Consumer Technology Association

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Consumer Technology Association™

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Washington Department of Ecology
Hazardous Waste and Toxics Reduction Program
P.O. Box 47600
Olympia, WA 98504-7600

Re: CTA Comments on Proposed Rule Making Chapter 173-337 WAC – Safer Products Restrictions and Reporting

To the Washington Department of Ecology and the Safer Products for Washington Program:

On behalf of the Consumer Technology Association (CTA), we respectfully submit these comments on the Rulemaking Proposal for Chapter 173-337 WAC – Safer Products Restrictions and Reporting (Proposed Rule). We appreciate the opportunity to submit these comments and Ecology's engagement with stakeholders throughout this multiyear process.

CTA is North America's largest technology trade association. Our members are the world's leading innovators – from startups to global brands – helping support more than 18 million American jobs. Our member companies have long been recognized for their commitment and leadership in innovation and sustainability, often taking measures to exceed regulatory requirements on environmental design and product stewardship.

Our comments are organized in order based on sections within the Proposed Rule:

WAC 173-337-015 Applicability

We appreciate that the Proposed Rule does not apply to priority consumer product repair and replacement parts manufactured before the effective date of the restriction. However, we also believe that replacement parts which are manufactured *after* the effective date but intended for use in products which were manufactured prior to the effective date may still need to contain restricted substances. This would allow for the continued service and repair of older finished goods without having to generate unnecessary waste.

In order to minimize the generation of unnecessary waste, companies should be able to continue selling spare parts to service products that were manufactured prior to the effective date. Ecology should incorporate the "repair as produced" principle that is reflected in EU RoHS. EU RoHS exempts cables or spare parts for the repair, reuse, and updating of

products placed on the market before the phase-out date of the restriction.[1] To apply this principle, CTA suggests the following alternate language for WAC 173-337-015(d) and (e):

> *(d) Repair and replacement parts to service priority consumer products that were placed on the market prior to the effective date of the restriction.*
> *(e) Refurbished priority consumer products where the priority consumer products were first placed on the market prior to the effective date of the restriction.*

WAC 173-337-020 Requesting an Exemption

We appreciate the creation of an exemption process within this Proposed Rule. This allows needed flexibility given the wide-ranging restrictions proposed in the regulation.

Section 173-337-020(5) states that a person who submits a request for exemption must comply with the requirements of the rule until Ecology approves the exemption request. The Proposed Rule creates a situation where a company who submits a request would have to stop all distribution of their product(s) until any exemption is approved. This could result in significant supply chain disruptions. We respectfully request that the Proposed Rule default to allowing the company requesting an exemption to continue selling the covered product until Ecology makes a final decision regarding a request for exemption. We also ask that the Proposed Rule provide a specific time in which the Department must issue a decision on an exemption request. We recommend replacing WAC 173-337-020(5) with the following:

> *(5) If a person submits a request a request for exemption to Ecology, the effectiveness of this rule as applicable to that person shall be stayed until Ecology approves or denies their request.*

WAC 173-337-025 Acronyms and Definitions

Electronic displays. We thank Ecology for including a definition for "electronic displays" since this device category is treated differently in the Proposed Rule from other electronic product categories. The initial definition used in 173-337-025 is similar to the definition used in other jurisdictions regulating flame retardants in electronic displays, but it is not fully aligned with the definitions used in New York and the European Union. For clarity, we ask that the definitions be aligned exactly. We propose the following definition used in New York:[2]

> ***"Electronic display"*** *means a product with a display screen and associated electronics that, as its primary function, displays visual information from wired or wireless sources and is available for purchase by individuals or households for personal use in a residential space. Electronic display shall not include: (a) any electronic display with a screen area smaller than or equal to one hundred square centimeters or fifteen and one-half square inches; (b) projectors; (c) virtual reality headsets; (d) all-in-one video conference systems; or (e) displays that are integrated*

[1] EU RoHSArticle 4 Annex II https://echa.europa.eu/restricted-subs-referred-art-4-rohs and EC RoHS FAQ including repair parts "Following the principle of 'repair as produced,' spare parts for the specific products already on the market before the dates mentioned above are exempted."

[2] New York Regulation of Chemicals in Upholstered Furniture, Mattresses, and Electronic Enclosures: https://www.nysenate.gov/legislation/laws/ENV/37-1001

with appliances and are not available for purchase as separate products by end-users.

External enclosures. CTA recommends the following definition for external enclosures which reflects that enclosures can be composed of multiple parts (pluralizing parts) and that enclosures should be defined around finished products:

> ***"External enclosures"*** *means the plastic external parts of the finished product that renders inaccessible all or any parts of the equipment that may otherwise present a risk of electric shock or retards propagation of flame initiated by electrical disturbances occurring within.*

Flame retardants. During Ecology's information session on January 18th, staff said verbally that organohalogen flame retardants do not include PFAS chemicals for the purposes of this rulemaking. If Ecology does indeed wish to distinguish PFAS and organohalogen flame retardants for this rulemaking, then we suggest including the statement that "flame retardants do not include PFAS" in the definition and remove WAC 173-337-112(1)(c)(ii)(C) and 112(2)(c)(i)(C).

Inaccessible electronic component. To provide additional clarity, we would like to propose that the term "consumer" be included as part of this definition. The proposed definition also includes access during any reasonably foreseeable use or abuse of the product. Reasonably foreseeable use is designed into the product, but the extent of abuse is not reasonably foreseeable as it is driven by the intent of the user. Hence, we recommend removing "abuse" from the definition. Given these concerns, we recommend the following definition:

> ***"Inaccessible electronic component"*** *means a part or component of an electronic product that is located inside and entirely enclosed within another material and is not capable of coming out of the product or being accessed during any reasonably foreseeable consumer use of the product.*

Intended for indoor/outdoor use. The definitions for these terms potentially conflict. While the definition of "indoor" says a product "designed primarily for use or storage inside buildings," the definition for "outdoor" specifies a product designed to maintain functionality after extended exposure to outdoor elements. It is possible for a product to meet both definitions. There is a critical need for clear, specific definitions for these two product categories. If a product falls within both categories, it could result in a situation where a manufacturer must meet both the reporting and prohibition requirements. Manufacturers should not have to comply with both parts of the regulation because some products can fit both definitions. We respectfully ask that Ecology make these definitions clearer and eliminate potential situations where a product could meet both definitions. If the definition of "outdoor" includes exposure to UV light, water, or immersion for an extended time, we ask that "extended time" be clearly defined. We recommend that the definition of "indoor" be altered to say "intended **only** for use or storage inside buildings."

Intentionally added chemical. The Proposed Rule defines "intentionally added chemical" as "a chemical that serves its intended function in the final product **or in the manufacturing of** the product or part of the product." This definition is far too broad. The inclusion of chemicals which serve an intended function during the manufacturing process goes beyond the common definition for an intentionally added chemical. Typically, this definition would only include chemicals which have an intended function for the finished product.[3] We ask that Ecology align Washington with other states who do not include chemicals used solely to serve a function in the manufacturing process. We respectfully suggest adopting the following definition:

> ***"Intentionally added chemical"*** *means a chemical that is deliberately used in the manufacture of a product or product component where the continued presence is desired in the final product to serve its intended function.*

WAC 173-337-055 Previously Owned Priority Consumer Products

We thank Ecology for exempting the resale of previously-owned products which were manufactured prior to the effective date of the restrictions in this Proposed Rule. This will allow increased reuse of products and supports a circular economy. However, we ask that the prohibition on selling previously owned priority consumer products not apply to all repair parts or replacement parts for products manufactured before the effective date. In addition to supporting a circular economy, this will avoid the unintentional application of this chapter to individual citizens. We refer you to our comments above on WAC 173-337-015 "Applicability" for similar comments on the need for exempting all replacement parts regardless of manufacture date which are used to repair products manufactured prior to the effective date.

WAC 137-337-112 Flame Retardants

Inaccessible components and parts 112(1)(a)(iii). We recommend a few small changes to the language in this section for clarity:

> *(iii) This subsection does not apply to the following parts of the priority consumer products described in (a) of this subsection*
> *(A) Inaccessible electronic component or parts, such as printed circuit boards and internal fans.*
> *(B) Internal parts that may be ~~are~~ removable and replaceable, but not accessible once the product is in use in its fully assembled and functional form.*

The addition of "in use" is to clarify that internal parts which extend the life of products such as maintenance or upgrade parts, consumables, or replacement batteries are considered

[3] For examples for how "intentionally added chemical" is defined in other states, below are links to a range of other state definitions. None of these definitions is as broad as the one in the Proposed Rule.
California: https://www.law.cornell.edu/regulations/california/22-CCR-69501.1
Vermont: https://legislature.vermont.gov/Documents/2022/Docs/CALENDAR/hc210430.pdf
Rhode Island: http://webserver.rilin.state.ri.us/BillText/BillText20/HouseText20/H7834.pdf
Maine: https://www.mainelegislature.org/legis/statutes/32/title32ch26-B.pdf

inaccessible. The addition of "or parts" is to reflect that inaccessible parts may refer to the interior of plastic external enclosures that are not accessible during the use of the product.

Minimum weight. Section 173-337-112(1)(a)(iii)(C) limits the product scope to plastic external enclosure parts that weigh 0.5g or more. We request that this minimum weight instead be 25g to reflect the minimum weight in 4.1.4.1 of IEEE Standard 1680.1-2018. This is also the minimum weight in the EPEAT Computers and Displays Category. Given that the Proposed Rule is applicable to an incredibly wide range of electronic products, we believe it best to adopt a minimum weight in line with these industry thresholds.

WAC 173-337-112(1)(b) Compliance schedule. We respectfully ask that Ecology alter 112(1)(b) to take effect on June 1, 2027 for all products instead of 2026 for some businesses. For manufacturers to transition to the proposed alternatives, any regulation should establish a compliance timeframe of at least 48 months after the effective date of final rule adoption. There is precedent for a 48-month compliance timeframe under both the RoHS 2 and REACH regulations. For an in-depth discussion for why 48 months is necessary, we incorporate CTA's comments to Ecology from January 2022, comments to Ecology from August 2022, and CTA's comments submitted to EPA in 2021.[4]

WAC 173-337-112(2)(b) Compliance schedule. For Section 112(2)(b) regarding plastic external enclosures for electronic products for outdoor use, the Proposed Rule says that the reporting takes effect January 1, 2024. However, WAC 173-337-060 says that reporting must be submitted January 31st of the year *after* the effective date. It is our understanding that this means notification must first be made for this section by January 31, 2025. If this is not the case, we ask that Ecology make the reporting timelines clearer.

Applicability for displays. WAC 173-337-112(1)(b)(ii)-(iv) treats displays with all-in-one video systems, certain displays integrated with appliances, projectors and virtual reality headsets differently than other displays and on a different timeline than other displays. We believe this was specific language was meant to align with regulations in the EU and New York State. However, New York also exempts displays with a screen area smaller than or equal to one hundred square centimeters from their law. We ask that Ecology include this size limitation within this category.[5] We also discuss this in the suggested definition for "electronic display" above.

WAC 173-337-112(1)(c) Restriction and presumptions regarding total chemical concentrations. The Proposed Rule states a presumption that the presence of certain

[4] CTA comments to Ecology January 2022: https://scs-public.s3-us-gov-west-1.amazonaws.com/env_production/oid100/did200002/pid_202268/assets/merged/li03ii2_document.pdf?v=953QVP6SW
CTA, IPC, and ITI comments to EPA on TSCA regulations: https://www.regulations.gov/comment/EPA-HQ-OPPT-2021-0202-0148

[5] New York Regulation of Chemicals in Upholstered Furniture, Mattresses, and Electronic Enclosures: https://www.nysenate.gov/legislation/laws/ENV/37-1001

halogens indicates that they are used as organohalogen flame retardants. Using analytical methods for determining the total bromine or other elements would not differentiate the use of halogens as organohalogen flame retardants versus some other use. For example, if a product used fluorinated coatings, the total fluorine test would identify the use of fluorine and this would lead to an inaccurate assumption that it is from an organohalogen flame retardant.

In addition, Ecology has acknowledged that some flame retardants which could replace organohalogen flame retardants may require the use of an anti-drip agent that may contain fluorine. Thus, it would be improper to presume that the presence of total fluorine above a threshold amount indicates the presence of organohalogen flame retardants. We request that Ecology delete proposed WAC 173-337-112(1)(c)(ii)(C) and (2)(c)(i)(C).

De minimis concentrations. We request adequate de minimis concentrations be established for the restriction. While intentionally-added flame retardants are within scope of the regulation with a limit of 1000 ppm (0.1% by weight), these intentional additions have included impurities, byproducts, and recycled materials not being regulated. The electronics industry needs appropriate thresholds to properly manage chemicals of concern across the supply chain. We request Ecology set the threshold to 1000 ppm (or 0.1% by weight) which is the same level set for brominated flame retardants PBB and PBDE by the EU RoHS Directive.

Homogeneous material. As we discuss above, we oppose the use of the total concentrations presumptions outlined in WAC 173-337-112. However, if Ecology does continue with this presumption in their Rule, we encourage the Department to include the definition and term "homogeneous material" to better align with existing EU law. Under the current Proposed Rule, it could be interpreted that the 1,000 ppm concentration applies to the entire complex article. We recommend that Ecology instead align with EU RoHS which restricts "concentration value by weight in homogeneous materials."[6] Therefore, if Ecology is going to use this presumption, we propose the following for WAC 173-337-112(1)(c)(ii)(A)-(C):

> *(ii) Ecology presumes the detection of:*
> *(A) Total bromine concentrations above 1,000 ppm indicate intentionally added organohalogen flame retardants within homogeneous material.*
> *(B) Total chlorine concentrations above 1,000 ppm indicate intentionally added organohalogen flame retardants within homogeneous material.*
> *(C) Total fluorine concentrations above 1,000 ppm with less than 5,000 ppm total phosphorus indicate intentionally added organohalogen flame retardants within homogeneous material.*

[6] Directive 2011/65/EU on RoHS Article 4(2) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02011L0065-20221001

And we propose the following for WAC 173-337-112(2)(c)(i)(A)-(C):

> *(A) Total bromine concentrations above 1,000 ppm indicate intentionally added organohalogen flame retardants within homogeneous material.*
> *(B) Total chlorine concentrations above 1,000 ppm indicate intentionally added organohalogen flame retardants within homogeneous material.*
> *(C) Total fluorine concentrations above 1,000 ppm with less than 5,000 ppm total phosphorus indicate intentionally added organohalogen flame retardants within homogeneous material.*

Finally, we recommend the following definition for "homogeneous material" that comes from 2011/65/EU RoHS Directive:[7]

> "***Homogeneous Material****" means one material of uniform composition throughout or a material, consisting of a combination of materials, that cannot be disjointed or separated into different materials by mechanical actions such as unscrewing, cutting, crushing, grinding and abrasive processes."*

Additional Comments on Proposed Rule

Recycled plastic. The Proposed Rule does not provide any reference to the use of recycled plastic in manufacturing covered products. It is possible that recycled older electronics would contain restricted substances in some amount and could end up in recycled plastic used to make new devices. We think it important to encourage recycling by exempting articles which are made from recycled plastic, so long as no new prohibited chemicals are added during the recycling or production process. EPA has issued rules with similar language under TSCA containing exemptions for products and articles from recycled plastic.[8] The restriction on using recycled materials disrupts manufacturers' efforts for a circular economy.

Ecology should provide CAS Registry Numbers for all proposed restrictions. It is essential that the Department of Ecology provide CAS RNs on any chemical it restricts in consumer products. It should provide a full list of all flame retardants it is restricting in covered plastic electronic enclosures. As manufacturers communicate across the supply chain, referring to these identification numbers is the most effective way to accurately ensure compliance. If companies are to change their products to comply with any chemical regulation in a timely manner, the Department providing CAS RNs would make it significantly easier and more efficient to accomplish.

Research and development. Any restriction on electronics enclosures should include an exemption for research and development purposes. Manufacturers need the freedom to innovate, particularly in the constantly evolving technology and electronics sector. Without the ability to conduct research and development of products and articles within the United

[7] Directive 2011/65/EU on RoHS Article 3(20) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02011L0065-20221001

[8] EPA's rules for DecaBDE and PIP (3:1) in 2021 provide exemptions for articles and products made from recycled chemical-containing plastic provided no new amounts of that chemical is added during the recycling process or added to the articles and products made from the recycled plastic.

States, it would be very difficult for manufacturers to meet the advanced technical performance specifications of their products. Responsible chemicals management programs should be permitted and encouraged. Commercial manufacture, import, and distribution of electronic external device enclosures including organohalogen flame retardants for R&D purposes such as prototypes should be exempted from restriction. At minimum, the following should be excluded: (1) when a limited number of articles are used for research and development activities in the state, and (2) when products are responsibly recovered after use in research and development activities.

PFAS. The Proposed Rule includes PFAS as a priority chemical class, and while electronic products are not included as priority products, we would like to comment briefly given the possible precedential nature of including this priority chemical class. The definition of PFAS proposed would encompass thousands of chemical compounds which is far too broad a scope. Instead, it should focus on narrower subclasses of PFAS. We are also concerned with the conclusion that a detection of total fluorine equates to the intentional addition of PFAS. Fluorine may be present in products for reasons other than PFAS. Finally, the lack of CAS RNs provided by the Department will create concerns like we mention above with flame retardants.

Bisphenols and thermal paper. We respectfully ask that FDA-regulated medical devices be exempt from the restriction on bisphenols and thermal paper. We also ask that Ecology regulate "intentionally added" bisphenols and remove the 200 ppm threshold. Bisphenols may be present as impurities or contaminants. The proposed rule already exempts FDA-regulated medical devices in the sections regarding flame retardants. Alternatively, we ask that manufacturers be given at least five-year phase-in time for this restriction to allow manufacturers time to identify feasible alternatives.

Conclusion

Thank you again for the opportunity to provide these comments on the Rulemaking Proposal for the Safer Products Restrictions and Reporting. If you have any questions about our comments, please do not hesitate to contact me at dmoyer@cta.tech.

Sincerely,

Dan Moyer
Sr. Manager, Environmental Law & Policy
Consumer Technology Association