

December 6, 2012

Via E-Mail

Ms. Wendy Cleland-Hamnett
Director, Office of Pollution Prevention and Toxics
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-0001

Re: Request That EPA Immediately Extend the Deadline for Submission of
Requests to Withdraw the Listing for Cadmium and Cadmium
Compounds in the TSCA Section 8(d) Model Rule, and the Effective Date
for the Final Rule to Adopt That Listing, as Published at 77 Fed. Reg.
71561 (Dec. 3, 2012)

Dear Ms. Cleland-Hamnett:

We write on behalf of the International Cadmium Association (ICdA) to request that the U.S. Environmental Protection Agency (EPA) immediately take final action to extend the December 17, 2012, deadline for submission of requests pursuant to 40 C.F.R. § 716.105(c) that EPA withdraw the listing adding cadmium and cadmium compounds to the Toxic Substances Control Act (TSCA) Section 8(d) rule, and to extend the January 2, 2013, effective date for that rule, as published by EPA on December 3, 2012. 77 Fed. Reg. 71561. The requested extension of the December 17, 2012, submission date is necessary to allow ICdA and other affected parties sufficient time to prepare requests that EPA withdraw the listing or that EPA withdraw or stay the final rule. The extension of the effective date is necessary to allow EPA time to consider carefully and respond to such requests before the rule takes effect. ICdA also requests that EPA make conforming changes in the promulgation date for purposes of judicial review, the deadline for petitioning for judicial review, and the reporting deadline for affected parties that are consistent with the extended effective date for the rule.

The current deadline for submission of requests to withdraw the listing for cadmium and cadmium compounds is too expedited to allow affected parties to prepare proper requests that EPA withdraw the listing for cadmium and cadmium compounds, or otherwise withdraw or stay the final rule. In addition, the effective date for the rule must be extended to allow adequate time for EPA to evaluate and to take appropriate final action concerning each of these requests before the final rule takes effect. ICdA believes that the factors described below are sufficient to support a determination by EPA that there is “good cause” to withdraw the listing for cadmium and cadmium compounds under 40 C.F.R. § 716.105(c). In the alternative,

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these factors would also provide a proper basis for a decision by EPA to withdraw or to stay the final rule pending further review.

ICdA believes that this listing rule is far broader in scope and economic impact than would be necessary to address the legitimate questions that have been raised about potential consumer exposure to cadmium and cadmium compounds. ICdA also believes that EPA has discretion not to adopt such broad and economically burdensome reporting requirements notwithstanding the prior listing action by the Interagency Testing Committee.

In addition, there are very significant problems with and discrepancies in the final rule as it was promulgated that must be corrected or this final action will be arbitrary and capricious. These problems are attributable to the language of the rule as EPA elected to promulgate it, rather than to any intrinsic obligation EPA may have to list the affected substances. In particular, there are two problems with the form of the rule as it was promulgated that EPA must resolve.

First, the rule requires that manufacturers or importers of cadmium or cadmium compounds determine whether these substances “have been, or are reasonably likely to be, incorporated into consumer products.” Unfortunately, neither the rule nor the preamble provide a clear standard or guidance concerning how this determination will be made. Affected parties do not know whether they have some sort of affirmative duty to investigate the use of these substances, or to interrogate their customers concerning the intended use. This novel language should never have been adopted without providing better guidance, particularly in the absence of prior notice and comment.

Second, EPA repeatedly uses language in the preamble indicating that the listing extends to manufacture or importation of cadmium or cadmium compounds “as part of an article.” This language is not consistent with the text of the specific amendments as promulgated, nor does this broad language find support in the general provisions of the TSCA Section 8(d) rule. This conflict between the preamble and the promulgated rule creates significant uncertainty concerning the scope of the reporting requirements created by this rule and must be resolved. Moreover, ICdA believes that EPA has not fully considered the broad economic impact of extending reporting requirements to manufacturers or importers of articles. These reporting requirements may extend to virtually every company that imports or assembles electronic components.

ICdA does not believe there is any reasonable prospect that EPA can consider and resolve all of the serious questions presented by this final rule in the 16-day period between the deadline for submission of withdrawal requests and the effective date of the rule. This problem is severely exacerbated in this instance because the submission and effective dates bracket the holiday period. In the event that EPA elects not to grant the requested extensions, ICdA

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respectfully requests that EPA assure that adequate program personnel and legal counsel will be available during the holidays to evaluate the many requests for withdrawal that will be submitted, and to draft those additional notices that will be needed to provide proper relief.

Sincerely,



Lynn L. Bergeson

cc: The Honorable Lisa P. Jackson (via e-mail)
Mr. James J. Jones, Acting Assistant Administrator (via e-mail)
Mr. Robert W. Jones, Chemical Control Division (via e-mail)