

June 3, 2019

**COMMENTS OF THE RETAIL ASSOCIATIONS
ON EPA'S PROPOSAL TO MODERNIZE THE RCRA
IGNITABILITY CHARACTERISTIC**

DOCKET ID No. EPA-HQ-OLEM-2018-0830

1. Introduction

The Retail Industry Leaders Association (“RILA”), the National Association of Chain Drug Stores (“NACDS”), and their members (collectively, the “Retail Associations”) are pleased to submit these comments in response to the proposal of the U.S. Environmental Protection Agency (“EPA” or the “Agency”) to modernize the characteristic of ignitability used for identifying hazardous wastes under the Resource Conservation and Recovery Act (“RCRA”). *See* 84 Fed. Reg. 12,539 (April 2, 2019). The Retail Associations have no objection to the purely technical changes that EPA has proposed, including clarifying that the aqueous alcohol exclusion applies to wastes with more than 50% water, allowing alternative laboratory methods for determining flash point, and harmonizing the definitions of ignitable compressed gases and oxidizers with the corresponding definitions in the U.S. Department of Transportation (“DOT”) regulations. However, for the reasons stated in these comments, the Retail Associations oppose the other changes to the ignitability characteristic that EPA has proposed and/or requested comment on. The changes to the characteristic are not necessary to protect the environment, health or safety, and they would unduly burden the retail industry.

Retailers sell a wide variety of products in our stores every day that are generally deemed safe for consumption or use by ordinary consumers, and which meet all applicable safety regulations. If a customer discards these products at home, he or she throws it out in the normal municipal waste disposal or recycling stream. However, when the same consumer product goes unsold by a store or is returned to a store by a customer, it may be classified as a “hazardous waste,” potentially subjecting the store to the same burdensome hazardous waste generator regulations as a steel mill or chemical plant. Because of the regulatory complexity and uncertainty, retailers often have little choice but to handle all such unsold, returned, or used products as fully regulated hazardous wastes, despite the fact that these products pose little or no risk to human health and the environment. This imposes tremendous costs on the industry and makes recycling difficult or impractical.

The Retail Associations greatly appreciate this opportunity to submit comments on the proposed changes to the RCRA ignitability characteristic. This is also an important opportunity to further build our relationship and continue to work with EPA on ways to protect our customers and the environment, while streamlining the burdensome regulatory compliance process for our businesses – two goals that are not mutually exclusive. We also welcome the opportunity to

provide additional input to EPA, and to answer any questions the Agency may have with respect to the points made in these comments.

Section 2 below provides a general summary of our comments. Section 3 provides background on the Retail Associations and their interest in this rulemaking. Section 4 explains why the Retail Associations oppose most of the changes that EPA has proposed and/or requested comment on with respect to the long-standing exclusion for aqueous alcohol wastes. Similarly, Section 5 presents the basis for the Associations' opposition to EPA's proposals with respect to multiphase wastes. Section 6 expresses our general support for some of the technical changes EPA has proposed to the test methods used for evaluating ignitability, although it also highlights a related concern that we have. Section 7 provides more detail on the potential impacts of the Agency's proposal on the retail sector, and Section 8 provides a brief conclusion. Finally, we reiterate the commitment of the Retail Associations to continuing to work with EPA to develop common sense regulations that protect our customers and the environment while not overburdening businesses with red tape and unnecessary compliance costs.

2. Summary of Comments

The Retail Associations oppose most aspects of EPA's proposal, with the exception of a few minor technical changes to the ignitability characteristic. We summarize our main substantive comments briefly below, and then provide an overview of our analysis of the economic impacts of the Agency's proposal on the retail sector, which are likely to be substantial despite EPA statements to the contrary.

2.1 Summary of Main Substantive Comments

- o ***Proposed Exception to the Aqueous Alcohol Exclusion for Certain Alcohol Solvent Wastes.*** The Retail Associations oppose EPA's proposal to establish a new exception to the aqueous alcohol exclusion for the four alcohols specified in the "F003" and "F005" hazardous waste listings when such alcohols have been used for their solvent properties. As an initial matter, the Agency's proposal is so ambiguous that it fails to give the regulated community adequate notice and opportunity to comment, as required by law. Although EPA did not mention this and may not even recognize it, the proposed exception is inconsistent with a key RCRA rule issued in 2001 and would effectively repeal an important part of that rule. The exception also would arbitrarily result in inconsistent classification of substantially similar wastes. The Agency has not provided any rationale for the proposed exception, and the exception does not appear to be warranted in terms of environmental protection. However, the proposal would impose tremendous new costs on the retail sector and other industries.
- o ***Proposed Minimum 50% Water Content for Wastes Covered by the Aqueous Alcohol Exclusion.*** The Retail Associations do not object to EPA's proposal to modify the aqueous alcohol exclusion so that it applies only to wastes with more than 50% water. We believe this is how most regulators and members of the regulated community have long understood the exclusion.

- o ***Other Potential Changes to the Aqueous Alcohol Exclusion.*** The Retail Associations oppose the other potential changes to the aqueous alcohol exclusion that EPA requested comment on in the preamble to the proposal (e.g., limiting the exclusion to certain alcohols or wastes, increasing the minimum water content for exclusion above 50%, or establishing a minimum alcohol content). Once again, EPA has not provided sufficient details about these potential changes to enable the regulated community to provide meaningful comments. Moreover, the Agency has not offered any justification for any of these potential changes, and the changes could have substantial adverse effects on the retail sector and other industries.

- o ***Proposed New Regulatory Provision for “Multiphase Mixtures.”*** The Retail Associations oppose the proposed new provision for multiphase mixtures, since there is no clear definition of what mixtures would be covered, which limits the ability of the regulated community to provide meaningful comments and, if adopted, would fail to give “fair notice” of the scope of the rule, as required by law. To the extent that the proposed provision might cover manufactured articles with minute amounts of liquids (e.g., small sealed batteries with electrolytes or small mechanical devices with a few drops of lubricating liquid), it has not been and cannot be justified, and it would impose substantial costs on the retail industry and others that EPA has failed to consider. Moreover, the proposed language is inconsistent with the aqueous alcohol exclusion and (perhaps inadvertently) would eviscerate that exclusion.

- o ***Proposed Guidance on Free Liquids.*** The Retail Associations oppose EPA’s proposal to issue new guidance that would establish an aggressive Pressure Filtration Technique as the definitive procedure for determining whether a waste contains a liquid for purposes of ignitability (and perhaps corrosivity) testing. EPA’s proposal is inconsistent with long-standing Agency guidance on this issue as well as with the 2013 RCRA rule on solvent-contaminated wipes, which allow or even require use of the Paint Filter Liquids Test for determining when free liquids are present. EPA has not provided any rationale for its proposed change, and we doubt any rationale exists. In addition, to the extent that EPA may intend to apply its proposed guidance to corrosive wastes, the guidance would similarly be flawed in that context, and the Agency has not provided the regulated community adequate notice and opportunity to comment. EPA has not addressed the substantial adverse impacts that this guidance would have on the retail sector and other industries.

- o ***Technical Changes to the Ignitability Characteristic.*** The Retail Associations generally support the proposed technical changes to the ignitability characteristic, including those designed to allow modern methods for measuring the flash point of liquids, and those designed to harmonize the definitions of ignitable compressed gases and oxidizers with DOT rules. However, we urge EPA to clarify that if a generator properly determines that a waste has a flash point outside the ignitable range using any one of the test methods specified in the rule, it can rely on that result and manage the waste as non-ignitable, without regard to whether any of the other specified methods might lead to a different result. Otherwise, especially in cases where the measured flash point is close to the

regulatory threshold, the generator might have to perform duplicative and expensive testing, without any real environmental benefit.

2.2 Summary of Economic Impacts of the Proposal

EPA states that the proposed rule would have no significant economic impacts, but the opposite is true – especially for the retail industry. To the extent that the proposed rule would substantively change the ignitability characteristic (*e.g.*, by establishing an exception to the aqueous alcohol exclusion, narrowing the exclusion in other ways, regulating manufactured articles with minute amounts of liquids, and/or requiring more aggressive methods to determine if a solid waste contains free liquids for purposes of ignitability – or corrosivity – testing), generators would have to perform new hazardous waste determinations for all potentially affected wastes. As discussed in Section 7.1 below, the costs of such reevaluations just within the retail sector would likely be upwards of tens of millions of dollars.

Moreover, in some cases, the newly hazardous wastes may change the status of the generators (*e.g.*, from Very Small Quantity Generators (“VSQGs”) to Small Quantity Generators (“SQGs”), or from SQGs to Large Quantity Generators (“LQGs”)), resulting in still greater costs. As discussed in Section 7.2 below, such costs would likely be in the range of several million dollars each year or even higher for the retail industry alone.

3. The Retail Associations and Their Interest in This Rulemaking

The Retail Associations represent a broad cross section of the retail sector in the United States, including large and small companies, from chains with more than a thousand stores nationwide to regional companies with a handful of stores. Each of the individual Associations is described briefly below:

- o RILA is the U.S. trade association for retailers that have earned leadership status by virtue of their sales volume, innovation or aspiration. We convene decision-makers to collaborate and gain from each other’s experience. We advance the industry through public-policy advocacy and education. And through research and thought leadership, we propel developments that foster both economic growth and sustainability. Our aim is to elevate a dynamic industry by transforming the environment in which retailers operate. [RILA members](https://www.rila.org/about/Pages/RILA-Retail-Members.aspx) <<https://www.rila.org/about/Pages/RILA-Retail-Members.aspx>> represent more than \$1.5 trillion in annual sales and operate more than 100,000 stores, manufacturing facilities, and distribution centers nationwide. Our member retailers and suppliers have facilities in all 50 states and the District of Columbia, as well as internationally, and employ millions of workers domestically and abroad. For more information, please visit rila.org.
- o NACDS represents traditional drug stores, supermarkets and mass merchants with pharmacies. Chains operate over 40,000 pharmacies, and NACDS’ over 80 chain member companies include regional chains, with a minimum of four stores, and national companies. Chains employ nearly 3 million individuals, including 157,000 pharmacists. They fill over 3 billion prescriptions yearly, and help patients use medicines correctly and

safely, while offering innovative services that improve patient health and healthcare affordability. NACDS members also include more than 900 supplier partners and over 70 international members representing 21 countries. For more information, please visit nacds.org.

The Retail Associations and their members have a clear and strong interest in this rulemaking. They market an extremely wide range of products that exhibit the current characteristic of ignitability or might be newly classified as ignitable under EPA's proposal, including but not limited to the following:

- Adhesives
- Almond extracts
- Beers
- Cough syrups
- Degreasers
- Distilled spirits
- Dyes
- Essential oils
- Fuel additives
- Gasoline
- Hand sanitizers
- Inks
- Lacquers
- Lamp oils
- Mouthwash
- Nail polish removers
- Paints
- Pesticides
- Perfumes
- Rubbing alcohol
- Starter fluids
- Sealants
- Spot removers
- Stains
- Vanilla extracts
- Varnishes
- Windshield wiper fluids
- Wines

Of course, the vast majority of such items handled by retailers are not wastes in their hands, but rather are sold to customers and ultimately disposed or recycled (after use) by the customers. Nevertheless, significant amounts are either returned by customers or are unsold due to various reasons (*e.g.*, damage, defect, recall, obsolescence, expiration, seasonal product changes, or removal from shelves due to failure to “sell through”). Most of these unsold/returned items are not wastes, because they are suitable for re-shelving, liquidation sale through a secondary market, donation to non-profit organizations, or shipment to a manufacturer or its agent for credit. *See generally* 84 Fed. Reg. 5816, 5827 (February 22, 2019) (“retail items that are sent through reverse logistics are not solid waste at the retail store if they have a reasonable expectation of being legitimately used/reused (*e.g.*, lawfully redistributed for their intended purpose) or reclaimed”). In some instances, however, the unsold/returned products do become wastes, and depending upon their composition, may be classified as hazardous wastes. Retailers may also generate smaller amounts of ignitable or potentially ignitable wastes in other ways, such as through cleaning/maintenance of buildings, equipment, and vehicles, constructing product displays, providing various services to customers, and conducting routine office/administrative functions. In light of all these potential mechanisms for generating ignitable or potentially ignitable wastes, the Retail Associations, their members, and the retail sector more broadly, have a strong interest in the current rulemaking.

4. The Retail Associations Oppose Most of the Proposed Changes to the Exclusion for Aqueous Alcohol Wastes

Under the ignitability characteristic that has been in place since the beginning of the RCRA regulatory program in 1980, liquid wastes have generally been classified and regulated as ignitable hazardous wastes if they have a flash point less than 60°C (140°F). *See* 40 C.F.R. § 261.21(a)(1). However, there has always been an exception to this general rule for “aqueous solution[s] containing less than 24 percent alcohol by volume.” *Id.* EPA established this exclusion on the ground that even though such solutions may have a low flash point, they generally do not pose a significant ignitability risk because they are not capable of sustaining combustion. *See, e.g.*, 45 Fed. Reg. 33,084, 33,108 (May 19, 1980) (“This exclusion will remove from the ignitability characteristic liquid wastes which the Agency knows may flash but not sustain combustion”).

In the current proposal, EPA has proposed two main changes to the exclusion for aqueous alcohol wastes. First, the Agency has proposed to modify the exclusion so that it applies to wastes with “at least 50 percent water by weight,” rather than “aqueous” wastes. *See* 84 Fed. Reg. at 12,552 (to be codified at 40 C.F.R. § 261.21(a)(1)). Second, it has proposed to establish an exception from the exclusion “if the alcohol has been used for its solvent properties and is one of the alcohols specified in EPA Hazardous Waste No. F003 or F005 in 40 CFR 261.31.” *Id.* The Agency has also requested comment on a number of other potential changes to the aqueous alcohol exclusion, such as limiting it to particular wastes or particular alcohols, establishing a minimum alcohol content to qualify for the exclusion, or increasing the required water content above 50%. *See* 84 Fed. Reg. at 12,547. Each of the changes that EPA has proposed or requested comment on is discussed below.

4.1 Proposed 50% Water Requirement

As noted above, EPA’s first proposal with respect to the aqueous alcohol exclusion is to modify the exclusion so that it applies to wastes with “at least 50 percent water by weight,” rather than “aqueous” wastes. *See* 84 Fed. Reg. at 12,552 (to be codified at 40 C.F.R. § 261.21(a)(1)). The Retail Associations do not object to this change, because they believe that most regulators and members of the regulated community have long interpreted the term “aqueous” waste in this context to mean wastes with greater than 50% water.

4.2 Proposed Exception for Certain Alcohol Solvent Wastes

EPA’s second proposal with respect to the aqueous alcohol exclusion is to establish an exception from the exclusion “if the alcohol has been used for its solvent properties and is one of the alcohols specified in EPA Hazardous Waste No. F003 or F005 in 40 CFR 261.31.” *See* 84 Fed. Reg. at 12,552 (to be codified at 40 C.F.R. § 261.21(a)(1)). The Retail Associations oppose this proposal on several grounds, as discussed below:

o EPA’s Proposed Exception Is Unlawfully Ambiguous

The proposal by EPA to establish an exception to the aqueous alcohol exclusion is so ambiguous that it fails to provide the regulated community adequate notice and opportunity to comment as required under the Administrative Procedure Act (“APA”).

Moreover, if finalized, the proposed exception would not provide the regulated community “fair notice” of what would be regulated and therefore would violate constitutional standards of due process.

In order to understand the ambiguities, it is first necessary to review the language of the proposed exception closely. Under EPA’s proposal, the aqueous alcohol exclusion would not apply if (a) “the alcohol [contained in the waste] ... is one of the alcohols specified in EPA Hazardous Waste No. F003 or F005,” and (b) “the alcohol has been used for its solvent properties.” With respect to (a), there are four alcohols specified in F003 and F005: methanol, n-butyl alcohol, isobutanol, and 2-ethoxyethanol. *See* 40 C.F.R. § 261.31. Thus, under EPA’s proposal, if the alcohol in the waste is one of these four alcohols and it has been used for its “solvent properties,” the aqueous alcohol exclusion would not apply.

Unfortunately, the Agency does not define “solvent properties” in the proposal. Although EPA has previously indicated that “[chemicals] are used for their ‘solvent’ properties [if they] solubilize (dissolve) or mobilize other constituents.” *see* 50 Fed. Reg. 53,315, 53,316 (December 31, 1985), numerous uncertainties remain, including but not limited to the following:

-- ***Would commercial products formulated with one of the four alcohols in order to solubilize other ingredients (e.g., inks, paints, dyes, stains, coatings, lacquers, enamels, varnishes, fragrances) no longer be eligible for the aqueous alcohol exclusion?***

Long-standing EPA guidance makes clear that these commercial products are not covered by the F003 or F005 listings. *See, e.g.,* 50 Fed. Reg. 53,315, 53,316 (December 31, 1985) (“process wastes where solvents were used as ... ingredients in the formulation of commercial chemical products are not covered by the [F001-F005 spent solvent] listing[s]. The products themselves also are not covered”); Letter from Matthew Straus, Chief, Waste Identification Branch, EPA, to Gregory J. Harvey, Newark Air Force Station (May 2, 1986) (RCRA Online #11151) (“the F001 through F005 listings ... do not apply when the solvents are used as ... ingredients in commercial chemical products (e.g., paint and coatings)”). In addition, if the products contain less than 24% alcohol and greater than 50% water, they would currently be eligible for the aqueous alcohol exclusion from the ignitability characteristic. However, under EPA’s proposal, they might lose their exclusion and have to be classified as ignitable hazardous wastes, since the alcohol is being used to solubilize other constituents (arguably a “use for its solvent properties”) and the guidance on the limits of the F003 and F005 listings are not clearly incorporated into the proposed exception to the aqueous alcohol exclusion.

We question whether EPA actually intended that the proposed exception would apply in this type of situation, given that the Agency indicated that its proposal was based on a 1990 preamble stating that “[i]f the alcohol has been used for

solvent properties and is one of the alcohols specified in EPA Hazardous Waste No. F003 or F005, *the waste must be coded with these Hazardous Waste Numbers.*” See 84 Fed. Reg. at 12,546 and 12,543 (emphasis added), *quoting* 55 Fed. Reg. 22,520, 22,543 (June 1, 1990). Clearly, the 1990 preamble was focused on wastes that would qualify as F003 or F005 (since otherwise it would make no sense to require use of those codes), so presumably the proposed exception likewise was intended to cover only F003 and F005 wastes (and not other wastes with alcohol solvents, such as these commercial products). However, because of the way that the proposal was worded, considerable uncertainty remains.

-- ***Would unused cleaning/solvent products containing one of the four alcohols no longer be eligible for the aqueous alcohol exclusion?***

These unused cleaning/solvent products would clearly not be F003 or F005 wastes, because those listings apply only to “spent solvents,” and unused products would obviously not be spent. In addition, if the products contain less than 24% alcohol and greater than 50% water (with or without other cleaning ingredients such as detergents), they would currently be eligible for the aqueous alcohol exclusion. However, under EPA’s proposal, they might lose their exclusion, since the alcohol arguably was used for its solvent properties, by being incorporated as an active ingredient in a cleaning product intended to solubilize dirt or other contaminants.

We question whether EPA intended that the proposed exception would apply in this type of situation, given that the unused cleaning/solvent product, by definition, has not yet been used. Moreover, as noted above, the proposed exception was apparently based on 1990 language addressing F003 and F005 wastes. Since the unused cleaning products would not be F003 or F005 wastes, they should not be covered by the proposed exception, and thus should remain eligible for the aqueous alcohol exclusion. (Of course, if the unused cleaning/solvent product contains isobutanol as the sole active ingredient, it would qualify as EPA Hazardous Waste No. U140. See 40 C.F.R. § 261.33(f). The other three alcohols at issue are not listed as commercial chemicals products, and thus would not be regulated in the same way. *Id.*)

-- ***Would used cleaning/solvent products containing one of the four alcohols no longer be eligible for the aqueous alcohol exclusion?***

These used cleaning/solvent products generally would qualify as spent solvents (except in some cases, such as if they could continue to be used as is), and thus might be classified as F003 or F005 wastes. However, this would not always be the case. For example, the F003 and F005 listings apply only to certain solvent mixtures/blends; they do not apply to other solvent mixtures/blends, even if they contain one of the four alcohols and such alcohols were included in the mixture/blend for their solvent properties. See, e.g., 40 C.F.R. § 261.31 (defining F005 to include “spent solvent mixtures/blends containing, before use, a total of

ten percent or more (by volume) of one or more of the [F005] non-halogenated solvents [including isobutanol and 2-ethoxyethanol] or those solvents listed in F001, F002, or F004”). In addition, the F003 and F005 listings do not apply to wastewaters that contain listed spent solvents but that qualify for one of the mixture rule exemptions set forth in the regulations. *See* 40 C.F.R. §§ 261.3(a)(2)(iv)(B) (for wastewaters containing isobutanol or 2-ethoxyethanol spent solvents at levels below 25 parts per million on a weekly average basis at the headworks of a wastewater treatment system), (D) (for wastewaters containing *de minimis* losses of F003 or F005 wastes), and (E) (for wastewaters containing laboratory wastewaters with toxic listed wastes (presumably including F005 wastes even though such wastes also are listed for ignitability) if the laboratory wastewaters represent less than 1% of the flow at the headworks of the wastewater treatment system on an annualized basis).

To the extent the used cleaning/solvent products would not be classified as F003 or F005 wastes, for the reasons discussed above or others, we believe they should not be covered by the proposed exception, and thus should remain eligible for the aqueous alcohol exclusion. However, because EPA did not address this issue in its proposal, it is unclear what the Agency intends in this regard.

- ***How would the exception to the aqueous alcohol exclusion apply to wastes with more than one alcohol constituent?*** Under EPA’s proposed exception, the aqueous alcohol exclusion would not apply if “the” alcohol in the waste is one of the four specified alcohols and it is used for its solvent properties. However, the proposal is silent with respect to wastes containing more than one alcohol. Presumably, if all the alcohols present are among the four specified alcohols and were used for their solvent properties, the proposed exception would kick in, and the aqueous alcohol exclusion would not apply. However, the regulated community is left to guess what the status would be if a waste contains one of the specified alcohols and another alcohol that is not specified (*e.g.*, ethanol), or if a waste contains two of the specified alcohols and one of them is present for non-solvent purposes.
- ***Would the exception to the aqueous alcohol exclusion apply to wastes containing ethanol denatured with methanol?*** We believe the answer would be “no,” because ethanol is not one of the four specified solvents, and even though methanol is, it was used for its ability to denature the ethanol, not for its solvent properties. However, to the extent that the denatured ethanol was used as a solvent, questions might be raised as to whether the methanol was also being used, at least in part, for its solvent properties. The resulting confusion could create substantial problems, given that denatured ethanol is a ubiquitous solvent and methanol is a common denaturant.
- o ***EPA’s Proposal Would Effectively Repeal an Important Part of the Agency’s Carefully Crafted 2001 Hazardous Waste Identification Rule***

In the 2001 Hazardous Waste Identification Rule (“HWIR”) – after years of careful deliberation, including evaluation of public comments on proposals issued in 1995 and 1999 – EPA issued a final rule stating that “all wastes listed solely for [the] ignitability ... characteristic (including mixtures, derived-from and as generated wastes) are excluded [from regulation] once they no longer exhibit a characteristic.” See 66 Fed. Reg. 27,266, 27,268 (May 16, 2001). That rule is codified at 40 C.F.R. § 261.3(g). Under the rule, spent solvent wastes that would otherwise be classified as F003 wastes (e.g., spent methanol or n-butanol cleaning/solvent products) are not designated as such if they do not exhibit the characteristic of ignitability. See 40 C.F.R. § 261.31 (indicating that F003 was listed solely because of ignitability); 66 Fed. Reg. at 27,284-85 (discussing the applicability of the 2001 rule to F003 wastes). Of course, one way that such a waste might not exhibit the ignitability characteristic (as it has been defined since the beginning of the RCRA regulatory program, including 2001 and today) is if it qualifies for the aqueous alcohol exclusion. For example, if a spent methanol cleaning/solvent product has a low flash point but contains less than 24% alcohol and more than 50% water, it would not be ignitable (because of the aqueous alcohol exclusion) and it would not qualify as F003 (because of the 2001 HWIR rule).

EPA’s proposal, however, would lead to the opposite result, and thus would effectively repeal a key element of the HWIR rule. Under the proposal, the spent methanol cleaning/solvent product mentioned above would be deemed ignitable, since the aqueous alcohol exclusion would no longer apply. In addition, since the waste would be deemed ignitable, it would no longer be a waste listed for ignitability that doesn’t exhibit a characteristic, and it would have to be designated F003. This is precisely the result that the 2001 HWIR rule was designed to prevent.

While EPA may be entitled to repeal one of its prior rules, in order to do so it must provide clear notice of its intent, as well as a rational basis for the proposed change. The Agency has done neither here, and thus cannot move forward with its proposal.

o ***EPA Has Not Provided Any Rationale for the Proposed Exception to the Aqueous Alcohol Exclusion***

In the preamble to the current proposal, EPA states that it is proposing the exception to the aqueous alcohol exclusion “to codify the existing guidance into the regulatory text.” See 84 Fed. Reg. at 12,546. The Agency also indicates that the existing guidance that it is referring to is the 1990 preamble statement that “[i]f the alcohol has been used for solvent properties and is one of the alcohols specified in EPA Hazardous Waste No. F003 or F005, the waste must be coded with these Hazardous Waste Numbers.” See 84 Fed. Reg. at 12,546 and 12,543 (emphasis added), quoting 55 Fed. Reg. 22,520, 22,543 (June 1, 1990).

To the extent that EPA might intend for its proposed exception to apply to wastes that contain one of the four alcohols but do not qualify as F003 or F005 wastes (for any of the reasons discussed above), the 1990 preamble clearly does not apply to such wastes. As noted above, since the 1990 preamble was discussing wastes that would need to be coded

as F003 or F005, it had no relevance to wastes not covered by those codes. Thus, the 1990 preamble could not serve as a justification for EPA's proposal.

Even if EPA intends that the proposed exception apply only to wastes that would otherwise qualify as F003 or F005 wastes, the 1990 preamble does not provide a justification. The 1990 preamble language was making the rather unremarkable statement that regardless of whether or not an alcohol-containing waste is ignitable, if it meets the definition of an F003 or F005 waste, it must be managed as such. This text was not intended to modify in any way the scope of the ignitability characteristic or the F003/F005 listings. Moreover, in the case of F003, the 2001 HWIR rule was intended to modify the relationship between the ignitability characteristic and the F003 listing, by providing that wastes that are not ignitable (*e.g.*, due to the aqueous alcohol exclusion) no longer qualify as F003 wastes. EPA cannot justify undoing that 2001 rule simply by referring to guidance that predated the HWIR rule by more than a decade – especially since that guidance does not stand for principle EPA is now seeking to codify (and even if it somehow did, it was clearly superseded by the HWIR rule).

o ***The Retail Associations Do Not Believe Any Rationale Exists for the Proposed Exception to the Aqueous Alcohol Exclusion***

Under RCRA, any “regulations identifying the characteristics of hazardous waste ... shall be based on ... criteria [previously] promulgated [by EPA].” *See* 42 U.S.C. § 6921(b)(1), RCRA § 3001(b)(1). The referenced criteria are set forth in the RCRA regulations at 40 C.F.R. § 262.10, and specify that the Agency may “identify and define a characteristic of hazardous waste ... only upon determining that ... [a] solid waste that exhibits the characteristic may: (i) Cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (ii) Pose a substantial present or potential hazard to human health or the environment when it is improperly treated, stored, transported, disposed of or otherwise managed.” For a characteristic based on a physical hazard like ignitability, clause (i) clearly does not apply. Thus, in order for EPA to expand the ignitability characteristic, as it has proposed to do by narrowing the aqueous alcohol exclusion, the Agency must determine that the newly regulated wastes pose a “substantial ... hazard to human health or the environment.”

The Retail Associations are not aware of any reason to believe that the wastes that would be newly classified as hazardous wastes under EPA's proposed narrowing of the aqueous alcohol exclusion pose a risk to human health or the environment. Indeed, the Agency itself acknowledges in the preamble to the current proposal that “EPA is currently unaware of existing mismanagement or damage cases” associated with these wastes. *See* 84 Fed. Reg. at 12,546. Moreover, EPA admits that it doesn't even know what wastes would be affected by its proposal. *Id.* (stating that the proposal “may only affect a small number of (currently unknown) waste streams”). Without such knowledge, there is no legal basis for EPA to proceed with its proposal. The Retail Associations believe that the Agency's limited resources are better spent addressing known hazards, rather than pursuing purely speculative risks to human health and the environment.

o ***The Proposed Exception to the Aqueous Alcohol Exclusion Would Arbitrarily Result in Inconsistent Classification of Substantially Similar Wastes***

As noted above, the original basis for the aqueous alcohol exclusion was to ensure that wastes with low flash points would not be regulated as ignitable hazardous wastes if they are unable to sustain combustion. EPA's proposed exception would bring back into the RCRA regulatory program some of the currently excluded wastes, without any regard to their ability to sustain combustion. To illustrate the point, consider a series of aqueous wastes with less than 24% (say 20%) of the following alcohols used for their solvent properties: (a) methanol (with one carbon and a flash point of 12.2°C), (b) ethanol (with two carbons and a flash point of 12.7°C), (c) n-propanol (with three carbons and a flash point of 25°C), and (d) n-butanol (with four carbons and a flash point of 35°C). See *Hawley's Condensed Chemical Dictionary* (15th Edition, 2007) at 816, 518, 1048, and 194, respectively. All of these wastes would currently be excluded from regulation, but under EPA's proposal, (a) and (d) would be newly subjected to regulation (since they are solvents specified in the F003 listing) – even though the wastes with alcohols in the intermediate range between these two (in terms of chemical structure (number of carbons) and flash point) would continue to be excluded. This would be regulation without any rhyme or reason.

Similarly, consider two aqueous wastes that contain 20% methanol, one of which contains methanol for its solvent properties, while the other contains methanol for another reason. Both of these wastes would currently be excluded from regulation, but under EPA's proposal the first one – and only the first one – would be newly regulated. Of course, both of them would be the same in terms of their ability to sustain combustion (assuming all the other constituents are the same); the ability to sustain combustion does not depend upon the *reason* why the methanol is present. Yet, EPA's proposal would treat the two identical wastes completely differently. There can be no justification for such an arbitrary rule.

o ***The Proposed Exception to the Aqueous Alcohol Exclusion Would Have Substantial Adverse Impacts on the Retail Sector***

Because there is so much uncertainty about what EPA's proposed exception to the aqueous alcohol exclusion would mean, it's difficult to say exactly what wastes might be affected. However, as discussed above, the status of an extremely wide range of wastes could potentially change, including large numbers of commercial products managed by retail facilities (*e.g.*, inks, paints, dyes, stains, coatings, cleaning products, and fragrances). To the extent that this might be the case, retailers would be required to perform new hazardous waste determinations for all the potentially relevant wastes. As discussed in more detail in Section 7.1 below, the costs of performing these evaluations would be a substantial burden for the retail sector and/or its suppliers. In some instances, the results could change the regulatory status of many retail facilities, thereby imposing much greater costs. EPA has not considered any of these costs, and it is doubtful that they would be justified, for the reasons discussed above.

4.3 Other Potential Changes to the Aqueous Alcohol Exclusion

EPA has asked for comment on a number of other potential changes to the aqueous alcohol exclusion that would have the effect of narrowing the exclusion and thereby expanding the universe of wastes classified as ignitable hazardous wastes. *See* 84 Fed. Reg. at 12,547. The potential changes mentioned by the Agency included limiting the exclusion to specific wastes or specific alcohols, increasing the minimum water content for exclusion above 50%, and establishing a minimum alcohol content (in addition to the maximum 24% alcohol limit) for eligible wastes. *Id.*

The Retail Associations oppose the potential changes mentioned by EPA, for several reasons. As an initial matter, the Agency has not provided sufficient detail about the potential changes under consideration to enable the regulated community to provide meaningful comment. For example, EPA has not specified what wastes or alcohols would be kept in or removed from the exclusion, if the exclusion is limited to specific wastes or alcohols. Similarly, the Agency has not specified how far above 50% it might increase the minimum water content requirement, or how high or low a minimum alcohol content limit might be set. Without such details, the regulated community cannot fully assess the reasonableness of the changes mentioned by EPA, the potential impacts of such changes, etc.

In any event, EPA has not offered any justification for making any of the potential changes. As noted above, an expansion of the ignitability characteristic would require a determination that the affected wastes pose a substantial threat to human health or the environment. The Agency has acknowledged that it is “unaware of existing mismanagement or damage cases” associated with the current alcohol exclusion, and that it doesn’t know what wastes would be affected by a change to the exclusion. *See* 84 Fed. Reg. at 12,546. Under these conditions, there is no legal basis for EPA to proceed with any of these potential changes.

5. The Retail Associations Oppose the Proposed Changes to the Regulations and Guidance with Respect to Multiphase Wastes

EPA has proposed a new provision that would classify “multiphase mixtures” as ignitable hazardous wastes if “any liquid phase [in the waste] has the flash point described in paragraph (a)(1) [*i.e.*, less than 60°C (140°F)], or any non-liquid phase has the properties described in paragraph (a)(2) [*i.e.*, if such phase is capable of causing a vigorous and persistent fire through friction, absorption of moisture, or spontaneous chemical changes].” *See* 84 Fed. Reg. at 12,552 (proposed to be codified at 40 C.F.R. § 261.21(a)(5)). The Agency has also proposed modifying its guidance manual on testing of solid wastes (commonly known as “SW-846”) to specify that “[t]he definitive procedure for determining if a waste contains a liquid for the purposes of the ignitability and corrosivity characteristics is the pressure filtration technique specified in Method 1311.” *Id.* at 12,548. The Retail Associations oppose both proposals, for the reasons discussed below.

5.1 New Regulatory Provision for Multiphase Mixtures

As noted above, EPA's first proposal with respect to multiphase wastes is adding a new provision stating that multiphase mixtures are hazardous if any liquid phase has a low flash point, or if any non-liquid phase meets the standards for ignitable non-liquids. The Retail Associations' objections to this proposal are as follows:

o ***EPA's Proposed New Provision for Multiphase Mixtures Is Unlawfully Ambiguous***

EPA's proposal to issue a new regulatory provision for multiphase mixtures does not define the mixtures to which it would apply, and therefore fails to provide the regulated community adequate notice and opportunity to comment as required under the APA. Moreover, if finalized, the proposed provision would not provide the regulated community "fair notice" of what would be regulated and therefore would violate constitutional standards of due process.

The preamble to the proposed rule does describe "multiphase wastes" as "wastes that, due to differences in density (*e.g.*, oil/water) or physical form (*e.g.*, solid/liquid), separate into two or more phases." *See* 84 Fed. Reg. at 12,547. However, it is unclear whether multiphase *mixtures* (the term used in the proposed regulatory text) are the same as the multiphase *wastes* described in the preamble. The word "mixture" is typically reserved under the RCRA regulations for a combination of two or more wastes after they have been separately generated, not a single as-generated waste. *See, e.g.*, 40 C.F.R. § 261.3(a)(2)(iv). It is unclear, however, whether EPA, in fact, intends the proposed provision to be limited to such waste combinations.

In either event, the preamble description of multiphase wastes refers to "wastes that ... separate." That language suggests that it is limited to wastes that separate on their own, without human intervention; it notably does *not* refer to "wastes that can be separated." Yet, in the proposed change to SW-846 (discussed in more detail below), EPA indicates that a solid-phase waste should be deemed to contain a liquid requiring separate testing if a liquid can be forced out through an aggressive pressure technique performed in a laboratory. That seems inconsistent with the preamble description of multiphase wastes, leaving the Retail Associations, and the regulated community more broadly, to wonder what EPA intends to regulate.

Similarly, it is unclear to what extent, if any, the preamble description of multiphase wastes or the proposed regulatory provision for multiphase mixtures is intended to apply to solid-phase manufactured articles that contain minute amounts of liquids, either in encapsulated form (*e.g.*, the electrolyte in a small sealed battery) or in unencapsulated form (*e.g.*, a few drops of lubricating liquid in a small mechanical device). At one point in the preamble, EPA states that laboratories should separate and test the different phases of a waste "to the extent practicable." *See* 84 Fed. Reg. at 12,547. Perhaps in these cases, separation would not be deemed practicable, such that the minute amounts of liquids would not have to be evaluated separately. Indeed, these articles would likely "pass" the Paint Filter Liquids Test and the Pressure Filtration Technique (discussed in more detail below), suggesting that the liquids would not have to be tested or evaluated

separately. However, it is unclear what the Agency intends in this regard, or how EPA and state regulators would apply the proposed rule in practice.

- o ***To the Extent that EPA May Intend to Regulate Manufactured Articles with Minute Amounts of Liquids as Multiphase Mixtures, Its Proposal Has Not Been and Cannot Be Justified***

As discussed above, EPA cannot expand the ignitability characteristic unless it is able to demonstrate that the wastes that would be brought into the RCRA regulatory program as a result pose a substantial risk to human health or the environment. EPA has not made such a showing for manufactured articles that contain minute amounts of liquids. Nor do we believe such a showing is possible. Even if such liquids might have a low flash point (and are not eligible for the aqueous alcohol exclusion), minute quantities surrounded by much larger amount of solids would likely never be able to sustain combustion (even in the unlikely event that that they might flash in the first instance). Accordingly, there is no basis for classifying these articles as hazardous wastes.

- o ***To the Extent that EPA May Intend to Regulate Manufactured Articles with Minute Amounts of Liquids as Multiphase Mixtures, Its Proposal Would Have Substantial Adverse Effects on the Retail Sector***

In the event that EPA intends to regulate manufactured articles with minute amounts of liquids as multiphase wastes, its proposal would impose substantial new burdens on the retail sector, without any corresponding environmental benefits. Retailers often will not know if the manufactured articles they handle contain minute amounts of liquids, and even if they do, they are not generally in a position to know whether such liquids would meet the ignitability criteria. In addition, testing by retailers would not be practical, given that testing requires substantial quantities of materials (*e.g.*, 75 g) and large numbers of articles would need to be destroyed to harvest the necessary amount. Manufacturers of the articles might be in a better position to know this information or to test the materials, but that isn't necessarily the case, and in any event it may be difficult for retailers to obtain the information (particularly, but not only, for imported goods). For example, information about minute amounts of liquids in manufactured articles are not required to be provided on safety data sheets.

As discussed in more detail in Section 7.1 below, the effort to perform or obtain these evaluations for all of the potentially affected products would be a substantial burden for the retail sector and/or its suppliers. In some instances, the results could change the regulatory status of many retail facilities, thereby imposing much greater costs. EPA has not considered any of these costs, and it is doubtful that they would be justified, for the reasons discussed above.

- o ***EPA's Proposed New Provision for Multiphase Mixtures Would Be Inconsistent with the Aqueous Alcohol Exclusion***

Under the proposed rule, multiphase mixtures would be classified as ignitable hazardous wastes if any liquid phase in the waste “has the flash point described in paragraph (a)(1) [*i.e.*, less than 60°C (140°F)].” Importantly, this language does not incorporate an aqueous alcohol exclusion, as the rule for (purely) liquid wastes does. EPA has not offered any justification for this omission, and the Retail Associations cannot perceive of any. We are also concerned that since many/most liquid wastes may have a small amount of filterable solids in them (and therefore could potentially be deemed multiphase wastes), applying a strict flash point test for multiphase mixtures, without an aqueous alcohol exclusion, would effectively eviscerate the exclusion.

One way to avoid these problems would be to modify the proposed provision to say that multiphase mixtures are ignitable if any liquid phase “has the properties described in paragraph (a)(1) [*i.e.*, the provision for ignitable liquids].” This language would also have the advantage of being parallel to the portion of the proposed new provision that relates to non-liquid phases with ignitable properties. As noted above, however, the Retail Associations urge EPA not to finalize the provision for multiphase mixtures at all.

5.2 Proposed Change to SW-846 for Determining When Solids Contain Liquids

EPA’s second proposal with respect to multiphase wastes is to add language to SW-846 specifying that “[t]he definitive procedure for determining if a waste contains a liquid for the purposes of the ignitability and corrosivity characteristics is the pressure filtration technique specified in Method 1311.” *See* 84 Fed. Reg. at 12,548. As discussed above, this proposal is at odds with the description of multiphase wastes in the preamble to the proposal as “wastes that separate” by themselves, without human intervention. In addition, the Retail Associations oppose this proposal on several other grounds, as discussed below:

o EPA Has Not Provided Any Rationale for Its Proposed Guidance on Free Liquids, and the Retail Associations Doubt Any Rationale Exists

In the preamble to the current proposal, EPA did not say much about the proposed guidance on assessing free liquids, other than to note that it proposed similar guidance in 1993 but decided in 1995 not to finalize that proposal. *See* 84 Fed. Reg. at 12,548, *discussing* 58 Fed. Reg. 46,052 (August 31, 1993) (proposal) and 60 Fed. Reg. 3089 (January 13, 1995) (decision not to finalize the proposal). That is hardly a justification for proceeding with the same guidance now. Clearly, the Agency has not demonstrated, or even attempted to demonstrate, that the proposed guidance is necessary to protect human health and the environment.

The Retail Associations do not believe that the current proposal is warranted. If a waste passes the Paint Filter Liquids Test, it should be sufficient to evaluate the potential ignitability of the waste under the standard for non-liquids. Indeed, this is the position that EPA itself has long taken. For example, the RCRA regulations prohibit the placement of free liquids in landfills, and specify that the Paint Filter Liquids Test must be used “[t]o demonstrate the absence or presence of free liquids.” *See* 40 C.F.R. §§ 264.314(b) and 265.314(b); 50 Fed. Reg. 18,370 (April 30, 1985) (promulgating these

provisions and explaining the basis for use of the Paint Filter Liquids Test). In 1990, EPA stated that “in determining whether a waste is ‘liquid’ ... for the purpose of ignitability or corrosivity testing ... [t]he generator of the waste may use any method for which he can provide appropriate scientific or technical justification. The Agency ... is generally willing to accept test results from the use of Method 9095, the ‘paint filter’ test.” See Letter from Sylvia K. Lowrance, Director, Office of Solid Waste, EPA, to Robert D. Wyatt (February 16, 1990) (RCRA Online #13352).

Even after the last document cited by EPA in the current proposal (*i.e.*, the January 13, 1995 decision not to finalize the proposed guidance on use of the Pressure Filtration Technique), the Agency stated that “the Paint Filter test is the method to use to determine if a free liquid is present for ignitability determination” and indicated that this would continue to be the case unless and until EPA issued a final rule to the contrary. See Letter from David Bussard, Director, Characterization and Assessment Division, Office of Solid Waste, EPA, to Charles D. Duthler, ICI Composites, Inc. (January 26, 1995) (RCRA Online #11935). Because that appears to be the last EPA statement on the issue, and because a final rule to the contrary has obviously not been issued, the Paint Filter Liquids Test has been the test authorized by EPA guidance for the last 20+ years (and well before that). Moreover, as discussed immediately below, the Agency issued a final rule in 2013 mandating use of the Paint Filter Liquids Test for determining whether solvent-contaminated wipes (including those contaminated with ignitable solvents) are subject to RCRA regulation. There is no apparent reason for now switching tests, and EPA has not offered one.

o ***EPA’s Proposal Is Inconsistent with the 2013 Rule on Solvent-Contaminated Wipes***

In 2013 - after *decades* of deliberation and analysis, including consideration of rulemaking petitions in 1985 and 1987, the results of the Agency’s Common Sense Initiative of the 1990s, and evaluation of public comments on proposals and notices of data availability issued in 2003 and 2009 – EPA issued a final rule establishing regulatory exclusions for used solvent-contaminated wipes (including those contaminated with ignitable solvents) that have “no free liquids” when sent for recycling or disposal. See 78 Fed. Reg. 46,448 (July 31, 2013) at 46,449-54 (discussing the history of the rule) and 46,484-85 (codifying the final exclusions at 40 C.F.R. §§ 261.4(a)(26) and (b)(18)). For these purposes, the Agency defined “no free liquids” by reference to the Paint Filter Liquids Test, explicitly choosing not to adopt the Pressure Filtration Technique. See *id.* at 46,467; 40 C.F.R. § 260.10 (“*No free liquids* ... means that solvent-contaminated wipes may not contain free liquids as determined by Method 9095B (Paint Filter Liquids Test)”).

EPA’s proposal to add guidance to SW-846 specifying that the Pressure Filtration Technique is the only “definitive” way to determine whether liquids are present, for ignitability purposes, is clearly inconsistent with the 2013 Wipes Rule. Since EPA has determined that the Paint Filter Liquids Test is the proper test for determining whether used solvent-contaminated wipes contain liquids that must be evaluated for ignitability, that same test should be appropriate for other wastes. EPA has not offered any reason for

applying a different “no free liquids” standard to different categories of wastes, and the Retail Associations do not believe any such reason exists. This is especially true with respect to wastes that are substantially the same as the used solvent-contaminated wipes covered by the 2013 Rule, such as unused pre-moistened wipes or wipes contaminated by liquids other than solvents. *See* 40 C.F.R. § 260.10 (definition of “solvent-contaminated wipe”).

The Agency also has not explained how it envisions the proposed new guidance would relate to the 2013 Wipes Rule. Presumably, the rule on solvent-contaminated wipes would take precedence, since it is a formal rule (rather than mere guidance) and more specific. However, the conflicting statements would undoubtedly lead to confusion in the regulated community, and it might be an invitation to arbitrary enforcement.

- o ***To the Extent that EPA May Be Planning to Apply Its Proposed Guidance to Corrosive Wastes, the Agency Has Not Provided Adequate Notice and Opportunity to Comment, and the Guidance Would Be Similarly Flawed***

The language that EPA appears to be proposing for addition to SW-846 could potentially address “EPA’s position on determining free liquids” not only for purposes of the ignitability characteristic, but also for purposes of the corrosivity characteristic. *See* 84 Fed. Reg. at 12,548. However, EPA has hidden the ball on this issue. The proposal is entitled “Modernizing Ignitable Liquids Determinations,” providing no hint that the corrosivity characteristic might be affected. Indeed, the potential application of the proposed guidance to corrosive wastes can only be loosely inferred from a single statement buried near the end of the proposal. *Id.* In this way, the regulated community has been denied adequate notice of EPA’s intent, and has been denied a meaningful opportunity to comment. If, in fact, EPA is intending to extend its proposed guidance to corrosive wastes, such an extension would be improper for much the same reasons that the guidance is inappropriate for ignitable wastes (as discussed above).

- o ***The Proposed Guidance on Free Liquids Would Have Substantial Adverse Impacts on the Retail Sector***

Retailers frequently generate a variety of wastes that could potentially be affected by EPA’s proposed guidance on when solids contain liquids that need to be evaluated separately for ignitability (and possibly corrosivity) purposes. One type of waste that might be especially affected is unused pre-moistened wipes or other applicators (*e.g.*, cotton swabs). Such wipes and applicators are sold in stores for an exceptionally wide range of applications, such as for medical/sterilization purposes (*e.g.*, individually wrapped alcohol pads), cleaning, personal care, and application of surface treatments, pesticides, and pharmaceuticals. Retailers may generate these items as wastes in certain circumstances, such as if the products are damaged, expired, discontinued, or returned by customers (*e.g.*, in a slightly used pack). In essentially all cases, these products would be expected to pass the Paint Filter Liquids Test. However, it is not readily obvious how these products would fare under the Pressure Filtration Technique. It seems possible that some of these products, if subjected to the aggressive pressure required under that

Technique, might express a small amount of liquid, which might then have to be tested for ignitability (and possibly corrosivity). As discussed in more detail in Section 7.1 below, performing these evaluations on all of the potentially affected products would be a substantial burden for the retail sector and/or its suppliers. In some instances, the results could change the regulatory status of many retail facilities, thereby imposing much greater costs. EPA has not considered any of these costs, and it is doubtful that they would be justified, for the reasons discussed above.

One other important type of waste generated by retailers that might be affected by EPA's proposal on free liquids is absorbents used to clean up minor spills. It is generally easy to make an on-the-spot determination that used absorbents do not contain free liquids under a Paint Filter Liquids Test. However, a determination under the Pressure Filtration Technique might not be susceptible to such simple judgments. Thus, retailers might have to either have the absorbents tested or manage them all as liquid-containing wastes. Once again, this would impose substantial costs on the industry, without any discernable environmental benefit.

6. The Retail Associations Generally Support Some of the Technical Changes EPA Has Proposed for the Ignitability Test Methods, But Has Some Related Concerns

EPA has proposed a number of technical changes to the test methods used to evaluate the ignitability of wastes. Some of the changes are designed to allow the use of more modern methods to test the flash point of liquids (*e.g.*, methods that use non-mercury temperature measuring devices and electric spark ignition, rather than flame ignition). Others are designed to harmonize the definitions of ignitable compressed gases and oxidizers with the corresponding definitions under the Hazardous Materials Regulations issued by DOT.

The Retail Associations generally support these changes. However, we are concerned about one aspect of the proposal for the flash point test methods. Under the proposed rule, a liquid waste would generally be classified as ignitable if it has a low flash point "as determined by using one of [several] standards." *See* 84 Fed. Reg. at 12,552 (proposed to be codified at 40 C.F.R. § 261.21(a)(1)). This language leaves open the question of the status of a waste if different ones of the specified tests (properly performed) yield different results.

We urge EPA to clarify that if a generator properly determines using one test method that a waste has a flash point outside the ignitable range (*i.e.*, above 60°C or 140°F), it can rely on that result and manage the waste as non-ignitable. If a generator does not have that assurance, and has to be concerned that a regulator might reach a different conclusion based on one of the other specified test methods, it might effectively be forced to run *all* of the specified test methods (especially in cases where the flash point initially measured is close to the regulatory threshold). The rule in this way would effectively be transformed to define all liquid wastes as ignitable unless the flash points measured by *all* of the specified tests are above the regulatory threshold. This would be a major change to the regulation, and would lead to unnecessary and duplicative testing, at great expense and for no environmental benefit. We doubt that this is what EPA intended, so we urge the Agency to clarify that one test is sufficient.

7. The Retail Associations Strongly Disagree that EPA’s Proposal Would Have No Significant Economic Impacts

In the preamble to the current proposal, EPA states that “[t]his is not a significant regulatory action because it does not have significant economic impact.” *See* 84 Fed. Reg. at 12,550. The Retail Associations strongly disagree. As discussed above, several of the changes to the ignitability characteristic that EPA has proposed or asked for comment on have the potential to change substantially the regulatory status of a wide range of wastes, such as aqueous alcohol wastes, manufactured articles with minute amounts of liquids, unused pre-moistened wipes that are discarded, and used absorbents. As a result, generators of such wastes – including those in the retail industry – will have to perform new hazardous waste determinations for all potentially affected wastes, which will obviously entail significant new costs. Any wastes found to be newly hazardous will also have to be managed as hazardous wastes for the first time, which will entail additional costs. Moreover, in some cases, the newly hazardous wastes will change the status of the generators (*e.g.*, from VSQGs to SQGs, or from SQGs to LQG), resulting in still greater costs.

EPA has not considered any of these costs. In order to show how great these costs may be, we provide estimates for some of the key costs to the retail sector below. As discussed below, the retail sector alone would likely incur a one-time cost upwards of tens of millions of dollars for making new hazardous waste determinations under the proposed rule. In addition, the change in generator status for some retail facilities would likely result in annual costs of several million dollars per year or ever greater for the industry.

7.1 Costs of Reevaluating Wastes Generated by the Retail Sector

To the extent that EPA issues a final rule that substantively changes the ignitability characteristic (*e.g.*, by establishing an exception to the aqueous alcohol exclusion, narrowing the exclusion in other ways, regulating manufactured articles with minute amounts of liquids, or requiring more aggressive methods to determine if a solid waste contains free liquids for purposes of ignitability – or corrosivity – testing), generators will have to perform new hazardous waste determinations for all potentially affected wastes. (This might not be necessary to the extent that the final rule merely makes minor technical changes to the ignitability characteristic, such as by clarifying that the aqueous alcohol exclusion applies to wastes with more than 50% water, or by allowing alternative laboratory methods for determining flash point.)

The retail sector would likely be affected more than any other industry, because of the extremely large number of products that it handles and could potentially generate as wastes. A large retailer with substantial online operations, for example, can be expected to handle over 10 million discrete products, or Shop Keeping Units (“SKUs”). Although many of these items would clearly not be affected by a change to the ignitability characteristic (*e.g.*, apparel and books), the retailer would have to review its entire inventory to identify such items. Moreover, some significant portion of the inventory would require closer scrutiny (*e.g.*, most or all liquid products and/or products that might have even minute amounts of liquid). If we assume that just 10% of the SKUs would require closer scrutiny, that would amount to 1,000,000 new hazardous waste determinations.

It is difficult to estimate how much each determination would cost, and the cost might vary from item to item (*e.g.*, because some determinations might be relatively simple, while others might require close review of available information from suppliers, requests for supplemental information, expert involvement, and/or laboratory testing). However, in order to obtain a ballpark estimate, we note that EPA in 2015 estimated that the costs of merely *recording* the results of a single hazardous waste determination to be \$12.17. *See* EPA, “Economic Assessment of the Potential Costs, Benefits, and Other Impacts of the Improvements to the Hazardous Waste Generator Regulatory Program, As Proposed” (June 2015) at 3-7 (stating that “each ... waste determination that a facility must document ... has a cost of \$12.17” and clarifying that this reflects only “the costs of documenting and maintaining records” not the costs of actually making the determinations). The cost of making a determination would undoubtedly be much higher, most likely in excess of \$100 per SKU. In any event, if we conservatively estimate the cost to be between \$12 and \$100 per determination, the total cost for a large retailer with substantial online operations (based on 1 million determinations, as estimated above) would be in the range of \$12-100 million.

Of course, only a very small number of retailers have such large product inventories. Based on an informal survey of members of the Retail Associations, chain stores most commonly carry only 10,000 to 50,000 SKUs at a time. Assuming the same 10% of items would require new hazardous waste determinations, and the same cost of \$12 to \$100 per determination, the cost for a “typical” chain would be between \$12,000 and \$500,000. We estimate that 200 to 500 chains would experience costs in that range. (The number of stores within such chains would obviously be much higher, but we assume here that the chain would only do the determination once for all of the individual stores that it owns or operates.) Thus, the total costs for new hazardous waste determinations by these chains would be in the range of \$2.4 million to \$250 million.

While the numbers above are only estimates, it seems clear that a substantive change to the ignitability characteristic, as the Agency has proposed, would cost the retail sector alone upwards of tens of millions of dollars for reevaluating the materials it handles. The Retail Associations do not believe that such costs can be justified by any potential environmental benefits of the revised characteristic (especially since, as discussed above, it is questionable whether there are any benefits). In any event, it is incumbent on EPA to consider these costs carefully, rather than simply claim that there are no significant costs.

7.2 Costs Associated with Changes in Generator Status

Another potentially significant cost that retailers may incur as a result of the proposed rule is based on the fact that the reclassification of some wastes may cause some retail facilities to have to change their generator status to a higher category of generator (*e.g.*, from VSQG to SQG, or from SQG to LQG). Given the uncertainties discussed above about the scope of EPA’s proposal, it is difficult to estimate how many facilities might change status in this way. However, to obtain a ballpark estimate, we note that the Agency has previously estimated that there are 16,774 SQGs and 22,471 VSQGs in the retail sector. *See* 79 Fed. Reg. 8926, 8932 (February 14, 2014). We believe these numbers are significant underestimates, since they are

based on the number of retail facilities in the RCRAInfo database, and there is no reason for most SQGs or VSQGs to be included in that database. This is especially true with respect to VSQGs, given the U.S. Census estimate that there are approximately 1.7 million retail facilities in the U.S. *Id.* Roughly half of these facilities are in retail sectors (*e.g.*, food service, apparel, and home furnishings) that might not generally be expected to generate hazardous wastes (although they actually might, especially in the course of store maintenance activities). Nevertheless, that still leaves about 800,000 retail facilities that might reasonably be expected to be VSQGs. For current purposes, we will conservatively assume that there are 16,774 retail SQGs (based on EPA's estimate) and between 22,471 and 400,000 retail VSQGs (based, respectively, on EPA's estimate and half of the 800,000 estimate derived above from U.S. Census figures).

If we assume that only 1% of retail SQGs and VSQGs will change their generator status as a result of the proposal, the numbers would be 167 retailers changing status from SQG to LQG, and between 224 and 4000 retailers changing status from VSQGs to SQGs. EPA has recently estimated that the difference in compliance costs for LQGs and SQGs is \$3400 per year, and that the corresponding difference for SQGs and VSQGs is between \$3600 and \$3800 per year. *See*, EPA, "Regulatory Impact Analysis of Proposed Rule To Add Aerosol Cans to the Universal Waste Rule" (February 2018) at 25, Table 17. The Retail Associations believe these cost differentials have been understated by EPA. However, if we use those figures, the total increased costs for the retailers changing from SQGs to LQGs would be \$578,800 per year (*i.e.*, 167 x \$3400), and the total increased costs for the retailers changing from VSQGs to SQGs would be between \$806,400 per year (*i.e.*, 224 x \$3600) and \$15,200,000 per year (*i.e.*, 4000 x \$3800). Adding the costs for both categories of generators whose generator status might change, the total would be between \$1.4 million and \$15.8 million per year.

Once again, the numbers above are only estimates, but it seems clear that the retail sector could incur costs of several million dollars every year, or even more, as a result of changes in generator status under the proposed rule – on top of the one-time cost of tens of millions of dollars to perform new hazardous waste determinations (as discussed above). EPA must take all these costs into account and consider whether they are justified by any potential benefits of the rule. Inasmuch as EPA has not identified any benefits, and we question whether any exist, the Retail Associations do not believe that these costs can in any way be justified.

8. Conclusion

For the reasons discussed above, the Retail Associations oppose most aspects of EPA's proposal, with the exception of a few minor technical changes to the ignitability characteristic. The substantive changes to the characteristic that the Agency has proposed or requested comment on (*e.g.*, establishing a new exception to the aqueous alcohol exclusion, narrowing the exclusion in other ways, and requiring more aggressive methods to determine if a solid waste contains free liquids for purposes of ignitability – or corrosivity – testing) are ambiguous, arbitrary, inconsistent with long-standing RCRA regulations and guidance, and unwarranted from an environmental perspective. They would likely impose substantial new costs on the retail sector, including upwards of tens of millions of dollars to reevaluate all the relevant materials that retail facilities may generate as wastes, as well as several millions of dollars each year or more in new waste management costs for retail facilities that might change their generator status as a result of the proposed rule.

The Retail Associations have no objection to the purely technical changes that EPA has proposed (*e.g.*, clarifying that the aqueous alcohol exclusion applies to wastes with more than 50% water, allowing alternative laboratory methods for determining flash point, and harmonizing the definitions of ignitable compressed gases and oxidizers with corresponding DOT definitions). However, we urge EPA not to move forward with any of the more substantive changes that it has proposed or requested comment on.

Once again, we appreciate this opportunity to provide our comments on this proposed rulemaking. We would welcome the opportunity to provide additional input and/or to answer any questions the Agency may have with respect to the points made above.

Sincerely,

A handwritten signature in blue ink, appearing to read "Austen Jensen".

Austen Jensen
Senior Vice President, Government Affairs
Retail Industry Leaders Association

A handwritten signature in black ink, appearing to read "Kevin Nicholson".

Kevin Nicholson
Vice President, Public Policy and Regulatory Affairs
National Association of Chain Drug Stores