By email to beck.nancy@epa.gov

July 6, 2017

Dr. Nancy B. Beck (7401M)
Deputy Assistant Administrator
Office of Chemical Safety and Pollution Prevention
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-0001

Re: Formaldehyde in Composite Wood Products – Non-Complying Lots Provision

Dear Dr. Beck:

On behalf of the Kitchen Cabinet Manufacturers Association (KCMA), I am writing to request that EPA issue a formal guidance document on the non-complying lot provision of the Formaldehyde Emission Standards for Composite Wood Products, 81 Fed. Reg. 89674 (Dec. 12, 2017) (the "Rule").

The key provision, 40 C.F.R. § 770.22(f), requires that downstream entities, i.e., fabricators, importers, distributors, and retailers, notify their customers when they have distributed composite wood products belonging to non-complying lots. Section 770.22(f) merely makes general references to "composite wood products," and it is unclear whether the provision is applicable even when the downstream entities distribute component parts and finished goods, rather than panels. In a recent FAQ, EPA indicated that it is not applicable in that circumstance. KCMA appreciates this, but other provisions in the Rule provide a reasonable reading to the contrary. Given the potential conflict between the regulatory language and the FAQ, KCMA requests EPA to take more formal action to cement its position in the FAQ that paragraph (f) does not apply to component parts and finished goods.

Non-complying lots are composite wood products for which test results show that the products exceeded the applicable formaldehyde emission standards under the Rule.[1] Such composite wood products should not be certified and may not be sold, supplied, or offered for sale in the United States in a way inconsistent with section 770.22.[2] The 2013 proposed rule did not address the situation where a non-complying lot had been shipped to customers, because under the proposal composite wood products could not be shipped until after receipt of test

[1] See 40 C.F.R. § 770.3 (definition of "non-complying lot").
[2] 40 C.F.R. § 770.22(a).

results showing them to be in compliance with the applicable emission standards.[3] In the final rule, however, EPA established a notification system in section 770.22 requiring that panel producers and downstream entities notify their customers if composite wood products have already entered into commerce but are subsequently identified as belonging to non-complying lots.

Section 770.22 notifications have two components: Paragraph (d)(1) governs panel producer notifications; paragraph (f) governs downstream entity notifications. KCMA's concern is with paragraph (f), which states:

> Fabricators, importers, distributors, or retailers who are notified that they have received composite wood products belonging to a non-complying lot and who have further distributed the composite wood products are responsible for notifying the purchasers of the composite wood products in accordance with paragraph (d)(1) of this section.

This language only refers to "composite wood products" without any qualification. However, generally, the Rule regulates three forms of products: panels, component parts, and finished goods. The Rule defines "component wood products" without specific reference to any of the three products:

> *Composite wood product* means hardwood plywood made with a veneer or composite core, medium-density fiberboard, and particleboard.[4]

Important for our discussion here, section 770.22(f) does not mention panels. Thus, a permissible inference is that the term "component wood product," which section 770.22(f) uses, is not equivalent or limited to panels. Instead, component parts and finished goods might also be in scope. This inference is supported by the fact that the Rule has a separate definition for "panel":

> *Panel* means a thin (usually less than two inches thick), flat, usually rectangular piece of particleboard, medium-density fiberboard or hardwood plywood. Embossing or imparting of an irregular surface on the composite wood products by the original panel producer during pressing does not remove the product from this definition. Cutting a panel into smaller pieces, without additional fabrication, does not make the panel into a component part or finished good. This does not include items made for the purpose of research and development, provided such items are not sold, supplied, or offered for sale.[5]

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[3] The 2013 proposed rule would require that panel producers retain the lots of panels before the testing results are available. Thus, no notification would be required. EPA changed the compliance burden in the final rule by permitting panel producers to ship their panels downstream before test results became available, thus necessitating the notifications. See 78 Fed Reg. 34820, 34834-35 (June 10, 2013); 81 Fed. Reg. 89674, 89704 (Dec. 12, 2016).
[4] 40 C.F.R. § 770.3.
[5] Id.

The possible broad construction of "composite wood products" leads to the concern for fabricators: It would be extremely disruptive of the downstream supply chain if component parts and finished goods that are fabricated from non-complying lots of panels also were to trigger notification obligations. When fabricators receive notification from their panel suppliers that a shipment of panels failed an emissions test, those panels almost certainly no long exist as such. Instead, they will almost always have already been converted into component parts or finished goods. Unfortunately, affected component parts or finished goods are not easily trackable. Nor will it be meaningful for paragraph (f) to cover component parts or finished goods. In contrast to panels, testing of component parts or finished goods is not feasible. Also, formaldehyde emissions may have well diminished to acceptable levels by the time a composite wood product reaches the fabrication stage. Therefore, paragraph (f) should not apply to the distribution of component parts or finished goods by fabricators and others in the supply chain.

EPA agrees with this conclusion and issued an FAQ document on June 7, 2016 to clarify its position.[6] FAQ 18, addressing the meaning of "composite wood products" in the downstream entity notification context, states:

> 18. As a fabricator, distributor, importer, or retailer, what are my responsibilities if I have been supplied panels that are determined to have come from a non-complying lot, but I have already fabricated or incorporated them into a component part or finished good?
>
> The non-complying lots provision in 40 CFR § 770.22 only refers to composite wood products in the form of panels, meaning that only affected panels are subject to the requirements of that section. The non-complying lot provisions do not apply beyond when non-complying panels have been incorporated into component parts or finished goods; thus, in that scenario, there is no requirement for you to notify downstream entities in the supply.

EPA also stated:

> NOTE: The following three questions [i.e. Questions 16 through 18] apply only to composite wood panels. Panels that have been incorporated into component parts or finished goods are not subject to the requirements discussed in these questions.

KCMA appreciates these statements in the FAQs. However, we request more formal documentation of the position. While EPA's position in the FAQs is reasonable and should be followed, the language in the Rule itself permits alternative construction.

The term "composite wood panels" has confusing references in the Rule and, in multiple provisions, suggests a position contrary to that in the FAQs. For example, in some provisions, EPA clearly intended for the term "composite wood products" to encompass panels, component parts, and finished goods alike:

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[6] The FAQs are available at https://www.epa.gov/formaldehyde/regulated-stakeholder-questions-and-answers-epas-rule-implement-formaldehyde-standards.

> *Stockpiling* means manufacturing or purchasing **composite wood products, whether in the form of panels or incorporated into component parts or finished goods**, between July 7, 2010 and June 12, 2017 at an average rate at least 20% greater than the average rate of manufacture or purchase during the 2009 calendar year for the purpose of circumventing the emission standards and other requirements of this subpart.[7]
>
> The sale of stockpiled inventory of **composite wood products, whether in the form of panels or incorporated into component parts or finished goods**, is prohibited after December 12, 2017.[8]
>
> After December 12, 2017, only certified **composite wood products, whether in the form of panels or incorporated into component parts or finished goods**, are permitted to be sold, supplied, offered for sale, or manufactured (including imported) in the United States, unless the product is specifically exempted by this part.[9]
>
> Importers, fabricators, distributors, and retailers must take reasonable precautions to ensure that **the composite wood products** they sell, supply, offer for sale, or hold for sale, **whether in the form of panels, component parts, or finished goods**, comply with the emission standards and other requirements of this subpart.[10]

A similar statement also appeared in the preamble to the final rule:

> As proposed, in order to document compliance, the importer or fabricator would have to obtain from the supplier records identifying the panel producer(s) that produced the composite wood products and the dates that the composite wood products were manufactured and purchased from the panel producer(s), as well as bills of lading or invoices that include a written affirmation from the supplier that **the composite wood products, whether in the form of panels or incorporated into component parts or finished goods**, are compliant with this subpart.[11]

EPA apparently recognized that some requirements may attach differently to different types of products. It acknowledged the need for clarification of the regulatory scope in certain contexts. The preamble stated:

> EPA has also clarified throughout the regulatory text whether particular provisions apply to panels, component parts, or finished goods, or all three.[12]

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[7] Id. (emphasis added).
[8] 40 C.F.R. § 770.12(a) (emphasis added).
[9] 40 C.F.R. § 770.15(a) (emphasis added).
[10] 40 C.F.R. § 770.30(a) (emphasis added).
[11] 81 Fed. Reg. 89674, 89708 (emphasis added). A similar statement appears at p. 89709.
[12] 81 Fed. Reg. at 89678-79.

One such case is in the stockpiling provision. There, EPA proposed a good solution to assign obligations specific to certain products—it qualified "composite wood products" by product type:

> To determine whether stockpiling has occurred, the rate of manufacture or purchase is measured as follows:
> (1) For **composite wood products in the form of panels**, the rate is measured in terms of square footage of panels produced.
> (2) For **composite wood products incorporated into component parts or finished goods**, the rate is measured in terms of the square footage of composite wood product panels purchased for the purpose of incorporating them into component parts or finished goods.[13]

Section 770.22(f) has no corresponding limitation. In the FAQs, EPA expressed its intent that only panels are included. Ideally, the term "composite wood products" in section 770.22(f) would be expressly limited to panels. Unfortunately, it is not; EPA did not use the limiting phrase "in the form of panels" or its equivalent anywhere in section 770.22. Consequently, it could be argued in the future that, because EPA did not take a similar approach in section 770.22(f) as it did for the stockpiling provision, EPA intended to impose downstream notification requirements on distribution of component parts and finished goods that contain panels from non-complying lots. The FAQs may be helpful to rebut such an argument, but a more formal guidance document would be even more effective.

Thus, KCMA requests that EPA prepare a formal guidance document to cement its position in the FAQs—that section 770.22(f) does not apply to distribution of component parts or finished goods. That is a sound policy position. EPA has already made a helpful effort to establish it. The position is vulnerable only because the regulatory language is unclear. A more controlling and authoritative measure to permanently lock in that position will protect EPA from potential challenges, provide regulatory certainty to KCMA and its members, and serve well the implementation of the non-complying lot provision and the Rule in general.

[13] 40 C.F.R. § 770.12(b) (emphasis added).

Thank you for your consideration of this request. Please feel free to contact me with questions or comments. I may be reached at (703) 264-1690, bnatz@kcma.org.

Sincerely,

Betsy Natz, CEO
Kitchen Cabinet Manufacturers Association

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