should ensure that its uses of the term impurity are harmonized across all regulations that implement TSCA requirements. The treatment of impurities in the preamble for the proposed rule requires clarification as it appears to diverge from the Agency’s treatment of impurities in other TSCA contexts. For example, for purposes of the Chemical Data Reporting (CDR) Rule, impurity is defined as “a chemical substance which is unintentionally present with another chemical substance.”¹⁰ This same definition is used for the Section 5 premanufacture notice requirements and significant new use reporting (SNUR) rules as well.¹¹ Impurities are exempt from the reporting requirements under the CDR Rule¹², and are excluded from premanufacture notice requirements,¹³ and generally are excluded from SNUR requirements as well.¹⁴ However, in this rule, EPA appears to subject mercury unintentionally present in a final product as an impurity which is subject to the reporting requirements of the rule if the product in which mercury is present was manufactured in a process in which mercury was intentionally used.¹⁵ The rule would therefore subject to the rule’s reporting requirements those entities that use mercury in their manufacturing processes, but do not *intend* to have mercury remain present in their final products. However, the reporting on the presence of mercury in a manufactured product under the same circumstances would not be required in the context of CDR and PMN reporting rules.

If EPA’s objective with this rulemaking is to attempt to determine the amount of mercury used and traded in the United States, requiring reporting regarding the amount of mercury unintentionally present in a final product, as well as the mercury that was intentionally used in the manufacturing process for the product, seems likely to result in double-counting mercury that was used by a particular entity. EPA’s collection of information regarding the amount of mercury unintentionally present in products resulting from manufacturing processes during which mercury is intentionally used also goes beyond the collection necessary for EPA to ensure the United States’ compliance with the Minamata Convention. Section 4 of the Minamata Convention, pertaining to mercury-added products, applies only to products with “intentionally

¹⁰ 40 CFR § 704.3

¹¹ 40 CFR § 720.3(a)(m) (defining “impurity” for the purposes of premanufacture notices); 40 CFR § 716.3 (defining “impurity” for the purposes of SNUR requirements).

¹² 40 CFR § 704.5(c).

¹³ 40 CFR § 720.30(h)(1)

¹⁴ 40 CFR §§ 716.20(a)(6), (a)(9)

¹⁵ See esp. passages appearing in 82 Fed. Reg. at 49,571 (Oct. 26, 2017).

added” mercury.¹⁶ Section 5 of the Convention, applying to manufacturing processes that use mercury or mercury compounds, similarly does not require reporting regarding the amount of mercury unintentionally present in products manufactured during manufacturing processes that use mercury or mercury compounds. Thus, it appears it is not necessary for EPA to seek reporting on mercury when it is unintentionally present in a commercial product for any purposes.

E. Elemental Mercury and Mercury Compounds

EPA should consider clarifying the definition of “elemental mercury” for purposes of the rule. For example, under Minamata, elemental mercury is only a material in which mercury is present at 95% or greater by weight.¹⁷ However, IMERC reporting does not define a concentration limit for classifying a material as elemental mercury. CUC requests that EPA clarify which definition of elemental mercury the Agency intends to adopt and how any differences in this regard will be accommodated for purposes of exempting information already reported for IMERC purposes.

The application of the proposed rule to mercury compounds also requires some clarification. Table 1 of the proposed rule provides examples of mercury compounds that would be covered by this rule,¹⁸ but notes in the preamble that all of the example compounds appear on the TSCA Inventory. CUC requests that EPA clarify whether EPA intends to require parties to report the manufacture or use of all mercury compounds, or only those that are listed on the TSCA Inventory. For example, EPA should clarify whether reporting is required for a substance or complex mixture which might contain mercury and which is exempt from reporting under TSCA (e.g., a research and development compound), or exempt from listing on the Inventory (such as a compound produced pursuant to a Low Volume Exemption).

V. Chemical Synthesized Products versus Fabricated Products and Articles

CUC also requests that EPA provide clarification regarding the application of all facets of the reporting requirements of the proposed rule to mercury-added products versus products that incorporate mercury-containing components, especially as it could pertain to products that might fit within both categories. For example, the rule fails to provide direction or clarity as it might pertain to a complex piece of industrial equipment that might be manufactured in the U.S. by an entity that assembles equipment using mercury-containing components which have been produced by an independent supplier, in combination with one or more mercury-containing

¹⁶ Minamata Convention on Mercury, Article 2(f).

¹⁷ Basel Convention Coordinating Centre – Regional Centre of the Stockholm Convention for Latin America & the Caribbean, *The Minamata Convention on Mercury and its Implementation in the Latin American and Caribbean Region* (April 2014),

http://mercuryconvention.org/Portals/11/documents/publications/report_Minamata_LAC_EN_FINAL.pdf.

¹⁸ 82 Fed. Reg. at Table 1, 49,582-83.

components produced by an entity who is the producer of the finished product. The final rule might be enhanced through the use of examples, including diagrams and depictions, in which hypothetical products with mercury-containing components and various production supply chains are considered.

The final rule language also could be clarified if the language is enhanced in the final rule and preamble to distinguish between mercury-containing products that are the result of a manufacturing processes which involve chemical synthesis, alloy generating, blending and mixing operations versus those in which manufactured articles with mercury-containing components are produced and may enter and reenter commerce as various components are fabricated and assembled in a variety of operations.

VI. Additional Exemptions

Based on the United States' reporting obligations pursuant to the Minamata Convention, CUC recommends EPA consider including the following exemptions in the final rule. The exemptions requested by CUC focus in particular on categories of mercury-containing products that are not covered by the Minamata Convention.

First, the CUC encourages EPA to exempt from the reporting requirements of the proposed rule mercury-added products listed in Annex A of the Minamata Convention as exempt from Article 4 of the Convention. We understand that pursuant to Article 4, Paragraph 2 of the Minamata Convention, the United States is exempt from the phase-out requirements of Article 4 because the United States submitted notification of its existing domestic measures to address mercury-added products. Although the United States may later be required to submit additional information showing the effectiveness of these measures, we understand such a requirement would not cover uses of mercury-added products that are exempt from the phase-out provisions of Article 4, including those "essential for civil protection and military uses." If the U.S. is not required to report on the effectiveness of its measures to address products used for these purposes, EPA should exempt products used for these purposes from the requirements of the proposed rule.

In addition, EPA should consider specifically exempting reporting of import and export of manufacturing equipment, including component parts that might be needed to replace or repair on-board mercury-containing parts, when such components are being transferred intra-company (whether this involves shipments occurring solely within the U.S. or between facilities located within the U.S. and another country).

Conclusion

CUC appreciates the Agency's interest in soliciting public input on the proposed regulation and would be pleased to meet with EPA personnel to discuss these comments and related issues if doing so would assist in the development of the final rule.