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VIA REGULATIONS.GOV

Office of Pollution Prevention and Toxics
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Re: Joint Steel Industry Comments on Proposed Chemical Data Reporting Revisions under TSCA Section 8(a); Docket Number EPA-HQ-OPPT-2018-0321

Dear U.S. Environmental Protection Agency:

On behalf of the American Iron and Steel Institute ("AISI"),[1] the Steel Manufacturers Association ("SMA"),[2] and the Specialty Steel Industry of North America ("SSINA")[3] (collectively, "the Steel Associations"), we are pleased to provide the following comments regarding the U.S. Environmental Protection Agency's ("EPA's" or "the Agency's") proposed revisions to the Chemical Data Reporting ("CDR") rule under Section 8(a) of the Toxic Substances Control Act ("TSCA"). 84 Fed. Reg. 17,692 (Apr. 25, 2019). As detailed below, these comments focus on the CDR reporting requirements for inorganic byproducts that are sent for

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1 AISI represents 21 member companies, including integrated and electric furnace steelmakers, accounting for the majority of U.S. steelmaking capacity with facilities located in 41 states, Canada, and Mexico, and approximately 120 associate members who are suppliers to or customers of the steel industry.

2 SMA is the largest steel trade association in North America, in terms of membership, and the primary trade association of electric arc furnace ("EAF") steel producers, often referred to as "minimills," that make various steel products, including carbon, alloy, and stainless steels, from a feedstock of nearly 100 percent steel scrap. The member companies of the SMA are geographically dispersed across the country and account for over seventy-five percent of total domestic steelmaking capacity.

3 SSINA is a national trade association comprised of producers of specialty steel products, including stainless, electric, tool, magnetic, and other alloy steels. SSINA members account for over 90 percent of the specialty steel manufactured in the United States.

recycling and EPA's failure to propose meaningful burden reduction as mandated by the 2016 TSCA amendments.

Background

The 2016 amendments to TSCA, adopted through the Frank R. Lautenberg Chemical Safety in the 21st Century Act, included a specific mandate in Section 8(a)(6) for EPA to conduct a negotiated rulemaking to reduce the burden of CDR reporting requirements for recycled inorganic byproducts.

> NEGOTIATED RULEMAKING —
>
> (A) The Administrator shall enter into a negotiated rulemaking pursuant to subchapter III of chapter 5 of title 5, United States Code, to develop and publish, not later than 3 years after the date of enactment of the Frank R. Lautenberg Chemical Safety for the 21st Century Act, a proposed rule **providing for limiting the reporting requirements, under this subsection, for manufacturers of any inorganic byproducts, when such byproducts, whether by the byproduct manufacturer or by any other person, are subsequently recycled, reused, or reprocessed**.
>
> (B) Not later than 3 and one-half years after such date of enactment, the Administrator **shall publish a final rule resulting from such negotiated rulemaking**.

TSCA §8(a)(6) (emphasis added). The history of the formation and work of the negotiated rulemaking committee that EPA formed in response to this mandate from Congress is recounted in detail in the joint industry stakeholder comments, to which the Steel Associations were signatories, filed on December 11, 2017, under Docket Number EPA–HQ–OPPT–2016–0597 (*Comments of Several Industry Groups Represented on the Negotiated Rulemaking Committee – Negotiated Rulemaking to Limit Reporting of Inorganic Byproducts That Are Recycled, Reused, or Reprocessed*) ("*Industry Stakeholder Comments*"). Those comments are hereby incorporated by reference.

The Negotiated Rulemaking Committee explored a number of options that reasonably would have reduced the burden of CDR reporting for inorganic byproducts. The Committee was unable to reach a consensus agreement on any of these proposals, which was unsurprising given that the non-industry stakeholders (*i.e.*, entities that do not file CDR reports but are consumers of the information) had no incentive to compromise or to support reduction in reporting burdens. Consistent with the Section 8(a)(6) mandate from Congress, subsequent to the failure of the Negotiated Rulemaking Committee, EPA recognized that the agency was still

required to publish a rule, informed by the negotiations, to limit CDR reporting requirements for recycled inorganic byproducts. The current proposal purports to satisfy this Congressional mandate.

The Proposed CDR Revisions Do Not Meaningfully Limit Reporting Burdens for Recycled Inorganic Byproducts

The proposed CDR rule revisions fail to limit, in any meaningful way, reporting requirements for recycled inorganic byproducts as Congress intended under TSCA Section 8(a)(6). The proposed revisions related to inorganic byproducts sent for recycling are either narrowly targeted (*e.g.*, exemptions for specifically identified byproducts that are recycled in a site-limited, enclosed system and for byproducts that are manufactured as part of non-integral pollution control and boiler equipment) or offer little or no actual burden reduction (*e.g.,* allowing reporting in specified metal categories for inorganic byproducts; establishing a petition process to expand the list of specific byproduct exemptions).

In particular, while the Steel Associations have no objection to an option to report using metal categories instead of for an individually listed byproduct, there is little reason for a reporting facility to choose the "metal category" approach. Theoretically, under this approach, a facility could "combine and report multiple inorganic byproduct metal substances, that otherwise would be reported individually as listed on the TSCA Inventory, into one or more specifically-listed [metal] categories." 84 Fed. Reg. at 17,706. In practice, as several stakeholders remarked during the Negotiated Rulemaking Committee meetings, there is simply no good reason why a mill would choose to report for a specific metal category (or, in most cases, numerous metal categories), rather than file a report using for the byproduct itself. In fact, the metal category reporting approach would add complexity to the reporting process, as EPA's discussion of the approach in the preamble to the proposed CDR revisions makes clear:

> However, the manufacturer would not be able to bifurcate the production volume of the same byproduct chemical substance and report a portion in a category and another portion as a specific chemical substance unless the bifurcation is due to having different metal elements present in the byproduct. Some substances would be required to be reported as listed on the TSCA Inventory and not as part of these metal compound categories, because they are of particular interest to EPA.

84 Fed. Reg. at 17,706.

EPA's proposal to provide for a petition process to expand the list of inorganic byproducts exempt from CDR reporting also provides no burden relief. As described by EPA:

> Any person would be able to request that EPA amend the manufacturing process and related byproduct substance exempted list. **EPA is proposing to model the procedure to request amendments after the one described in 40 CFR 711.6(b)(2)(iii) to amend the list of partially exempted chemical substances for which the processing and use information is of low current interest.** The proposed procedure would require a written request that identifies the process and byproduct chemical substance in question, including a written rationale for the request that provides sufficient specific information, including cites and relevant documents, to demonstrate to EPA that the byproduct substance(s) and manufacturing process(es) in question either would or would not meet the criteria for this exemption.

84 Fed. Reg. at 17,709 (emphasis added). As EPA notes above, a similar petition process already exists for seeking an exemption from some or all of the CDR reporting requirements. Either petition process places the burden on the reporter facility to demonstrate that the criteria for the exemption are satisfied. The utility and desirability of such an approach is shown, or the lack thereof, by the fact that few such "low current interest" petitions have been filed for inorganic byproducts in the last decade-plus since inorganic substances were brought within the scope of the CDR program.

EPA Should Pursue Actual Burden Reduction and Adopt a More Reasonable Interpretation of the "Extracted Component Chemical Substances" Exemption

Of the burden reduction approaches considered by the Negotiated Rulemaking Committee, one in particular was viewed as "low hanging fruit" by EPA representatives and a number of other stakeholders: reform EPA's overly narrow interpretation of the "extracted component chemical substances" exemption under 40 C.F.R. §711.10(c) and §720.30(g).

Section 711.10 identifies "[a]ctivities for which reporting is not required" and refers, in subsection (c), to manufacture of the chemical substance "in a manner described in 40 CFR 720.30(g) or (h)." In turn, Section 720.30(g) excludes from reporting requirements:

> Any byproduct if its only commercial purpose is for use by public or private organizations that (1) burn it as a fuel, (2) dispose of it as a waste, including in a landfill or for enriching soil, or (3) extract component chemical substances from it for commercial purposes. (This exclusion only applies to the byproduct; it does not apply to the component substances extracted from the byproduct.)

When first adopted, in 1977 as part of the Inventory Reporting requirements in Part 710, EPA explained its original understanding of the "extraction" exemption as follows:

> Comment 55: Persons who extract component chemical substances from byproducts should not be required to report those chemical substances.
>
> Response: The Administrator agrees with this comment.... There is no requirement that these persons report any chemical substance which is extracted or separated from a byproduct, **including by means of heat or a chemical reaction**, if the chemical substance that is recovered is actually present in the byproduct or was an intermediate used in the manufacture of the byproduct....

42 Fed. Reg. 64572, 64587 (Dec. 23, 1977) (final Inventory Reporting regulations) (emphasis added). Hence, when originally adopted, the exemption was intended to cover the situation where a parent metal (such as zinc) is extracted from a metal oxide byproduct (*e.g.*, furnace dust which includes zinc oxide) that is sent for recycling. (In this situation, the zinc oxide-containing byproduct is the result of a manufacturing process in which the zinc is an "intermediate" in production of the zinc oxide).

However, EPA's interpretation has shifted. For example, in the 2011 CDR revisions rule, EPA stated about the provision:

> [T]he component to be extracted must be already existing as a distinct chemical substance in the waste stream. When the chemical substance present in the byproduct and the chemical substance extracted from the byproduct are distinct chemical substances, neither the manufacture of the byproduct nor the manufacture of the extracted chemical substance qualify for the 40 CFR 720.30(g)(3) exemption.

76 Fed. Reg. 50816, 50849 (Aug. 16, 2011). Similarly, in the 2016 TSCA CDR reporting instructions[4] EPA states:

> A "component chemical substance" means a chemical substance that already exists in the byproduct. If the recycling process involves breaking chemical bonds or forming new chemical bonds to convert a chemical substance in the byproduct into a different chemical substance (which is then extracted), then the recycling process does not count as extracting a component chemical substance of the byproduct.
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> Note: In circumstances where other substances in the byproduct are chemically reacted in order to facilitate the separation of a desired component chemical

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[4] EPA, *Instructions for Reporting 2016 TSCA Chemical Data Reporting* at 2-6 (June 23, 2016) https://www.epa.gov/sites/production/files/2016-05/documents/instructions_for_reporting_2016_tsca_cdr_13may2016.pdf (emphasis added).

> substance, such that the component chemical substance itself is not chemically changed before being extracted, then the process does constitute an extraction of the unchanged component chemical substance.

Hence, EPA now considers the exemption not to cover a parent metal recovered from a metal oxide, due to the chemical reaction that occurs during such extraction. It is nonsensical (or at least a highly restrictive reading), however, to suggest that the parent metal – the same metal atom, whether in parent metal or compound form – is not a "component chemical substance" of the byproduct. Such an interpretation dramatically limits the scope of the exemption and thwarts the policy of Congress to promote recycling and reduce the burdens of reporting for recycled inorganic byproducts.

Accordingly, the Steel Associations urge EPA to revise Section 711.10 and the agency's interpretation of the "extracted component chemical substance" exemption by adopting the proposal introduced during the Negotiated Rulemaking Committee process (during which it was known as "Approach B" detailed in the document "*Potential Approaches for the Chemical Data Reporting (CDR) Inorganic Byproducts Negotiated Rulemaking Committee*"). Under this approach, Section 711.10(c) would be revised as follows (deleted text in strikeout and new text in italics):

> 711.10 Activities for which reporting is not required.
>
> A person described in § 711.8 is not subject to the requirements of this part with respect to any chemical substance described in § 711.5 that the person solely manufactured or imported under the following circumstances:
>
> (a) The person manufactured or imported the chemical substance described in § 711.5 solely in small quantities for research and development.
>
> (b) The person imported the chemical substance described in § 711.5 as part of an article.
>
> ~~(c) The person manufactured the chemical substance described in § 711.5 in a manner described in 40 CFR 720.30(g) or (h).~~
>
> *(c) The person manufactured the chemical substance described in § 711.5 in a manner described in 40 CFR 720.30(g) (1) If the person manufactured the chemical substance described in § 711.5 in a manner described in 40 CFR 720.30(g)(3) and the chemical substance is an inorganic substance that will be subsequently reacted by oxidation, reduction, precipitation, chelation, smelting, ion exchange or other transformation, to a different form of the initial inorganic*

> *component chemical with the intent to recycle, reuse, or reprocess the inorganic chemical substance for commercial purposes, the person is not subject to reporting.*
>
> *(d) The person manufactured the chemical substance described in § 711.5 in a manner described in 40 CFR 720.30(h).*

This approach would restore the exemption to its an originally intended scope and include recycling involving extraction of a different form of the initial component chemical substance, such as extracting a parent metal from a metal oxide-containing byproduct. Importantly, CDR reporting still would be required for the extracted substance that is reacted (manufactured) from the byproduct and enters the stream of commerce. As detailed in the *Industry Stakeholder Comments* noted above, little if any useful information would be lost by expanding the scope of the exemption and EPA would continue to retain authority to request further information on the recycled byproduct if circumstances warrant.

Conclusion

The Steel Associations appreciate the opportunity to provide the foregoing comments regarding the proposed CDR revisions. EPA should take this opportunity to provide meaningful burden reduction related to reporting of inorganic byproducts sent for recycling by adopting the approach outlined above and rationalizing the interpretation of the "extracted component chemical substance" exemption. If EPA would like to discuss these comments or needs additional information, please contact the Steel Associations counsel in this matter, Joe Green, at 202.342.8849 or JGreen@KelleyDrye.com.

Respectfully submitted,

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