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COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION ON EPA'S REQUEST FOR PUBLIC COMMENT ON "EVALUATION OF EXISTING REGULATIONS"

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The Retail Industry Leaders Association ("RILA") welcomes the new Administration's review and evaluation of existing U.S. Environmental Protection Agency ("EPA" or the "Agency") regulations. Under the current regime, an individual retail store can be subject to the same Resource Conservation and Recovery Act ("RCRA") rules and requirements that apply to large traditional manufacturing facilities, such as steel mills, simply because the individual store is holding two or three boxes of unsold nicotine gum or because a small number of returned products in aerosol cans need to be sent back to the store's distribution center.

As a result of the Agency's current extraordinary interpretation of the regulations, fully 28% of so-called RCRA "hazardous waste generators" are actually individual stores that are holding nothing more than ordinary household products that were unsold (due, e.g., to expiration, product discontinuation, seasonal inventory changes, damage, etc) or that were returned by a customer (due, e.g., to defect, the customer changed her mind, or the product simply failed to live up to expectations). And yet (and not surprisingly), the so-called "hazardous waste" produced by these stores (ordinary consumer products) accounts for less than 0.1% by weight of the hazardous waste generated by the country, compared to the 61% that is generated by the chemical industry.

Nonetheless, a retail store that is unlucky enough to find itself classified as a "large quantity generator" must fulfill all of the costly regulatory obligations imposed on traditional large scale manufacturing facilities. These include such pointless exercises (in the case of a local grocery store) as preparing emergency response plans and notifying the store's local emergency responders (such as the fire station down the street) of the store's "large quantity generator" status and its response plan. In addition, all "large quantity generators" – be they chemical plants or local pharmacies -- are subject to periodic government inspections, which means that valuable inspection resources that could be used to evaluate manufacturing facilities that do have the potential to impact the environment are spent walking stores.

Common sense should be a sufficient basis to see that this area is ripe for reconsideration and fits squarely within the parameters of Executive Order 13777. Nonetheless, the following comments and accompanying material explain in detail the legal and policy infirmities of the current regulatory regime and provide a simple roadmap for changing it quickly. We, of course, would be happy to walk through these issues or answer any questions that the Administration may have regarding this situation.

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I. INTRODUCTION AND SUMMARY

The Retail Industry Leaders Association ("RILA" or the "Association") is pleased to submit these comments in response to the request of the U.S. Environmental Protection Agency ("EPA" or the "Agency") for public comments on regulations that may warrant repeal, replacement, or modification, pursuant to Executive Order 13777. *See* 82 Fed, Reg. 17,793 (April 13, 2017). These comments elaborate on the testimony that RILA previously submitted for the May 9, 2017 public hearing of EPA's Office of Land and Emergency Management ("OLEM"), a copy of which is included as part of these comments as Attachment A.

RILA is an organization of the world's most successful and innovative retailer and supplier companies – the leaders of the retail industry. RILA members represent more than $1.5 trillion in annual sales and operate more than 100,000 stores, manufacturing facilities, and distribution centers nationwide. The Association's 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 worldwide.

RILA appreciates the opportunity to provide input to EPA on regulations that may warrant reform. As discussed in more detail in Section II below, the hazardous waste regulations under the Resource Conservation and Recovery Act ("RCRA"), which were designed with traditional "heavy" industries in mind, are increasingly being applied to the retail sector, resulting in extremely high compliance costs with little or no benefit to human health or the environment. EPA, to its credit, has recognized the disconnect, and has started to work with the retail sector to address some of the problems. However, progress has been slow. We believe the current regulatory reform initiative provides an important opportunity to accelerate and strengthen these efforts.

As discussed in more detail in Section III below, RILA believes that three particular RCRA regulations meet virtually all of the criteria set forth in Executive Order 13777 for regulatory reform, such that they are especially well-suited for repeal, replacement, or modification:

- **Listing of Nicotine as an Acutely Hazardous Waste.** The listing of nicotine products as acutely hazardous wastes should be modified so as to exempt specific categories of low-concentration nicotine products that are currently on the market (*e.g.*, nicotine gum, lozenges, patches, prescription liquids, and e-cigarettes), as well as any future products containing less than a specified concentration of nicotine (*e.g.*, 3%), or so as to reclassify all such products as non-acutely hazardous wastes.

- **Classification and Regulation of Aerosol Wastes.** EPA's current regulatory framework for aerosol cans should be modified by (a) issuing guidance clarifying that aerosol cans do not exhibit the RCRA hazardous waste characteristic of reactivity; (b) issuing guidance that aerosol cans being sent for recycling are off-spec commercial chemical products being reclaimed and are not hazardous wastes or alternatively at least issuing guidance that aerosol cans containing non-hazardous chemical products and propellants that are ignitable, but common fuels, are not hazardous wastes if they are recycled to recover the propellant for use as a fuel; and (c) classifying aerosol cans as universal wastes, first informally by policy, and ultimately through rulemaking.

- **Application of the New Hazardous Waste Generator Rule to the Retail Sector.** The more stringent portions of the recently issued hazardous waste generator rule, as they apply to the retail sector, should be delayed from taking effect, or administratively stayed or suspended, until EPA can analyze fully what changes may be necessary to make the rule – and the RCRA regulations more generally – more appropriate for retailers.

Each one of these items is discussed in more detail in Section III below. However, in order to provide some useful perspective, we first give some brief background on application of the RCRA hazardous waste regulations to the retail sector.

II. BRIEF BACKGROUND ON RCRA AND THE RETAIL SECTOR

A. EPA's Application of RCRA Rules to Stores

The RCRA regulations were originally developed by EPA with traditional "heavy" industries in mind (*e.g.*, chemical manufacturing, petroleum refining, and steel making). In recent years, however, the same regulations have increasingly been applied to retail stores. Indeed, according to EPA statistics (which we believe significantly understate the problem), over 28% of regulated "large quantity generators" are actually individual stores, compared to the mere 12% of facilities that are represented by the chemical industry. *See* EPA, "Regulatory Impact Assessment of the Potential Costs, Benefits, and Other Impacts of the Final Hazardous Waste Generator Improvements Rule" (September 2016) ("Generator Rule RIA"), Exhibit 2-6 ("LQG Hazardous Waste Quantities and Number of Waste Steams Generated by Industry (2013)").

Not surprisingly, the large number of retail stores classified as hazardous waste generating facilities does not translate into significant environmental risks. The so-called "hazardous wastes" that the Agency deems to be "generated" by these facilities represent well below 0.1% (by weight) of the hazardous wastes generated in the country, compared to 61% for the hazardous wastes generated by the chemical industry. *Id*. That is because the so-called "hazardous wastes" are nothing more than the very same products that stores sell every day to their customers, and that those consumers use and dispose of in the normal municipal waste stream every day – and in far greater quantities (since retailers obviously sell far more products than they discard, and customers ultimately use and discard virtually all of what they buy).

Retailers obviously do not manufacture these products or "generate" them in the ordinary meaning of the word; but the Agency may deem a store to "generate" these products as "wastes" if the products are unsold (*e.g.*, due to expiration, obsolescence, product discontinuation, seasonal inventory changes, damage, defect, or recall) or returned by customers (*e.g.*, due to damage, defect, quality concerns, or simple failure to live up to expectations.

It makes no sense to apply the RCRA hazardous waste regulations to these products, when they represent less than 0.1% of the nation's hazardous waste stream and when far greater quantities of the exact same products are legally being disposed of by households (and small businesses) as non-hazardous wastes. This is especially true because the hazardous waste rules, designed as they were for traditional heavy industries, do not fit the retail sector, and thus pose serious challenges to retailers. For example, any given retail store may carry tens of thousands of different types of products. Each one of these has the potential to be returned by a consumer or recalled by a manufacturer at any time. EPA considers each of these types of products a waste or a separate "waste stream." While traditional industrial facilities may large quantities of each of its waste streams, they typically generate far fewer by type.

Moreover, retailers generally have far less knowledge of each individual product's composition and properties (since the store is only engaged in distributing products, rather than producing them). Retail companies also have far more "facilities" (or stores) than companies in other industries. Retail workers may have limited skills, may stay with the company for only a short period of time, and have understandable difficulty determining when items that look the same as the products that are stocked on shelves – and that they themselves may buy and use at home – may become subject to regulation as "hazardous wastes." The RCRA regulations do not account for any of these characteristics of the retail sector, and are inappropriate for that sector as a result.

B. Recent Attempts To Address the Situation

EPA in recent years has recognized the disconnect between RCRA and the retail sector, and has started to take steps to correct it. However, progress has been slow and the most recent regulatory change in the waning days of the previous Administration makes the situation even worse.

In 2014, the Agency issued a Notice of Data Availability ("NODA") seeking comments on the problems raised by application of the RCRA regulations to retailers. *See* 79 Fed. Reg. 8926 (February 14, 2014). RILA, together with other retail trade associations, submitted extensive comments on the NODA, which are incorporated into these comments as Attachment B ("NODA Comments"). In 2015, the Agency published two proposed rules – intended, at least in part, to address some retail issues – one focused on modifying the rules for all hazardous waste generators, and the other focused on the requirements for pharmaceuticals that are hazardous wastes. *See* 80 Fed. Reg. 57,918 (September 25, 2015) (proposed hazardous waste generator rule); 80 Fed. Reg. 58,014 (September 25, 2015) (proposed hazardous waste pharmaceutical rule). Once again, RILA, together with other retail trade associations, submitted extensive comments on these rulemakings, which are incorporated into these comments as Attachments C ("Generator Rule Comments") and D ("Pharmaceutical Comments").

About a year later, in September 2016, EPA issued a "Strategy for Addressing the Retail Sector under RCRA's Regulatory Framework" (hereinafter referred to as the "Retail Strategy") which outlined measures that the Agency was taking, or intended to take, to address the retail sector issues. RILA was heartened by these developments and was cautiously optimistic about EPA's efforts. However, we were greatly disappointed when, two months later, the Agency issued its final hazardous waste generator rule. *See* 81 Fed. Reg. 85,732 (November 28, 2016). As discussed in more detail further below, EPA appears to have ignored many of our comments. As a result, we see the rule as a big step in the wrong direction.

To get back on track and finally fix the mismatch between RCRA and the retail sector, we are proposing three different rules for repeal, replacement, or modification. Two of these proposals (the ones relating to low-concentration nicotine products and aerosol cans) are generally in line with items in EPA's Retail Strategy. The third calls for delay, stay, or suspension of the recent hazardous waste generator rule, as it applies to the retail sector, until that rule can properly be reevaluated taking into account the special circumstances of retailers. RILA hopes that these regulatory reform efforts can be undertaken quickly with the same spirit of cooperation that led to the NODA and the Retail Strategy, with the goals of protecting the environment and the general public – our customers – while providing retail businesses relief from unnecessary or inappropriate red tape and compliance costs.

III. SPECIFIC PROPOSALS OF RULES FOR REPEAL, REPLACEMENT, OR MODIFICATION

A. Listing of Nicotine as an Acutely Hazardous Waste

1. *Brief Background on the Nicotine Listing*

Under the RCRA regulations at 40 C.F.R. § 261.33(e), nicotine and salts (hereinafter referred to simply as "nicotine" for ease of discussion) are listed as acutely hazardous wastes (EPA Hazardous Waste No. P075) when discarded in the form of "commercial chemical products." For these purposes, a commercial chemical product is defined to include pure forms of the listed chemicals, technical grades of the listed chemicals, and all formulations in which a listed chemical is the sole active ingredient. *See* 40 C.F.R. § 261.33(d), Comment.

EPA has taken the position that the nicotine listing applies to a variety of products containing only low concentrations of nicotine, such as nicotine replacement therapy ("NRT") products designed to help people stop smoking tobacco (*e.g.*, nicotine gum, lozenges, patches, and prescription inhalers and nasal sprays), and e-cigarette products (*e.g.*, e-liquids containing nicotine, cartridges containing such liquids, and e-cigarettes containing such liquids or cartridges). *See, e.g.*, Letter from Robert W. Dellinger, Director, Material Recycling and Waste Management Division, EPA, to Charlotte A. Smith, Director, PharmEcology Services, WM Healthcare Solutions, Inc. (August 23, 2010) (RCRA Online #14817) (discussing nicotine patches, gums, and lozenges); Letter from Barnes Johnson, Director, Office of Resource Conservation and Recovery, EPA, to Daniel K. DeWitt, Warner, Norcross & Judd LLP (May 8, 2015) (RCRA Online #14850) (discussing e-liquids, e-cigarettes, and cartridges); *but see also* Letter from Barnes Johnson, Director, Office of Resource Conservation and Recovery, EPA, to Scott DeMuth, Vice President, Business Development, g2revolution, LLC (May 8, 2015) (RCRA Online #14851) (indicating that these products might not be solid or hazardous wastes if they are legitimately recycled to recover useful nicotine).

RILA does not agree that all of these products are properly covered by the nicotine listing. However, based on EPA's interpretation, a retail store that has to return or discard as little as 1 kilogram (2.2 pounds) of low-concentration nicotine products may be classified as a large quantity generator of hazardous wastes, subject to extremely onerous regulatory requirements. The result is that many retailers (*e.g.*, large numbers of grocery stores, pharmacies, and convenience stores) are unnecessarily and inappropriately regulated in the same manner as chemical plants, petroleum refineries, and other heavy industrial facilities.

2. ***The Nicotine Listing Meets Almost All of the Criteria under Executive Order 13777 for Rules Warranting Repeal, Replacement, or Modification***

The nicotine listing is particularly well-suited to EPA's current regulatory reform effort, because it meets virtually all of the criteria set forth in Executive Order 13777 for rules that warrant repeal, replacement, or modification. As discussed in more detail below, the listing was based primarily on an estimate of the toxicity of nicotine that had no technical foundation and was clearly erroneous. It is outdated since it was designed to regulate high-concentration nicotine pesticides that no longer exist, and it imposes tens of millions of dollars of compliance costs on the retail sector every year without any significant environmental benefits. The listing forces retailers to eliminate jobs and/or to limit job creation, and it diverts limited government resources away from much higher priority issues, in conflict with regulatory reform goals.

- ***Criterion #1*: The nicotine listing was based on data that do not meet basic standards of reliability and transparency, as required under the Information Quality Act.**

  EPA originally listed nicotine as an acutely hazardous waste based primarily on what it referred to as an "estimate" that the median lethal dose (LD50) to humans through oral administration is only 1 mg per kg of body weight (corresponding roughly to a fatal dose of 50-60 mg). *See* EPA Office of Solid Waste, Background Document entitled "Section 261.33 – Hazardous Waste from Discarding of Commercial Chemicals Products and the Containers and Spill Residues Thereof" (January 1981) ("CCP Background Document"), Appendix A, *cited in* Pharmaceutical Comments at 9. However, the U.S. Surgeon General recently stated that he could not find any support whatsoever for this figure. *See* Office of the Surgeon General, "The Health Consequences of Smoking – 50 Years of Progress" (2014) at 112 ("a systematic literature search was performed …; however, no study was located as a source for an estimate of the dose that is fatal to humans, and the figure of 50–60 mg is poorly documented"), *cited in* Pharmaceutical Comments at 9.

  In light of the Surgeon General's conclusion, the "data" that EPA principally relied upon for the nicotine listing

did not just fail to meet basic standards for reliability and transparency, as required by the Information Quality Act. The data simply did not exist.

Moreover, EPA's estimate of the toxicity of nicotine is inconsistent with over a dozen published studies showing that nicotine does not meet EPA's oral toxicity criteria for acutely hazardous wastes. *See generally* Pharmaceutical Comments at 11-13. Under the regulations, when there are inadequate human toxicity data, the determination of whether a waste is an acute oral toxin must be based on whether the wastes "have an oral LD 50 toxicity (rat) of less than 50 milligrams per kilogram." *See* 40 C.F.R. § 261.11(a)(2). In the present case, there can be no doubt that low-concentration nicotine products do not qualify as acutely hazardous under this standard, since even *pure* nicotine does not, as discussed below.

The Committee for Risk Assessment ("RAC") of the European Chemicals Agency ("ECHA") recently issued a report summarizing available toxicity information on nicotine. *See* ECHA, "RAC Opinion Proposing Harmonized Classification and Labeling at EU Level of Nicotine" (adopted September 10, 2015), *cited in* Pharmaceutical Comments at 11-13. After reviewing numerous studies, RAC concluded that "the oral LD50 of nicotine in rats ranges from 52.5 to 70 mg/kg, while the LD50 for nicotine sulphate in rats ranges from 56.7 to 83 mg/kg." *Id*. at 5. ECHA did not identify, and we have not found, even a single study that reported an oral LD50 (rat) value of less than 50 mg/kg. Given the overwhelming data that the LD50 for nicotine is higher than this value, it is clear that *pure* nicotine does not meet the oral toxicity criteria for an acutely hazardous waste (*i.e.*, "oral LD 50 toxicity (rat) of less than 50 milligrams per kilogram"). *See* 40 C.F.R. § 261.11(a)(2). The same would obviously be true for low-concentration nicotine products.

Because EPA based the nicotine listing primarily on a human toxicity "estimate" that was without any support, and that is inconsistent with every known study addressing the RCRA regulatory standard for acute oral toxicity, the listing should be repealed, replaced, or modified.

- ***Criterion #2*: The nicotine listing is outdated and unnecessary.**

EPA issued the nicotine listing in 1980 to address the only nicotine products that were then on the market – powerful pesticides, such as Black Leaf 40, which contained up to 40% nicotine. *See* NODA Comments at 5-6. However, in subsequent years, nicotine use as a pesticide started to decline rapidly. *See generally* EPA, Reregistration Eligibility Decision for Nicotine (March 2008) at 8. The last EPA registrations for use of nicotine as a pesticide on food crops were cancelled in 1994. *Id*. As of 2014, nicotine pesticides have been completely banned from use in the U.S. *See* 74 Fed. Reg. 26,695 (June 3, 2009) (EPA order cancelling "the last nicotine pesticide product registered for use in the United States … effective January 1, 2014").

Clearly, the nicotine listing was designed to address a problem that no longer exists. The products now covered by the listing are low-concentration nicotine products that were not – and could not have been – a target of the listing in 1980, since they simply did not exist back then. *See, e.g.*, 78 Fed. Reg. 19,718 (April 2, 2013) ("The nicotine gum and patch products were originally approved [by the Food and Drug Administration] between 1984 and 1992. Both the gum and the patch were initially available by prescription only; these products were switched from prescription to OTC status between 1996 and 2002. The nicotine lozenge and mini-lozenge were approved directly for OTC use in 2002 and 2009, respectively.").

The new products clearly do not pose the same risks as the old nicotine pesticides. As an initial matter, the new products contain far lower concentrations of nicotine, generally in the range of 0.1% to 3.0%. *See* NODA Comments at 6. There can be no doubt that nicotine gum and lozenges are not acutely hazardous, given that

they have, for decades, been consumed multiple times daily by millions of people, with the encouragement of public health authorities and the medical community. *See* NODA Comments at 7; Pharmaceutical Comments at 10; *see also* U.S. Public Health Service, "Clinical Practice Guideline: Treating Tobacco Use and Dependence" (2008 Update) (characterizing nicotine gums and lozenges as "an effective smoking cessation treatment that patients should be encouraged to use"). Nicotine patches are obviously not intended to be chewed or swallowed, but studies have shown that even when they are, the effects are not lethal. *See* NODA Comments at 7; Pharmaceutical Comments at 10-11; *see also* F. Harchelroad, et al., "Oral absorption of nicotine from transdermal therapeutic systems," *Veterinary and Human Toxicology* (1992); A. Woolf, "Childhood Poisoning Involving Transdermal Nicotine Patches," *Pediatrics* (1997). And, with respect to prescription nicotine liquids and e-cigarette products, even *pure* nicotine does not meet EPA's criteria for oral acute toxicity, as discussed above. So, the same must be true for these low-concentration nicotine products.

Inasmuch as the products that the listing was originally designed to address no longer exist, and the products now being affected by the listing do not pose the same risks, the listing is outdated, unnecessary, and ripe for repeal, replacement, or modification.

- ***Criterion #3*: The nicotine listing has costs that greatly outweigh any possible benefits.**

Because the listing classifies low-concentration nicotine products as acutely hazardous wastes, any facility generating more than 1 kilogram (or 2.2 pounds) of such wastes within a calendar month is classified as a Large Quantity Generator ("LQG") of hazardous waste. *See* 40 C.F.R. § 262.13, Table 1. RILA has estimated (using three separate methodologies, all leading to essentially the same conclusion) that 12,000 retail facilities are classified as LQGs based *solely* on the fact that they sometimes have more than this amount of nicotine gum, lozenges, patches, and the like. *See* NODA Comments at 9-10; Pharmaceutical Comments at 13-14. As a result, these facilities (*e.g.*, grocery stores, pharmacies, and convenience stores) are subject to the same onerous regulatory requirements as chemical plants and petroleum refineries.

We previously estimated that the cost per facility of being (mis)classified as an LQG in this manner was between $3,024 and $5,515 per year. *See* NODA Comments at 10-12. However, since the time that we made that estimate in 2014, the costs of being an LQG have increased significantly as a result of the 2016 rule that overhauled the requirements for hazardous waste generators (*e.g.*, by imposing new requirements for recordkeeping, periodic re-notification of regulatory authorities, marking/labeling of containers, contingency plans, arrangements with local first responders, and closure of waste accumulation areas). *See* 81 Fed. Reg. 85,732 (November 28, 2016).

Even if we conservatively assume a cost per facility of only $4,000 per year – roughly the midpoint of the original range, before the added costs of the 2016 rule – the total costs for the 12,000 retail facilities that are classified as LQGs, due to the listing of nicotine as an acutely hazardous waste, would be $48 million per year. Actual costs are likely much higher.

There can be no doubt that these extremely high costs outweigh the benefits of the listing since, as discussed above, there are simply are no benefits. There is simply no basis for classifying low-concentration nicotine products as acutely hazardous wastes. Because the nicotine listing imposes tens of millions of dollars in costs each year for no discernible benefit, it should be repealed or replaced as soon as possible.

- ***Criterion #4*: The nicotine listing eliminates jobs and inhibits job creation.**

As discussed above, the nicotine listing imposes extremely large and wholly unwarranted costs on the retail sector. These additional regulatory costs – especially at a time when the industry is facing other major challenges – put pressure on retailers to reduce other costs, including the costs of labor. They also divert resources that might otherwise be devoted to developing innovative business practices or expanding business, thereby limiting opportunities for hiring new workers. Inasmuch as the nicotine listing eliminates jobs and/or inhibits job creation, it should be repealed, replaced, or modified.

- ***Criterion #5*: The nicotine listing interferes with regulatory reform initiatives.**

One of the main goals of all regulatory reform initiatives is to improve government efficiency by focusing limited resources on core problems. However, the nicotine listing forces EPA and states to divert compliance assurance, inspection, and enforcement resources away from the heavy industries that generate the vast majority of hazardous wastes, to the retail sector. It does this by pushing so many retail stores into the Large Quantity Generator category that retailers now represent over 28% of all LQGs (even though they account for less than 0.1% of all hazardous wastes generated). *See* EPA, Generator Rule RIA, Exhibit 2-6. Moreover, because LQGs are required to submit contingency plans (and all revisions to such plans) to first responders, *see* 40 C.F.R. § 262.262(a), fire departments and others are being overwhelmed by paperwork from retailers that is of little value and distracts them from their vital functions. *See* NODA Comments at 11-12. Because the nicotine listing diverts limited government resources away from much higher priorities, the listing should be repealed, replaced, or modified.

3. ***Proposed Reform of the Nicotine Listing***

Any one of the factors discussed above would warrant repeal, replacement, or modification of the nicotine listing. Taken together, these factors make a compelling case for regulatory reform. EPA has previously requested comments on this issue and stated that it could directly issue a final rule. *See* 80 Fed. Reg. at 58,073 ("no regulatory language is currently being proposed with respect to amending the P075 listing to exempt the low-concentration nicotine containing products. However, … EPA could finalize one of the approaches discussed previously without a separate proposed rulemaking in the future").

We urge the Agency to do so as soon as possible by exempting from the nicotine listing all low-concentration nicotine products, including specific categories of products that are currently on the market and any other products containing less than a specified concentration of nicotine (*e.g.*, 3%). *See generally* Pharmaceutical Comments at 14-18. Attached as Exhibit 1 is draft regulatory language to accomplish this change.

B. Classification and Regulation of Aerosol Wastes

1. ***Brief Background on Aerosol Waste Regulation***

The RCRA hazardous waste regulations do not explicitly address aerosol cans. However, EPA has issued countless letters and memoranda interpreting and applying the RCRA regulations in the context of aerosol cans. *See generally* NODA Comments at 17-20. According to these Agency documents, the status of aerosol cans as wastes or non-wastes, and as hazardous or non-hazardous, depends upon a bewildering array of factors (*e.g.*, the identity of the propellant; the identity of the chemical product to be dispensed by the can; whether the can was used, and if so, by whom; whether the can meets the RCRA definition of "empty"; whether the can has been punctured and drained of fluids; whether the can is dented, corroded, or missing the actuator button; whether the can might be sold on a secondary market or donated for use; whether the can might be sent to a manufacturer for potential credit; and if/how

the can might be recycled). *Id*. Even with all of the documents EPA has issued on this subject, the status of aerosol cans in many instances remains unclear. *Id*.

The situation has been made even more difficult by the fact that EPA has stated that waste aerosol cans – whether full or empty – have the potential to qualify as reactive hazardous wastes, without providing any meaningful guidance to generators of when this might be the case. *See* 40 C.F.R. § 261.23(a) (RCRA definition of reactivity); EPA, RCRA Hotline Report (September 1987) (RCRA Online #13027) ("Irrespective of the lack of contained waste, … aerosol cans [c]ould be a RCRA hazardous waste because they demonstrate the hazardous characteristic of reactivity"). The Agency has repeatedly denied requests for guidance on which aerosol cans might be reactive. *See, e.g.*, Letter from Elizabeth A. Cotsworth, Acting Director, Office of Solid Waste, EPA, to T.L. Nebrich, Jr., Technical Director, Waste Technology Service, Inc. (May 19, 1997) (RCRA Online #14235) ("Cotsworth Aerosol Letter") ("*Over the past several years* we have received *numerous* questions concerning the regulatory status of used aerosol cans under the … hazardous waste regulations. We are not at this time able to make a categorical determination as to whether various types of cans that may have contained a wide range of products exhibit the characteristic of reactivity" (emphasis added)). Moreover, EPA has not provided any guidance on how companies, including retailers, might determine for themselves which aerosol cans (if any) exhibit the characteristic of reactivity. *See* Letter from David Bussard, Director, Hazardous Waste Identification Division, EPA, to Paul G. Wallach (August 14, 1997) (RCRA Online #14176) ("[f]or the characteristic[ ] of … reactivity, there is no test method specified as to the operational definition of the characteristic"). Nevertheless, the Agency has stressed that "[i]t remains the responsibility of the generator … to make [the reactivity] determination." *See* Cotsworth Aerosol Letter. By raising the specter that aerosol cans might be reactive, declining to provide guidance on when they are, and saying that generators are responsible for making a proper determination, EPA has left the regulated community, including retailers, in an extremely tenuous position.

2. ***The Current Regulatory Framework for Aerosol Cans Meets Almost All of the Criteria under Executive Order 13777 for Rules Warranting Repeal, Replacement, or Modification***

The current RCRA regulatory framework for aerosol cans, like the nicotine listing discussed above, is well-suited to EPA's current regulatory reform effort, because it meets virtually all of the criteria set forth in Executive Order 13777 for rules that warrant repeal, replacement, or modification. The fact that the regulations do not explicitly address aerosol cans does not in any way diminish this conclusion. Executive Order 13777 states that it extends to all existing regulations "as defined in section 4 of Executive Order 13771," and that referenced provision defines regulation to include "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." The EPA letters and memoranda discussed above are clearly statements of "particular applicability" that are "designed to implement [or] interpret … law or policy."

As discussed in more detail below, the current regulatory framework for aerosol cans is based in part on a bald assertion by EPA – which is without any technical support and appears to be erroneous – that aerosol cans may be reactive wastes. The framework is ineffective, since it is so complex and confusing that the regulated community inevitably either over-manages or under-manages the products. It imposes tens of millions of dollars of compliance costs on the retail sector every year without any significant environmental benefits, and, in doing so, forces retailers to eliminate jobs and/or to limit job creation. It also unnecessarily complicates – and thereby undermines – compliance by the regulated community, and implementation by federal and state inspection and enforcement personnel, in conflict with key regulatory reform goals.

- ***Criterion #1*: The regulatory framework for aerosol cans was based, in part, on data that do not meet basic standards of reliability and transparency, as required under the Information Quality Act.**

As noted above, one key element of the current regulatory framework for aerosol cans is the long-standing EPA statement that such cans, whether full or empty, "[c]ould be a RCRA hazardous waste because they demonstrate the hazardous characteristic of reactivity." *See* EPA, RCRA Hotline Report (September 1987) (RCRA Online #13027). To our knowledge, however, the Agency has never provided any data demonstrating that aerosol cans may qualify as reactive hazardous wastes, much less any data meeting the standards of reliability and transparency mandated under the Information Quality Act. The regulated community should not be subjected to onerous regulations based on mere speculation and innuendo, as EPA has done here.

Moreover, as RILA has previously demonstrated to EPA, the U.S. Department of Transportation ("DOT") hazardous materials regulations ensure that aerosol products do not meet the definition of a reactive hazardous waste under RCRA. *See generally* NODA Comments at 20-23. All aerosol cans must meet the DOT requirements in order to be transported in commerce. Under the DOT rules, aerosol cans must be capable of withstanding the same types of conditions that wastes are required to withstand in order not to be classified as RCRA reactive wastes. *See, e.g.*, 49 C.F.R. § 173.306(a)(3)(ii) ("the metal container must be capable of withstanding without bursting a pressure of one and one-half times the equilibrium pressure of the contents at 130°F"); § 173.306(a)(3)(v) ("[n]o leakage or permanent deformation of a [aerosol] container may occur [at 131°F]"); § 173.24(b)(1) (all packagings, including aerosol cans, must be "designed, constructed, maintained, filled, [their] contents so limited, and closed, so that under conditions normally incident to transportation … there will be no identifiable … release of hazardous materials to the environment").

There can be no doubt that aerosol cans are not the type of wastes intended to be covered by the RCRA reactivity characteristic. When EPA originally promulgated the RCRA reactivity characteristic in 1980, it stressed that "the problems posed by reactive wastes appear to be confined to a fairly narrow category of wastes." *See* EPA, "Background Document, Reactivity Characteristic" (May 1980) ("Reactivity Background Document") at 10. However, aerosol cans are anything but a narrow category of wastes. On the contrary, they are among the most ubiquitous of all wastes. Literally billions of aerosol cans are discarded each year by hundreds of millions of households and businesses. *See* NODA Comments at 15-17, 23. It is also worth noting that EPA in 1980 cited numerous "damage incidents" to support establishment of the RCRA characteristic of reactivity, but not a single one of these incidents involved aerosol cans, despite their ubiquitous nature. *See* Reactivity Background Document, Appendix I.

In short, EPA's bald statement about the potential reactivity of aerosol cans was not based on any reliable data, and it was clearly erroneous. Thus, the Agency should "repeal" that statement by issuing superseding guidance and/or a new rule clarifying that waste aerosol cans are not reactive hazardous wastes.

- ***Criterion #2*: The regulatory framework for aerosol cans is ineffective.**

The current regulatory framework for aerosol cans is so complex and confusing that it is ineffective. As discussed above, the status of aerosol cans as wastes or non-wastes, and as hazardous or non-hazardous, depends on a host of different factors. It would be difficult, and in some cases may be impossible, for a retail store (or other handler of aerosol cans) to obtain all of the information needed about each individual aerosol can being handled in order to assess all the factors identified by EPA. Moreover, even if it were practicable to obtain such information, the regulatory implications would not always be clear.

In light of the complexity and confusion surrounding the proper characterization of unsold/returned/used aerosol cans, some retailers (and other generators) conservatively assume that all such items are hazardous wastes (*e.g.*, due to reactivity). However, this results in unnecessary costs for management of such materials,

without any meaningful environmental benefit (especially given that aerosol cans are probably not reactive, as discussed above). Moreover, it could also result in unnecessary costs for other wastes, if, for example, misclassification of the aerosol cans causes some retailers to misclassify themselves as Small Quantity Generators ("SQGs") or even LQGs, rather than as Very Small Quantity Generators ("VSQGs"). Other retailers (and other generators) may take the opposite approach, assuming that none of their aerosol cans are hazardous wastes. However, this could result in improper management of some aerosol cans, such as those that are not empty and contain chemical products that are listed or characteristic hazardous wastes.

In short, the current regulatory framework is so complex and confusing that it leads to unintended and undesirable behaviors by many persons handling unsold, returned, or used aerosol cans. For this reason, the current framework should be repealed, replaced, or modified.

- ***Criterion #3*: The regulatory framework for aerosol cans has costs that greatly outweigh any possible benefits.**

The regulatory framework for waste aerosol cans imposes extremely high costs on the retail sector. Aerosol cans represent the single biggest waste stream generated by retailers. Indeed, the cans frequently account for 50% (by weight) or even more of all the potentially hazardous unsold/returned products handled by retailers. *See* NODA Comments at 16. Thus, aerosol cans are the main reason that many retail facilities are classified as regulated LQGs or SQGs of hazardous wastes. The number of such facilities can conservatively be estimated to be about 20,000, based on the fact that EPA has estimated that there are a total 70,000 to 85,000 LQGs and SQGs in the country, and approximately 28% of LQGs are retailers. *See* EPA, Generator Rule RIA, Exhibit ES-2 (number of LQGs and SQGs) and Exhibit 2-6 (breakdown of LQGs by industry); *see also* 79 Fed. Reg. at 8932 (EPA estimate that there are 16,774 retail SQGs); Generator Rule Comments at 17 (estimating the total number of retail LQGs and SQGs together at between 21,933 and 51,074). As discussed above in the context of the nicotine listing, the cost per store of being classified as an LQG can be estimated to be between $3,024 and $5,515 per year – not counting the additional costs imposed by the 2016 hazardous waste generator final rule. *See* NODA Comments at 10-12. While the costs associated with being a SQG are likely to be somewhat lower, the difference is probably not substantial, especially in the wake of the hazardous waste generator rule. Even if we very conservatively estimate that the average cost for LQGs and SQGs together is only $2,000 per year, the total for all 20,000 facilities would be $40 million per year. The actual costs are likely much higher.

There can be little doubt that these very high costs greatly exceed any potential environmental benefits. As discussed above, none of the aerosols are reactive hazardous wastes, despite EPA's suggestions that they might be. Although some of the aerosol cans may be hazardous for other reasons, the aerosols discarded by retailers are precisely the same items that are being discarded by retail customers (*i.e.*, households and small businesses) in far greater quantities in their ordinary trash. Indeed, we conservatively estimate that customers discard approximately 25 times as many aerosol cans as retail establishments do, and the difference is likely far greater. *See* NODA Comments at 16-17 (estimating that retailers discard 22,000 tons of aerosol cans each year, compared to 500,000 tons discarded by consumers each year). It makes little sense to impose costs of over $40 million dollars per year on retailers to ensure that a tiny percentage of all aerosols are kept out of municipal landfills, when over 95% of the same aerosols will continue to go to the same landfills.

- ***Criterion #4*: The regulatory framework for aerosol cans eliminates jobs and inhibits job creation.**

As in the case of the nicotine listing, the very high costs imposed by EPA's regulatory framework for aerosol cans – especially at a time when the industry is facing other major challenges – put pressure on retailers to reduce

other costs, including the costs of labor. They also divert resources that might otherwise be devoted to developing innovative business practices or expanding business, thereby limiting opportunities for hiring new workers. Inasmuch as the aerosol framework eliminates jobs and/or inhibits job creation, it should be repealed, replaced, or modified.

- ***Criterion #5*: The regulatory framework for aerosol cans interferes with regulatory reform initiatives.**

One of the key goals of regulatory reform is to improve implementation of and compliance with existing regulations. However, the complexity and confusion of the current regulatory framework for aerosol cans work at cross-purposes with this goal. EPA itself has acknowledged that needless complexity and confusion in regulations leads to less compliance. *See, e.g.*, 64 Fed. Reg. 36,466, 36,473 (July 6, 1999) ("If regulatory requirements are simpler … the compliance rate will improve"). They also make it more difficult for federal and state inspection and enforcement personnel to do their jobs. In order to address these problems, EPA should repeal, replace, or modify the existing regulatory framework for aerosol cans.

3. ***Proposed Reform of the Regulatory Framework for Aerosol Cans***

Any one of the factors discussed above would warrant repeal, replacement, or modification of the current regulatory framework for aerosol cans. Taken together, these factors make a compelling case for regulatory reform. RILA has previously proposed three main regulatory reform steps for aerosol cans, *see* NODA Comments at 20-31, and we reiterate those proposals here:

(1) EPA should issue guidance clarifying that aerosol cans do not exhibit the RCRA hazardous waste characteristic of reactivity. The basis for such guidance is discussed above in the context of Criterion #1. *See also* NODA Comments at 20-23.

(2) EPA should issue guidance that aerosol cans being sent for recycling are off-spec commercial chemical products being reclaimed and are not hazardous wastes. Alternatively, EPA should at least issue guidance that aerosol cans containing non-hazardous chemical products and propellants that are ignitable, but common fuels, are not hazardous wastes if they are recycled to recover the propellant for use as a fuel. *See* NODA Comments at 23-25. We believe such guidance would be consistent with EPA's long-standing guidance on aerosols, but the Agency has never explicitly addressed this issue. Such a clarification would be extremely helpful to many retailers and would greatly facilitate environmentally sound recycling of the products. *Id*.

(3) EPA should classify aerosol cans as universal wastes, if possible first by policy, and ultimately through rulemaking. RILA has previously demonstrated to EPA that aerosol cans meet the criteria set forth in the RCRA regulations for addition to the list of universal wastes. *See* NODA Comments at 26-31; 40 C.F.R. § 273.81 (criteria). For example, aerosol wastes are generated ubiquitously by virtually all households, businesses, and government entities; they pose relatively low risks compared to other hazardous wastes (to the extent they are hazardous at all); regulation of aerosol wastes as universal wastes would facilitate diversion of the wastes from the municipal waste stream into environmentally sound recycling systems; and regulation as universal wastes would improve implementation of and compliance with the hazardous waste regulatory program by effectively relieving generators (and government inspectors and enforcement personnel) of the need to assess the regulatory status of each can as waste or non-waste,

and hazardous or non-hazardous.

Two states that are often viewed as leaders on environmental issues – California and Colorado – have long classified and regulated aerosol cans as universal wastes, and their programs for doing so appear to have been highly successful. *See* Cal. Health & Safety Code § 25201.16; 6 Colo. Code Regs. 1007-3, Section 273.2(d). Other states (*e.g.*, Minnesota, New Mexico, and Utah) have recently followed their lead. *See* Minnesota Pollution Control Agency, "Waste Aerosols and Compressed Gas Cylinders" (November 2016) ("You may now manage hazardous waste aerosols … that are not empty equivalent to universal wastes in Minnesota"); N.M. Admin. Code 20.4.1.1001(A)(3) and (D); Utah Admin. Code Rule 315-273-6(b). Moreover, some additional states (*e.g.*, Pennsylvania and New Jersey) regulate certain aerosols under their universal waste rules for paints or related wastes. *See* Pa. Admin. Code § 266b.4 (applying the state universal waste rule to "oil-based finishes") and § 266b.3(ii) (defining oil-based finished to include "aerosol paint cans"); N.J. Admin. Code 7:26A-1.3 (defining universal waste to include oil-based finishes, and defining such finishes to include "aerosol paint cans"). Indeed, some aerosols may be covered by EPA's own universal waste rule for pesticides. *See* 40 C.F.R. § 273.3. We urge EPA to bring this unnecessary piecemeal regulation to an end by finally classifying and regulating all hazardous waste aerosols as universal hazardous wastes.

EPA has indicated in its 2016 Retail Strategy that it plans to issue new guidance on the status of aerosol cans under RCRA, and to propose the classification and regulation of waste aerosol cans as universal wastes. Although RILA does not know the details of what EPA has in mind, we are generally encouraged by this aspect of the Agency's Retail Strategy. We encourage EPA to move forward on both fronts as quickly as possible.

C. Application of the New Hazardous Waste Generator Rule to the Retail Sector

1. ***Brief Background on the New Hazardous Waste Generator Rule As It Applies to the Retail Sector***

In the closing days of the Obama Administration, EPA issued a new rule that substantially overhauled the RCRA requirements for generators of hazardous wastes (which, for the reasons discussed above, could now include many ordinary retail stores who simply have the misfortune to have unsold products in aerosol cans or a surplus of nicotine cessation products). *See* 81 Fed. Reg. 85,732 (November 28, 2016). The new rule significantly ratcheted up virtually all of the long-standing requirements for generators, such as those relating to making and documenting hazardous waste determinations, classifying generators of acutely hazardous wastes, notifying EPA of generator hazardous waste activities, marking containers, operating satellite accumulation areas, closing central accumulation areas, making arrangements with local emergency responders, and the contents of contingency plans. It also purported to reduce requirements in three areas, namely with respect "episodic" generators of hazardous waste, consolidation of wastes from VSQGs, and the 50-foot buffer zone requirement for storage of ignitable or reactive wastes at LQG facilities.

RILA, together with a number of other retail trade associations, submitted extensive comments on the proposed hazardous waste generator rule. *See* Generator Rule Comments. The comments stressed that the proposed rule had largely ignored the retail sector, even though the sector accounts for by far the largest number of affected facilities. They also explained in detail how virtually every element of the proposal was inappropriate for the retail sector, even if it might be appropriate for more "traditional" hazardous waste generators (*e.g.*, in the chemical, petroleum, or steel industries).

Unfortunately, RILA's comments largely fell on deaf ears. EPA did acknowledge that "the retail … sector[ ]

operate[s] differently from traditional industrial hazardous waste generators." *See, e.g.*, 81 Fed. Reg. at 85,751. However, the Agency did not incorporate any special provisions for retailers. Instead, EPA went ahead and imposed all the new requirements on retailers in the same way as it did for industrial generators, even though it held out the hope that it would continue to consider whether modified rules for retailers might be developed at some indefinite future date. *See id*. ("a few years ago, the EPA began a review of how RCRA hazardous waste regulations apply to the retail sector in order to better understand retailers' challenges in complying with RCRA regulation. These efforts are on-going."); *id*. at 85,778 ("EPA continues to explore the various approaches to the retail sector as they … tend to operate very differently than typical hazardous waste generators and face unique issues with the RCRA regulations.").

2. ***The New Hazardous Waste Generator Rule, As It Applies to the Retail Sector, Meets Almost All of the Criteria under Executive Order 13777 for Rules Warranting Repeal, Replacement, or Modification***

EPA's approach of "shoot first, and (maybe) ask questions later" cannot be justified. As discussed below, it is based on data that clearly understate the challenges that RCRA in general, and the new generator rule in particular, pose for the retail sector. It imposes substantial costs on the retail sector that vastly outweigh any possible environmental benefit, forcing retailers to eliminate jobs and/or to limit new job creation. It also it diverts limited government resources away from much higher priority issues, in conflict with regulatory reform goals.

- ***Criterion #1*: EPA's application of the hazardous waste generator rule to the retail sector is inappropriate.**

  As discussed above, EPA effectively acknowledged that at least some provisions of the new hazardous waste generator rule were inappropriate for retailers, but proceeded to apply them to the retail sector anyway. The Agency's error was magnified by the fact that the retail sector constitutes a large percentage of the universe of hazardous waste generators simply because of the issues identified above; indeed, today more retail stores than any other type of facility are covered by the rule. Although EPA has indicated that it will consider changing the rules for the retail sector at some point in the future, in the meantime, retailers will have to comply with all aspects of the rule, regardless of whether they make sense for retailers or not. Such rigid application of the new rule clearly warrants modification.

- ***Criterion #2*: EPA's application of the hazardous waste generator rule to the retail sector was based on data that do not meet basic standards of reliability and transparency, as required under the Information Quality Act.**

  RILA went to great lengths in its comments on the proposed rule to correct EPA's misperceptions about the generation of hazardous wastes by the retail sector, because a better understanding of such generation would make clear that the Agency's proposal was not appropriate for retailers. *See, e.g.*, Generator Rule Comments at 9-11 and 16-20. However, the Agency finalized the rule and applied it to the retail sector, without taking this information into account.

  One prime example relates to the number of so-called "hazardous wastes" that the Agency deems to be "generated" per retail facility. RILA noted that retailers commonly stock tens of thousands of individual products (known as Stock Keeping Units or "SKUs"), essentially any of which may become a "waste" because it is unsold or returned. *See* Generator Rule Comments at 18-19. And each one of these products could be considered a separate "waste stream" in EPA's view.

  EPA's economic analysis for the final rule failed to account for this obvious reality. The Agency said that LQGs

(stores) in the retail sector generate only between 1 and 10 waste streams per facility, depending upon the type of store (*e.g.*, health and personal care stores, general merchandise stores, or building materials and garden equipment stores). *See* Generator Rule RIA, Exhibit 2-6. Even if EPA meant these numbers to apply only to *hazardous wastes*, they are absurd on their face. For example, the Agency elsewhere has noted that large numbers of pharmaceuticals, which are sold in and regularly disposed of by drug stores, are classified as RCRA hazardous wastes. *See, e.g.*, 80 Fed. Reg. at 58,017 (stating, among other things, that "[a] number of pharmaceuticals are prepared in alcohol, which may cause the waste to be hazardous due to ignitability (D001), even if the active pharmaceutical ingredient itself is not considered hazardous waste"). Moreover, to the extent that aerosols are considered hazardous wastes by the Agency, as discussed above, there are countless aerosol products that are sold in grocery, drug, and other stores, and regularly discarded by such stores. *See generally* NODA Comments at 15 (listing dozens of broad categories of aerosol products).

Clearly, many, if not most, retail stores could have many more than 1 to 10 so-called "hazardous waste streams" in the course of a year. EPA even recognized as much when it stated in its response to comments on the final hazardous waste generator rule that "we are aware of sectors such as [the] retail sector where a large number of [hazardous] waste streams are generated. But these large numbers are counterbalanced by other sectors where only 1 to 5 [hazardous] waste streams are generated per generator." *See* EPA, "Hazardous Waste Generator Improvements Final Rule Response to Comments Document" (October 4, 2016) at 191. However, the actual numbers that EPA relied upon for the retail sector were in the 1 to 5 range (or slightly higher). *See* Generator Rule RIA, Exhibit 2-6. And EPA was simply wrong in suggesting that "counterbalancing" the lighter burden on some industries could justify an across-the-board rule imposing significant burdens on another sector, like retail, that is manifestly so different from the "average" – especially when the retail sector represents the largest type of facilities affected by the rule.

In sum, EPA based its decision to apply the new hazardous waste generator rule to the retail sector on data about the retail sector that clearly bore no relation to reality. Accordingly, that decision should be repealed, replaced, or modified.

- ***Criterion #3*: EPA's application of the hazardous waste generator rule to the retail sector has costs that greatly outweigh any possible benefits.**

The new hazardous waste generator rule imposes very high costs on the retail sector. To get a sense of the costs, we focus here on the costs of just one of the new requirements under the rule, namely the new requirements for marking and labeling of hazardous waste containers.

EPA estimated that the annualized costs of these requirements across all hazardous waste generators would be between $2.64 million and $5.34 million. *See* Generator Rule RIA, Exhibit ES-5. However, this estimate was based on the assumption that each generator produces only a very small number of different types of wastes that do not vary significantly over time (and, apparently, that each container holds just one waste). *Id*. at 3-9 to 3-11. These assumptions may be appropriate for industrial hazardous waste generators, but not for retail stores.

As noted above, retailers carry tens of thousands of different products and each one of these product types would be considered a different discrete waste type, thus potentially resulting in a large number of different "waste streams" despite the fact that none would have a very large quantity at all. Moreover, these products could change significantly from year to year, and often within a year. *See* Generator Rule Comments at 19 (estimating that 10-25% of all SKUs handled by a store change each year on average). And, a single drum

container that is used to aggregate these products in the back of the store might have as many as 300 distinct items, or even more. *Id*. at 54. Under these circumstances, it will be difficult for retailers to be certain of how the various state agencies are going to interpret the new marking/labeling requirements. *Id*. at 54-55.

To the extent that compliance is achievable, it will clearly cost far more – likely orders of magnitude more – than EPA's estimate of less than $100 per year per generator (or store, in this case). *See* Generator Rule RIA, Exhibit 3-5. With tens of thousands of affected stores, the total costs to the retail sector will almost certainly be in the tens of millions of dollars each year. Of course, the costs of other requirements imposed by the new hazardous waste generator rule would be on top of this amount.

These costs far outweigh any potential environmental benefit. As noted above, the wastes discarded by retailers are precisely the same wastes that their customers – households and small businesses – discard every day in the ordinary trash, and in far greater quantities (in the aggregate) than retailers do (even in the aggregate). It makes little sense to impose tens of millions of dollars in costs on retailers to help reduce the amount of consumer products going to municipal landfills by an almost negligible amount.

- ***Criterion #4*: EPA's application of the hazardous waste generator rule to the retail sector eliminates jobs and inhibits job creation.**

The very high costs imposed by EPA's application of the new hazardous waste generator rule on the retail sector – especially at a time when the sector is facing other major challenges – puts pressure on retailers to reduce other costs, including the costs of labor. It also diverts resources that might otherwise be devoted to developing innovative business practices or expanding business, thereby limiting opportunities for hiring new workers. Inasmuch as the application of the generator rule to retailers eliminates jobs and/or inhibits job creation, it should be repealed, replaced, or modified.

- ***Criterion #5*: EPA's application of the hazardous waste generator rule to the retail sector interferes with regulatory reform initiatives.**

One of the main goals of all regulatory reform initiatives is to improve government efficiency by focusing limited resources on core problems. However, EPA's application of the new hazardous waste generator rule to the retail sector forces EPA and states to divert compliance assurance, inspection, and enforcement resources away from the heavy industries that generate the vast majority of hazardous wastes, to the retail sector, which generates negligible quantities of such wastes. For this reason, the rule, as it applies to the retail sector, should be repealed, replaced, or modified.

3. ***Proposed Reform for the New Hazardous Waste Generator Rule As It Applies to the Retail Sector***

Any one of the factors discussed above would warrant repeal, replacement, or modification of the hazardous waste generator rule, as it applies to the retail sector. Taken together, these factors make a compelling case for regulatory reform. In light of the fact that the rule is scheduled to take effect in "non-authorized" states (*i.e.*, Alaska, Iowa, and Puerto Rico) on May 30, and will start to be adopted and implemented by "authorized" states (*i.e.*, all the others) shortly after that, time is of the essence. We recognize that these issues cannot be fully addressed overnight. Accordingly, we believe the effective date of the final rule as it applies to the retail sector (other than those portions of the new rule that are less stringent than the pre-existing regulations) should be delayed pending further analysis, or EPA should administratively stay or suspend the applicability of the rule to the retail sector pending such analysis.

IV. CONCLUSION

For the reasons discussed above, RILA proposes three separate rules for repeal, replacement, or modification:

(1) The listing of nicotine products as acutely hazardous wastes should be modified so as to exempt specific categories of low-concentration nicotine products that are currently on the market (*e.g.*, nicotine gum, lozenges, patches, prescription liquids, and e-cigarettes), as well as any future products containing less than a specified concentration of nicotine (*e.g.*, 3%), or so as to reclassify all such products as non-acutely hazardous wastes.

(2) EPA's current regulatory framework for aerosol cans should be modified by (a) issuing guidance clarifying that aerosol cans do not exhibit the RCRA hazardous waste characteristic of reactivity; (b) issuing guidance that aerosol cans being sent for recycling are off-spec commercial chemical products being reclaimed and are not hazardous wastes or alternatively at least issuing guidance that aerosol cans containing non-hazardous chemical products and propellants that are ignitable, but common fuels, are not hazardous wastes if they are recycled to recover the propellant for use as a fuel; and (c) classifying aerosol cans as universal wastes, if possible first informally by policy, and ultimately through rulemaking.

(3) The more stringent portions of the recently issued hazardous waste generator rule, as they apply to the retail sector, should be delayed from taking effect, or administratively stayed or suspended, until EPA can analyze fully what changes may be necessary to make the rule – and the RCRA regulations more generally – more appropriate for retailers.

RILA very much appreciates this opportunity to provide input to EPA's regulatory reform efforts pursuant to Executive Order 13777. We are committed to continuing to work with the Agency to develop common sense regulations that protect the environment and the public – our customers – while not overburdening retail businesses with unnecessary or inappropriate red tape and compliance costs.

EXHIBIT 1

PROPOSED CHANGES TO THE RCRA REGULATIONS FOR LOW-CONCENTRATION NICOTINE PRODUCTS

Exempt Low-Concentration Nicotine Products from the Current Nicotine Listing

o Amend the following entry in 40 C.F.R. § 261.33(e), Table, as indicated:

Hazardous Waste No.	Chemical Abstracts No. (for parent compound only)	Substance
P075	54-11-5	Nicotine, & salts, **unless excluded as specified in § 261.36**

o Add the following new provision in 40 C.F.R. Part 261, Subpart D:

§ 261.36 Exclusion for Low-Concentration Nicotine Products

(a) Wastes containing nicotine or nicotine salts do not meet the listing description of EPA Hazardous Waste No. P075 if they meet the requirements of either paragraph (b) or (c) of this section. These wastes may, however, meet another hazardous waste listing description or may exhibit one or more of the hazardous waste characteristics.

(b) Wastes containing nicotine or nicotine salts do not meet the listing description of EPA Hazardous Waste No. P075 if they consist of any of the following commercial chemical products (including off-specification variants of such products, container or liner residues from storage of such products, or residues from spills of such products):

(1) Nicotine gum;
(2) Nicotine lozenges;
(3) Nicotine patches;
(4) Nicotine liquids for use in prescription inhalers or nasal sprays;
(5) Nicotine liquids for use in electronic cigarettes ("e-liquids");
(6) Cartridges containing e-liquids for use in electronic cigarettes; or
(7) Electronic cigarettes containing e-liquids or cartridges containing e-liquids.

(c) Wastes containing nicotine or nicotine salts do not meet the listing description of EPA Hazardous Waste No. P075 if they contain less than or equal to 3% nicotine or nicotine salts at the point of waste generation.