



BILLING CODE 6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

**[EPA-HQ-OPPT-2016-0597; FRL-9961-92]**

### **Chemical Data Reporting; Requirements for Inorganic Byproduct Chemical**

### **Substances; Notice of Establishment of Negotiated Rulemaking Committee; Notice of Public Meetings**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of Establishment of Negotiated Rulemaking Committee and Notice of Public Meetings.

**SUMMARY:** EPA is giving notice that it is establishing a Negotiated Rulemaking Committee (Committee) under the Negotiated Rulemaking Act (NRA). The objective of the Committee is to negotiate a proposed rule that would limit chemical data reporting requirements under section 8(a) of the Toxic Substances Control Act (TSCA), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, for manufacturers of any inorganic byproduct chemical substances when such byproduct chemical substances are subsequently recycled, reused, or reprocessed. The purpose of the Committee is to conduct discussions in a good faith attempt to reach consensus on proposed regulatory language. This negotiation process is required by section 8(a)(6) of TSCA. This notice lists the stakeholder groups from which EPA plans to invite representatives to participate as members of the Committee, all of whom have been identified as having a definable stake in the outcome of the proposed requirements. This notice also announces the first two meetings of the Committee, which are open to the public.

**DATES:** The first of the Committee meetings, which are both open to the public, will be

held on June 8, 2017, from 9 a.m. to 5 p.m. and on June 9, 2017, from 9 a.m. to 3:00 p.m.

The second Committee meeting will be held on August 16, 2017, from 9 a.m. to 5 p.m. and on August 17, 2017, from 9 a.m. to 3:00 p.m.

**ADDRESSES:** Both meetings will be held at William Jefferson Clinton East Building, Room 1153, 1201 Constitution Avenue NW, Washington, DC 20004.

**FOR FURTHER INFORMATION CONTACT:** Any member of the public wishing to obtain information concerning the public meetings may contact Jonah Richmond, Designated Federal Officer (DFO), Conflict Prevention and Resolution Center, Office of General Counsel, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (202) 564-0210; email address: *Richmond.jonah@epa.gov*. General information about the Committee, as well as any updates concerning the meetings announced in this notice, may be found at <https://www.epa.gov/chemical-data-reporting/negotiated-rulemaking-committee-chemical-data-reporting-requirements>.

For information on access or services for individuals with disabilities, or to request accommodation for a disability, please contact the DFO, preferably at least ten days prior to the meetings to give EPA as much time as possible to process your request.

*For technical information contact:* Susan Sharkey, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (202) 564-8789; email address: *Sharkey.susan@epa.gov*.

*For general information contact:* The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: *TSCA-Hotline@epa.gov*.

**SUPPLEMENTARY INFORMATION:****I. General Information***A. Does this Action Apply to Me?*

You may be potentially affected by this action if you manufacture (including manufacture as a byproduct chemical substance and including import) chemical substances listed on the TSCA Inventory. The following list of North American Industrial Classification System (NAICS) codes are not intended to be exhaustive, but rather provides a guide to help readers determine whether this action may apply to them:

1. Chemical manufacturers and importers (NAICS codes 325 and 324110; *e.g.*, chemical manufacturing and processing and petroleum refineries).
2. Chemical users and processors who may manufacture a byproduct chemical substance (NAICS codes 22, 322, 331, and 3344; *e.g.*, utilities, paper manufacturing, primary metal manufacturing, and semiconductor and other electronic component manufacturing).

If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How Can I Get Copies of this Document and Other Related Information?*

The docket for this action, identified by docket identification (ID) number EPA-HQ-OPPT-2016-0597, is available at <http://www.regulations.gov> or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public

Reading Room is (202) 566-1744, and the telephone number for the OPPT Docket is (202) 566-0280. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>.

## **II. Background**

### *A. What Action is the Agency Taking?*

As required by the Negotiated Rulemaking Act of 1996 (NRA), EPA is giving notice that the agency is establishing a Negotiated Rulemaking Committee. The objective of this Committee is to develop a proposed rule providing for limiting chemical data reporting requirements, under TSCA section 8(a), for manufacturers of any inorganic byproduct chemical substances when such byproduct chemical substances are subsequently recycled, reused, or reprocessed. This negotiation process, which includes the establishment of a federal advisory committee, is required by TSCA section 8(a)(6), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Lautenberg Act).

This Committee will be a statutory advisory committee under the Federal Advisory Committee Act, 5 U.S.C. App. 2 § 9(a)(1). In accordance with Section 9(c) of the Federal Advisory Committee Act, 5 U.S.C. App. I § 9(c), EPA prepared a charter for the establishment of the Negotiated Rulemaking Committee. Copies of the Committee's charter will be filed with the appropriate congressional committees, the Library of Congress, and available online at <https://www.epa.gov/chemical-data-reporting/negotiated-rulemaking-committee-chemical-data-reporting-requirements>. On December 15, 2016, EPA announced its intent to negotiate and establish this Committee (81 FR 90843). More information on this notice and comments received in response are in Unit VII.

This notice announces the stakeholder groups from which EPA intends to invite

individuals as members of the Committee, all of whom will have been identified as having a definable stake in the outcome of the proposed requirements. EPA is also announcing the first two meetings of the Committee. These meetings have been scheduled for the dates indicated under **DATES**, and are open to the public. Under normal circumstances, a notice of the Committee meeting must be published no later than 15 days before the date of that meeting. Due to unavoidable administrative circumstances, we are publishing this notice with less than 15 days' advance notice for the first Committee meeting on June 8 and 9, 2017.

*B. What is the Agency's Authority for this Action?*

This notice announcing EPA's establishment of a Negotiated Rulemaking Committee to negotiate a proposed regulation was developed under the authority of NRA sections 563 and 564 (5 U.S.C. 561, Pub. L. 104–320). Any proposed regulation resulting from the negotiation process would be developed under the authority of TSCA section 8 (15 U.S.C. 2607), as amended by the Lautenberg Act (Pub. L. 114–182).

*C. Chemical Data Reporting (CDR) Framework*

Under TSCA, EPA regulates the manufacture (including import), processing, distribution, use, and disposal of chemical substances in the United States. Information submitted by manufacturers (including importers) as required by CDR provides exposure-related data for chemical substances in U.S. commerce that are subject to TSCA. This information supports agency risk evaluation, risk management, and other programs; it is made publicly available, to the extent possible, while protecting information claimed as confidential business information.

Prior to 2011, CDR was known as the Inventory Update Reporting (IUR) regulation. In 1986, EPA promulgated IUR regulations under the authority of TSCA section 8(a) to

collect limited information on the manufacture (including import) of organic chemical substances listed on the TSCA Inventory, thereby providing more up-to-date production volume information on the chemical substances in U.S. commerce. In 2005, EPA amended IUR regulations to require the reporting of information on inorganic chemical substances and to collect additional manufacturing, processing, and use information. EPA has since made additional changes to the reporting requirements, and in 2011 changed the name of the reporting rule to Chemical Data Reporting. CDR regulations are currently codified at 40 CFR part 711. EPA believes CDR is the only current reporting obligation under TSCA section 8(a) that is likely to affect the manufacturers of inorganic byproduct chemical substances.

Manufacturers of inorganic chemical substances first reported this information in 2006, with subsequent reporting in 2012 and 2016. Specific reporting requirements for these manufacturers were phased in, to allow for the industry to better understand the reporting requirements and for EPA to gain a better understanding of the industry.

#### *D. Inorganic Byproduct Chemical Substances Under CDR*

A byproduct chemical substance is a chemical substance produced without a separate commercial intent during the manufacture, processing, use, or disposal of another chemical substance or mixture. 40 CFR 704.3, definition of *byproduct*. Such byproduct chemical substances may, or may not, in themselves have commercial value, but they are nonetheless produced for the purpose of obtaining a commercial advantage. 40 CFR 704.3, definition of *manufacture for commercial purposes*. Because byproduct chemical substances are manufactured for a commercial purpose, this manufacturing is reportable under CDR unless covered by a specific reporting exemption. CDR contains a specific reporting exemption for the manufacture of byproduct chemical substances limited to cases where those byproduct

chemical substances are not *used* for any commercial purposes (or are only used for certain limited commercial purposes) after they are manufactured. 40 CFR 711.10(c). Inorganic byproduct chemical substances are often recycled. The recycling of a byproduct chemical substance may qualify as a commercial purpose beyond the limited commercial purposes encompassed by 40 CFR 711.10(c). If so, the exemption from a manufacturer of a byproduct chemical substance from reporting this to CDR is not applicable.

On June 22, 2016, TSCA was amended by the Lautenberg Act. TSCA now includes a requirement that EPA enter into a negotiated rulemaking, pursuant to the NRA, to develop and publish a proposed rule to limit the reporting requirements under TSCA section 8(a), for manufacturers of any inorganic byproduct chemical substances when such byproduct chemical substances, whether by the byproduct chemical substance manufacturer or by any other person, are subsequently recycled, reused, or reprocessed. The objective of the negotiated rulemaking process is to develop and publish a proposed rule by June 22, 2019. In the event the Committee reaches a consensus and a proposed rule is developed through the negotiated rulemaking process, a final rule “resulting from such negotiated rulemaking” must be issued by December 22, 2019. 15 U.S.C. 2607(a)(6).

### **III. Facilitators**

In its Notice of Intent to Establish a Negotiated Rulemaking Committee and Negotiate a Proposed Rule (81 FR 90843, December 15, 2016), EPA stated that it was seeking a facilitator to conduct the negotiations. Christopher Moore, Ph.D., of Collaborative Decision Resources Associates, and Laura Sneeringer, of the Consensus Building Institute, have been retained for this purpose.

### **IV. Committee Membership**

### *A. Qualifications for Stakeholder Representatives*

The facilitators conducted extensive interviews with interested stakeholders, asking for recommendations for potential Committee members. To facilitate representative selection, the facilitators suggested qualifications, knowledge, and skills that should be possessed by representatives, which would help promote productive deliberations. These included:

- Knowledge of technical issues related to inorganic byproducts;
- Experience with CDR and inorganic byproduct reporting;
- Direct representation of a constituency or a stakeholder group as a whole, such as an industry, or as component parts, such as large or small companies;
  - Not serving as external technical consultants or legal counsel without constituents;
  - Authority to reach agreements and make commitments for their stakeholder group;
  - Willingness and flexibility to discuss issues that will be the focus of the dialogue with parties that may have different views or interests;
- Willingness to engage in productive interest-based negotiations and avoid adversarial or legal argumentation; and
- A commitment to negotiate in good faith and strive to find solutions that will meet all parties' interests to the greatest extent possible.

### *B. Represented Stakeholders*

EPA is planning to invite representatives from the following stakeholder groups to serve on the Committee:

- Inorganic chemical manufacturers and processors, including metal mining and related activities;

- Recyclers, including scrap recyclers;
- Industry advocacy groups;
- Environmental advocacy groups; and
- Federal, State, and Tribal governments.

## **V. Participation by Non-Members**

### *A. Attending Meetings*

EPA values public input during this process. The meetings announced in this notice will be open to the public, so interested parties may observe the meetings and communicate their views in the appropriate time and manner, as defined in each meeting's agenda.

Consistent with the requirements of FACA, formal meeting materials and summaries will be available online.

### *B. Oral Statements*

In general, individuals or groups requesting an oral presentation at a public meeting will be limited to five minutes. Each person making an oral statement should consider providing written comments as well as their oral statement so that the points presented orally can be expanded upon in writing. Interested parties should submit requests by email to [ecdrweb@epa.gov](mailto:ecdrweb@epa.gov) one week prior to the meeting dates, in order to be placed on the list of public speakers.

### *C. Written Statements*

Written statements will be accepted throughout the advisory process; however, for timely consideration, statements should be supplied by email to [ecdrweb@epa.gov](mailto:ecdrweb@epa.gov) one week prior to the meeting dates. Members of the public should be aware that written comments, including personal contact information, if included, may be posted to the Committee website

as well as placed in the EPA docket supporting this activity. Copyrighted material will not be posted without explicit permission of the copyright holder. Additionally, EPA will invite public comment on any proposed rule resulting from the Committee's deliberations.

## **VI. Meeting Schedule and Agenda**

### *A. Meeting Schedule*

EPA anticipates up to five Committee meetings will be held between June and October 2017, including the Committee meetings that EPA is announcing in this Notice. Committee meetings will be one and a half days each, and held in Washington, D.C., unless the Committee decides otherwise. The Committee will separately announce those meetings subsequent to the meetings being announced in this notice.

### *B. The First Committee Meeting*

The first Committee meeting will be held on June 8, 2017, from 9 a.m. to 5 p.m. and on June 9, 2017, from 9 a.m. to 3:00 p.m. The second Committee meeting will be held on August 16, 2017, from 9 a.m. to 5 p.m. and on August 17, 2017, from 9 a.m. to 3:00 p.m. Both meetings will be open to the public. Meeting details and agenda information will be available online at <https://www.epa.gov/chemical-data-reporting/negotiated-rulemaking-committee-chemical-data-reporting-requirements>, as well as in the EPA docket supporting this activity.

## **VII. Notice of Intent to Negotiate and Response to Public Comments**

On December 15, 2016, EPA published a notice of intent to establish a Committee to negotiate a proposed rule that would limit chemical data reporting requirements under section 8(a) of TSCA, for manufacturers of any inorganic byproduct chemical substances, when such byproduct chemical substances are subsequently recycled, reused, or reprocessed (81 FR

90843). The notice requested comment on membership, the interests affected by the rulemaking, the issues the Committee should address, and the procedures it should follow.

EPA received 18 comments on the notice of intent, which can all be found in the docket for this Notice. None of the comments opposed using regulatory negotiation for this rulemaking; most endorsed the process and included requests to serve on the Committee. However, one commenter raised four substantive issues, which EPA is responding to here.

*A. EPA Should Commit Staff with Appropriate Seniority and the Authority to Negotiate for the Agency*

The commenter encouraged EPA to select representatives that are knowledgeable about the issue and have the authority to make commitments for the agency. EPA agrees. EPA will have two representatives at the table – one technical expert on CDR, and the other an EPA manager with the authority to, in consultation with other EPA officials as needed, make commitments for the agency. EPA will also have other technical experts available to answer questions about other EPA programs, as recommended by the commenter.

*B. Additional Recommendations Regarding Committee Participation*

The commenter recommended that the Small Business Administration (SBA) Office of Advocacy be represented on the Committee. Because SBA's Office of Advocacy already has multiple established processes for providing input during rulemaking, such as serving on Small Business Advocacy Review Panels that are convened under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 609(b)(3) (1980), and participating in interagency review conducted under Executive Order 12866, 58 FR 51735 (October 4, 1993), and because EPA believes it is important for the federal government to be represented as a singular entity at the table, SBA will not serve on

the Committee. EPA will coordinate with SBA through the standard processes that apply to EPA rulemaking. In addition, SBA, as well as other federal agencies, will be invited to attend all Committee meetings as an observer.

*C. EPA is Required to Propose and Finalize a Rule Regardless of the Outcome of the Negotiated Rulemaking.*

The commenter believes that the Lautenberg Act requires EPA to propose and finalize a rule lessening the reporting burdens for inorganic byproducts sent for recycling, regardless of whether consensus is reached by the Committee. As EPA explained in its December 15, 2016, Notice, the agency construes its obligation to propose and finalize a rule under TSCA section 8(a)(6) as being contingent on the Committee reaching a consensus.

EPA's obligation under TSCA section 8(a)(6)(B) is to finalize a rule "resulting from such negotiated rulemaking." While EPA would have authority to issue an amendment to the CDR for inorganic byproducts even if negotiation failed to achieve any consensus, such a rule would not be a rule *resulting from* the negotiated rulemaking. Accordingly, TSCA section 8(a)(6)(B) presupposes that the negotiated rulemaking process reached consensus in directing EPA to issue a final rule.

This reading is consistent with the structure of TSCA section 8(a)(6) as a whole, requiring a proposed rule within three years of the Lautenberg Act's enactment and a final rule six months later. Under the commenter's reading, if the Negotiated Rulemaking Committee could not reach any consensus to limit the reporting requirements for inorganic byproducts, EPA would still be required to come up with its own approach by June 2019 without the benefit of agreement from the interested parties. EPA can reasonably assume that such an approach would draw adverse comment from the party or parties that blocked

consensus in the Negotiated Rulemaking Committee, and thus the agency would only have six months to solicit, consider, and respond to those comments before the statutorily required deadline. EPA does not believe that Congress intended for this to occur because it did not direct the agency to limit reporting requirements in any specific way that would require a rulemaking regardless of the outcome of the negotiated rulemaking. On the contrary, Congress specifically directed that the final rule must result from the negotiated rulemaking, which will likely simplify the comment process enough to enable the agency to meet these relatively short deadlines.

By establishing the Committee in today's Notice, EPA is fulfilling the Lautenberg Act's requirement to "enter into a negotiated rulemaking pursuant to" the NRA to develop and publish a proposed rule. 15 U.S.C. 2607(a)(6)(A). When viewed under the lens of the statutory structure, any requirement for EPA to actually "develop and publish" a proposed rule must necessarily also result from consensus being reached by the Committee.

For these reasons, EPA respectfully disagrees with the commenter. If consensus cannot be reached, and there is no agreement upon which to base a proposal, then there is no further statutory obligation to issue a proposal or a final rule. However, as noted in the December 15, 2016, Notice, EPA commits to working in good faith to seek consensus on a proposal that is consistent with the legal mandate of TSCA.

*D. Definition of Consensus Should Not Require Unanimous Concurrence of the Committee.*

The commenter recommended that the Committee use a definition of consensus that does not require unanimous concurrence among the Committee, citing the potential for one Committee member's veto to result in no agreement. The NRA defines consensus as unanimous concurrence, unless the Committee agrees otherwise. 5 U.S.C. 562. A unanimous

concurrence definition is important in ensuring no one interest or group of interests is able to control the process. While EPA believes that unanimous concurrence is not an unreasonably high bar, particularly with the assistance of a highly skilled neutral facilitator with expertise in building consensus, the Committee has the power under the NRA to agree to another definition of consensus.

**Authority:** 15 U.S.C. 2601 *et seq.*

Dated: May 24, 2017,

Wendy Cleland-Hamnett,

*Acting Assistant Administrator, Office of Chemical Safety and Pollution Prevention.*

[FR Doc. 2017-11570 Filed: 5/31/2017 4:15 pm; Publication Date: 6/5/2017]