April 10, 2006

Via Electronic Mail to: oppt.ncic@epa.gov
Document Control Office (7407M)
Office of Pollution Prevention and Toxics (OPPT)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460–0001

Re: Export Notification; Proposed Change to Reporting Requirements—Docket ID Number EPA–HQ–OPPT–2005–0058

Dear Sir or Madam:

The Society of the Plastics Industry, Inc. (SPI) appreciates the opportunity to submit these comments on the U.S. Environmental Protection Agency's (EPA's) proposal to amend Toxic Substances Control Act (TSCA) section 12(b) export notification regulations appearing at 40 C.F.R. Part 707, subpart D.[1] Founded in 1937, SPI is the trade association representing one of the largest manufacturing industries in the United States.[2]

First, SPI agrees with and supports the comments submitted by the American Chemistry Council (ACC) on the four specific questions raised by EPA in the proposal. In particular, SPI agrees that:

- the proposed reporting threshold levels are set at a reasonable level;
- it is appropriate to use GHS for guidance on establishing a *de minimis* concentration;
- it is appropriate to use the Stockholm Convention as a basis for selecting a 50 ppm threshold for PCBs; and
- adoption of the *de minimis* concentration exemption will result in a reduction of reporting burden.

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[1] *Export Notification; Proposed Change to Reporting Requirements*, 71 Fed. Reg. 6,733 (February 9, 2006).

[2] SPI's members represent the entire plastics industry supply chain, including processors, machinery and equipment manufacturers and raw materials suppliers. The U.S. plastics industry employs 1.3 million workers and provides more than $345 billion in annual shipments. For more information, visit SPI on the Web at www.plasticsindustry.org.

Second, consistent with the comments submitted on the proposal by ACC, below we provide additional comments and proposed changes that would further reduce reporting burdens for the Agency as well as the regulated community, while ensuring that the purpose of section 12(b) is furthered.

I. One-Time Reporting Requirement

SPI strongly supports EPA's proposal to change the current annual export notification requirements to a one-time reporting requirement for each destination country. SPI also agrees with ACC's recommendation that section 5(e), (a)(2), or (b) notifications submitted during the calendar year prior to the final rulemaking be eligible to qualify for the one-time notification requirement and that, if EPA agrees, this be clarified in the rulemaking record. SPI also supports changing EPA notification to foreign governments to occur on a one-time basis for the 12(b) reporting triggers specified in the proposal.

II. Duplicative Reporting

SPI agrees with ACC that EPA could achieve an even greater burden reduction for both EPA and the regulated community by amending the rule to provide that once EPA has submitted a one-time notification to a foreign government, the requirement for companies to submit duplicative 12(b) notifications (*i.e.,* notifications for the same substance to the same country) is waived. Because additional company reports do not trigger further communications by EPA to foreign governments, notification of export by a second company of the same substance to same country serves no purpose. Indeed, in the 1979 proposal to the 1980 final 12(b) rule EPA acknowledged that this redundancy is a problem because exporters have no way of knowing whether any other importers have previously submitted notices applicable to a specific substance and country.[3]

III. List of Reportable Substances, Thresholds, and Countries

EPA should maintain a current official list of 12(b) substances, applicable thresholds, and notified countries. Currently, without subscribing to a third party regulatory tracking service, it is nearly impossible for regulated entities to know what is reportable under section 12(b). EPA could also use this list as a mechanism to officially communicate non-CBI information regarding which countries have been notified for which substances, thereby enabling the burden reductions associated with the duplicative reporting elimination proposal described above.

Further, EPA should make the above-described lists the authoritative, legally binding source of information regarding the TSCA section 12(b) status of substances as of the date of their last updating. If these lists are not considered by EPA to be legally binding, in instances in which a reporting violation occurs due to an error appearing in one of these lists EPA should exercise its enforcement discretion in favor of the company involved.

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[3] 44 Fed Reg. 56,856, 56,858 (Oct. 2, 1979).

IV. R&D Substances

SPI believes that in this or a subsequent rulemaking EPA should exempt substances handled under the TSCA research and development (R&D) exemption ("R&D substances") from the 12(b) export notification requirement.[4] The majority of TSCA's reporting rules exempt certain specific types of substances.[5] Substances that are exempt from TSCA's section 5 premanufacture notification (PMN) requirements at 40 C.F.R. Part 720 are typical of the types of substances that EPA exempts from TSCA reporting rules. These include, *inter alia*, R&D substances; impurities; byproducts that are used for no commercial purposes; substances produced due to exposure to environmental factors; substances resulting from a chemical reaction that occurs incidental to storage or disposal of another substance, mixture, or article; substances produced upon end-use of another substance, mixture, or article; substances produced from the use of certain additives (*e.g.*, surfactants); and non-isolated intermediates.

Thus, an R&D substance can properly be manufactured, imported, processed, distributed, and used in the U.S. under TSCA without notifying EPA under section 5 of TSCA so long as it is handled in accordance with the R&D exemption. However, if the same R&D substance is itself or is known to contain a substance subject to section 12(b) an exporter of the R&D substance must make an export notification under section 12(b), subject to strict liability and substantial civil and potential criminal penalties. Accordingly, the existing section 12(b) requirement places obligations on the regulated community beyond those imposed under sections 4, 5, 6, 7, and 8 of the statute. While it is appropriate and prudent under section 12(b) to provide foreign governments with information regarding substances imported from the U.S., requiring exporters to notify EPA of substances that are exempt from the majority of TSCA's reporting requirements creates a higher standard for exported substances than for substances intended for use in the U.S.

In enacting section 12(b), Congress focused on communicating hazards associated with *chemicals*, not hazards associated with *shipments* of chemicals. In the preamble to the December 16, 1980 final rule, EPA explained the purpose of section 12(b) as follows:

> section 12(b) is primarily intended to alert and inform foreign governments, in a general manner, of hazards that may be associated with a chemical substance or mixture. The intended focus of the notice to foreign governments is the chemical substance or mixture and what EPA has done or found out about it, rather than

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[4] The TSCA "R&D exemption" appears at 40 C.F.R. § 720.36.

[5] *See, e.g.*, 40 C.F.R. э 704.5 (substances exempt from TSCA section 8(a) reporting and recordkeeping provisions); 40 C.F.R. § 710.4(c) (substances exempt from TSCA initial Inventory and Inventory Update Reporting requirements); 40 C.F.R. § 712.25(d) (substances exempt from TSCA preliminary assessment information rule reporting); 40 C.F.R. § 716.20(a)(9) (exempting impurities from TSCA section 8(d) rule); 40 C.F.R. §717.7(a)(2) (substances exempt from the TSCA section 8(c) rule); 40 C.F.R. § 720.30 (substances exempt from TSCA premanufacture notification requirements); 40 C.F.R. § 721.45 (substances exempt from TSCA significant new use rule notification requirements). *But see* section 8(e) of TSCA (substances meeting TSCA "chemical substance" definition subject to substantial risk reporting).

> specific export shipments from the United States . . . [t]he focus of the notice should therefore be to provide information to the foreign governments so that they may impose their own regulatory controls if appropriate.

45 Fed. Reg. at 82,844.

EPA further elucidated its interpretation of the purpose of section 12(b) when it amended Part 707 to reduce the export notification requirements for substances subject to notification only due to the existence of a section 4 data requirement. Specifically, EPA stated that section 12(b) is intended to

> ensure that foreign governments are alerted when EPA takes certain regulatory actions and to communicate relevant information concerning the regulated chemicals. The notification and accompanying information can be used by the importing governments to assess the risks and benefits of importing and using that chemical.

58 Fed. Reg. 40,238, 40,239 (July 27, 1993).

As shown by the preceding passages, EPA does *not* interpret section 12(b) as requiring notification to foreign governments of imports of EPA-regulated substances for purposes of stopping individual shipments, and, indeed *EPA has specifically rejected this "each shipment" approach.*[6] Rather, EPA views section 12(b) as providing a mechanism by which foreign governments can be notified of EPA actions under TSCA and can be provided with information that can assist them in developing and imposing their own regulatory controls as appropriate.

Just as TSCA regulates the manufacture, import, processing, use, and disposal of chemical substances in the U.S., such activities are regulated in foreign countries under their existing chemical control laws. Most of these laws provide exemptions for reporting "new" substances that are similar to the exemptions provided for under TSCA's PMN requirements.

Therefore, it is quite possible that a TSCA export notification might be received by a foreign government for a substance that has been intentionally and specifically exempted from the foreign country's new substance notification laws. It is these laws, not TSCA, that should serve as the basis for triggering the notification of a substance under the country's chemical control laws, and it should be these same laws that prompt the foreign government to request information from EPA on the hazards posed by the substance and whether and how the substance is regulated in the U.S. While, consistent with section 14 of TSCA, SPI supports the international exchange of information on the hazards posed by chemical substances, it objects to the imposition of significant potential civil and criminal liability for reporting substances that are not required to be reported in the U.S. under other sections of TSCA and that may not be reportable under the chemical control laws of the country of destination.

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[6] 45 Fed. Reg. at 82,844.

EPA itself notes that the most practical means of focusing the scrutiny of importing countries on the most significant EPA export notices "is to amend the section 12(b) reporting rules . . . to reduce the volume of notices."[7] EPA also recognizes that the increased number of notices in recent years is adversely affecting EPA's ability to respond to requests by importing countries for additional information on a particular chemical or import. In allowing importing countries to focus on those imported chemicals that warrant scrutiny, SPI believes that providing an exemption for R&D substances would be beneficial to foreign countries, EPA, and industry, and would promote the goals of section 12(b).

V. Timing of Notifications

In this or a subsequent rulemaking EPA should consider modifying the timing of required export notifications. SPI agrees with ACC's recommendation that EPA eliminate the requirement for notifications to be submitted to EPA within seven days of forming intent to export and instead allow notifications within one month of shipment or once per quarter, once per year, or some other reasonable timeframe.

VI. Electronic Submission

Finally, EPA should allow companies to opt for electronic submissions of 12(b) notifications if those submissions have no confidential business information.

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We thank the Agency in advance for its consideration of these comments.

Respectfully submitted,

Lynne R. Harris
Vice President, Science and Technology

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[7] 58 Fed. Reg. at 40,239.

Of Counsel:
Peter L. de la Cruz
Thomas C. Berger
Jean Cyril Walker
Keller and Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4100