



June 20, 2011

Board of Directors

John Applegate
Robert Glicksman
David Hunter
Thomas McGarity
Catherine O'Neill
Amy Sinden
Sidney Shapiro
Rena Steinzor

Sent via fax to 202-395-6102

Administrator Cass R. Sunstein
Office of Information and Regulatory Affairs
White House Office of Management and Budget
725 17th Street, N.W., Room 5228
Washington, D.C. 20503

Advisory Council

Patricia Bauman
Frances Beinecke
W. Thompson Comerford, Jr.
Robert Kuttner
John Podesta
James E. Tierney
Henry Waxman

Re: EPA's Proposal to List Chemicals Under the Toxic Substances Control Act (TSCA) § 5(b)(4)

Administrator Sunstein:

We write today as Member Scholars of the Center for Progressive Reform (CPR), a network of scholars around the nation working to protect health, safety, and the environment through analysis and commentary. We want to correct several points made in the U.S. Chamber of Commerce's June 7, 2011 letter asking you to urge the U.S. Environmental Protection Agency (EPA) to "[s]uspend the consideration and initiation of all TSCA § 5(b)(4) listings."¹ The Chamber's letter raised multiple objections to these listings. These objections are largely without merit. We therefore urge OIRA to conclude its review of the § 5(b)(4) listings, which have been delayed far longer than Executive Order guidelines allow, so that EPA can issue a Notice of Proposed Rulemaking, obtain comments from the public through normal processes, and decide whether to finalize the listings.

EPA is considering listing, or has proposed listing, five chemicals.² Each of these chemicals poses significant health and safety risks that the EPA has rightly determined warrant public dissemination. Bisphenol A (BPA) is used in the manufacture of many consumer products and has been shown to be a reproductive and developmental toxicant. Hexabromocyclododecane (HBCD), used as a flame retardant in the building and construction industry, presents health concerns that include potential reproductive, developmental and neurological

¹ Letter from William L. Kovacs, Senior Vice President, Environment, Technology & Regulatory Affairs, U.S. Chamber of Commerce, to Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs (June 7, 2011).

² See U.S. ENVIRONMENTAL PROTECTION AGENCY, ACTION PLAN FACT SHEET (April 2011).

effects in humans. Nonylphenol (NP) and Nonylphenol Ethoxylates (NPEs) are present in detergents, cleaners, agricultural and indoor pesticides, food packaging, and cosmetics. NP is extremely toxic to aquatic organisms and has been detected in human breast milk, blood, and urine. Phthalates are used as plasticizers to increase the flexibility, transparency, durability and longevity of plastics and primarily pose a concern for development of the male reproductive system. The flame retardant Polybrominated Diphenyl has been shown to be hazardous to humans, particularly children, and the environment due to its toxicity.

The Chamber has mischaracterized EPA's decision to list these chemicals as "blacklisting" and argues that such listing is without precedent. While the Agency has not previously listed chemicals under TSCA § 5(b)(4), it has developed other lists of chemicals that, much as the chemicals of concern list does, inform the public about the Agency's current thinking regarding those chemicals. It is exactly such transparency that President Obama explicitly encouraged in his January 21, 2009 Memorandum for the Heads of Executive Departments and Agencies,³ and that we as citizens ought to demand and expect from federal agencies. The Chamber pays lip service to transparency, but its goal is to head off issuance of an NPRM – a mere notice of agency intent that triggers opportunities for public comment on the best course of action for the agency. The Chamber is attempting to squelch, rather than advance, debate on these important issues. If the Chamber believes that EPA's science is flawed, it should make those arguments in a formal public comment process. The Chamber's current tactic serves only to generate more work for both OIRA and EPA while obfuscating and delaying the important health and safety information on which EPA seeks public input.

Furthermore, EPA's § 5(b)(4) listing authority is a core component of TSCA and is an integral part of the Congressional plan for disclosure of toxic chemical risks. That EPA has not previously exercised their § 5(b)(4) authority does not strip the Agency of that authority. On the contrary, such a delay in listing chemicals of concern illustrates that it is high time EPA perform its statutorily mandated duties and alert the public as to its findings regarding these chemicals. The Chamber ignores the plain meaning of the statute⁴ and instead demands that the EPA promulgate specific standards prior to proposing § 5(b)(4) listings. This demand overlooks the fact that the relevant standard – "may present an unreasonable risk" – is present throughout TSCA, and no court has ever forced the agency to define that term numerically. Indeed, the D.C. Circuit has noted that this term does not require the agency to have "absolute certainty," nor does it require proof of risk "to a more-probable-than-not" degree.⁵ Instead, the agency must simply have a solid, more-than-

³ Presidential Documents: Transparency and Open Government, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 21, 2009).

⁴ TSCA § 5(b)(4)(ii) states that "[i]n making a finding under clause (i) that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or any combination of such activities presents or may present an unreasonable risk of injury to health or the environment, the Administrator shall consider all relevant factors, including—

(I) the effects of the chemical substance on health and the magnitude of human exposure to such substance; and
(II) the effects of the chemical substance on the environment and the magnitude of environmental exposure to such substance."

⁵ *Chemical Manufacturers Association v. EPA*, 859 F.2d 977 (D.C. Cir. 1988) (interpreting "may present an unreasonable risk" language in Section 4 of the Act).

theoretical “basis for concern” that a chemical poses “unreasonable risk.”⁶ Again, the proper forum for the Chamber to express its views on the sufficiency of EPA’s data is the public comment period, or in judicial review. The Chamber instead attempts to stall by inflating a minimal statutory standard, at the core of agency discretion, into some sort of roadblock for issuing an NPRM.

In arguing that EPA has exceeded its statutory authority the Chamber inexplicably conflates TSCA § 5(b)(4) with § 6(a) by asserting that “EPA lacks the legal authority” to list or consider listing chemicals “absent sufficient evidence to support a § 6(a) rule.” These two sections of TSCA grant the Agency different regulatory powers (to list as a “chemical of concern” and to restrict or ban, respectively) and require that EPA satisfy correspondingly different evidentiary burdens. Section 5(b)(4) allows the Administrator of EPA to publish a list of chemicals of concern after determining that a chemical *may* present an unreasonable risk of injury to health or the environment. When the Administrator lists a chemical under § 5(b)(4) a manufacturer may be subject to several data-submission requirements that act to give EPA more information for assessing the risks posed by the listed chemical. There is no limit placed on the amount of the chemical that can be manufactured and a § 5(b)(4) listing in no way leads to a ban, real or imagined.

Section 6(a), on the other hand, does allow EPA to directly regulate the manufacture of chemicals. In order to exercise the expanded powers available under § 6, though, EPA must make a much more detailed showing than required to add a chemical to the § 5(b)(4) chemicals of concern list. In particular, to regulate under § 6(a) EPA must show that chemical *presents or will present* an unreasonable risk. It must also select the least burdensome method of regulation, a determination that has been interpreted by one circuit court of appeals to require the Agency to perform a cost-benefit analysis of every potential method of regulating a particular chemical.⁷ The more substantial regulatory requirements of § 6(a) do not extend to listing chemicals under § 5(b)(4), despite the Chamber’s best efforts to argue the contrary.

After equating a § 5(b)(4) listing with an outright ban, the Chamber expresses concern regarding potential tort actions or advocacy group litigation based upon EPA’s listing of chemicals. This fear is baseless since placement on the chemicals of concern list provides potential litigants with no additional statutory ground for relief. Rather, such placement indicates to both the public and industry that EPA believes these particular chemicals warrant further study and investigation because of their potential effects. If the Chamber’s members are concerned that the chemicals cause harm and therefore could be subject to a tort claim, their anxiety may well be warranted, but is neither exacerbated nor reduced by a § 5(b)(4) listing decision.

The Chamber further argues that EPA has failed to adequately account for the impacts of the rule, has not satisfied the requirements of the Information Quality Act, and has not consulted with stakeholders or parties otherwise affected by the proposed rule. These challenges conveniently lose sight of the fact that EPA has been unable to actually publish the proposed rule and its supporting documentation while the rule has been under review at OIRA. Thus, the Chamber has effectively

⁶ Id.

⁷ See *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

asked OIRA to postpone the rule prior to its proposal, thereby perpetuating the defects the Chamber claims to want cured. Were the NPRM released from review, then not only would the perceived defects be cured, but the Chamber, along with all other stakeholders, would be allowed to comment directly on the proposed rule.

We therefore request that OIRA release the § 5(b)(4) NPRM from review so that the public may benefit from the Agency's expert determinations regarding health and safety.

Sincerely,



Rena I. Steinzor
President, Center for
Progressive Reform
Professor, Univ. of Maryland
School of Law



Noah M. Sachs
Member Scholar, Center for
Progressive Reform
Associate Professor, Univ. of
Richmond School of Law



Wendy E. Wagner
Member Scholar, Center for
Progressive Reform
Professor, Univ. of Texas—
Austin School of Law