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Food and Drug Administration
5630 Fishers Lane
Room 1061
Rockville, Maryland 20852

**Re: Proposed Rule – Food Additives: Food Contact Substance Notification System
Docket No. 99N-5556**

The American Plastics Council (APC) submits these comments in response to the Agency's proposed rule published in the Federal Register of July 13, 2000, "Food Additives: Food Contact Substance Notification System," 65 Fed. Reg. 43269 (Proposed Rule), and FDA's "Guidance for Industry: Preparation for Premarket Notifications for Food Contact Substances: Administrative," June 2000 (Administrative Guidance). APC is a major trade association for the U.S. plastics industry. APC is comprised of 25 of the leading plastics manufacturers in the United States, with many members having a strong, global market presence. APC's membership represents 80 percent of the U.S. resin production capacity.

APC once again commends the Agency for its progress in implementing the Food Contact Substance Notification (FCN) System. As APC has stated in its previous comments, the FCN system represents a significant step toward streamlining the FDA's premarket review system, and APC strongly supports the system. The FCN system is intended to protect public safety while not imposing an undue or unwarranted regulatory burden on industry, by bringing the expenditure of resources "into line with" the generally low health risk posed by food contact substances (FCS's). Committee on Labor and Human Resources Report on the Food and Drug Administration Modernization and Accountability Act of 1997 ("FDAMA"), S. Rep. No. 105-43, 105th Cong., 1st Sess. 48 (1997). Toward this end, APC makes the following comments on the Proposed Rule and Administrative Guidance.

Good Laboratory Practice Statement

In section 170.101(c) of the Proposed Rule, FDA proposes that a Premarket Notification (PMN) must contain "[a] good laboratory practice statement for each nonclinical laboratory study that is submitted as part of the [PMN]." 65 Fed. Reg. 43269 at 43282.

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Because there are several different types of studies that may be submitted in support of the safety of an FCS, APC would like the Agency to clarify that the term "nonclinical laboratory studies" has the meaning given to that term in the Good Laboratory Practice regulations¹, and, therefore, that the term does not include migration studies, or tests conducted on the FCS to determine physical properties of the FCS. FDA has not traditionally required good laboratory practice statements for these studies when used to support a food additive that is the subject of a food additive petition, and there is no reason to treat the data used to support an FCN any differently. In fact, in the preamble to the proposed rule, FDA explains this requirement as being "comparable to §171.1(k) (21 CFR 171.1(k)) for FAP's." 65 Fed. Reg. 43269 at 43273.

Requirement of an FCN for an FCS

In the preamble to the Proposed Rule, 65 Fed. Reg. 43269 at 43274, FDA asserts "[u]nder section 409(a) of the [Federal Food, Drug, and Cosmetic] act, in the absence of an effective notification, an FCS cannot be lawfully marketed." This is counter to APC's understanding of the legal status of FCS's, the legislative history of section 309 of FDAMA (creating the FCN system), and the Agency's own statements. Elsewhere in the preamble to the proposed rule, FDA states "[n]otifications are required only for FCS's that are food additives; FCS's that are prior sanctioned or GRAS for their intended use do not require premarket notification to FDA." 65 Fed. Reg. 43269 at 43271. As the Agency states in its Administrative Guidance "FCS's that may be the subject of a PMN but that are not food additives include substances that are GRAS or prior sanctioned for their intended use, substances that, under their intended conditions of use may contact food but are not reasonably expected to migrate to food, and substances that FDA has historically considered constituents of food additives." Administrative Guidance, Section II.B.2, p. 5. The Senate Report discussing FDAMA states "a PMN will be required only for a food contact substance that is a 'food additive' within the meaning of section 201(s)." S. Rep. No. 105-43, 105th Cong. 1st Sess. 46 (1997). Accordingly, APC would like FDA to clarify that its statement on page 43274 of the preamble to the Proposed Rule was intended to refer only to FCS's that are also food additives.

Acknowledgement and Confirmation Letters

APC supports proposed section 170.104(b)(2), wherein the Agency agrees to issue a letter acknowledging receipt of the FCN, establishing the filing date (and, therefore, establishing the 120-day review period and effective date if the Agency does not object), and describing the FCS and the intended conditions of use. 65 Fed. Reg. 43269 at 43283;

¹ *Nonclinical laboratory studies* means *in vivo* or *in vitro* experiments in which test articles are studied prospectively in test systems under laboratory conditions to determine their safety. The term does not include studies utilizing human subjects or clinical studies or field trials in animals. The term does not include basic exploratory studies carried out to determine whether a test article has any potential utility or to determine physical or chemical characteristics of a test article. 21 C.F.R. Part 58.3(d) (2000).

see also Id., at 43274. This letter will be valuable to both industry and the Agency to ensure that a mutual understanding exists regarding the subject of the FCN. Including this information in the acknowledgment letter allows sufficient time for both parties to discuss and reach agreement on these issues should there be any discrepancy. For these same reasons, however, though not a statutory requirement, APC believes that the issuance of a letter from the Agency at the conclusion of the 120-day period should be a mandatory, not voluntary requirement.

As the Agency acknowledges, during the review process, it is possible that limitations or other restrictions may need to be placed on the use of the FCS that were not anticipated at the time the acknowledgment letter is issued. Id. While the Agency agrees to inform the notifier as soon as possible of any changes, Id., a letter from the Agency setting forth the conditions allowed to become effective should be a requirement. A letter from the Agency evidencing the conclusion of the review would be useful in dealing with other agencies, such as USDA, and in dealing with customers to prevent confusion in the marketplace. If it becomes standard practice for customers to rely on an acknowledgement letter and the absence of an objection letter, it may be difficult for customers to ascertain the status of an FCS and the allowed conditions of use. While this information may be available on FDA's web site, there is likely to be some delay in posting the information, and thus some period where the only statement of allowed conditions of use for the FCS would be in the acknowledgement letter. Also, it has been true in the past that customers, as well as other Agencies, prefer to have a statement in writing from FDA regarding the status of an FCS.

Thus, to avoid any confusion regarding the status of an FCS, APC requests that a confirmation letter from the Agency setting forth the Agency's conclusion of the review, including a description of the FCS and its allowed conditions of use, should be required. It should not be a significant burden on the Agency to issue such a letter, as the letter should consist of nothing more than a summary of the Agency's previous communications with the notifier. For clarity and certainty in the marketplace, APC believes such a letter should be a requirement, and therefore APC proposes adding the following text to proposed section 170.104(a): "At the conclusion of the 120-day period, FDA shall issue a letter advising the notifier of the conclusion of the Agency's review, stating the effective date of the PMN, and describing the FCS and the allowed conditions of use."

Form 3480

Regarding FDA Form 3480, APC again commends the Agency for its efforts toward streamlining the review process. APC further commends the Agency for making the form available in several different electronic formats, accommodating the various word-processing and other document management software that various companies may have. Making the form available in a format that industry can utilize is vital to the form's usefulness. As APC commented previously, Form 3480 provides a useful guide for industry to the information that is expected in an FCN, and it may be used by industry as a model for the format of an FCN. Further, the form could be useful to the Agency as a

concise summary of the key information contained in the FCN, thereby speeding the review process.

Based on the admittedly very limited experience with the form to date, however, it appears that the form may not be fully serving its intended purposes. Currently, the form may be little more than an extra document that notifiers must complete, rather than a summary document containing useful and important information. The substantive information in the FCN is likely to be contained in the comprehensive summary, much as it would be with a food additive petition, and referenced in the form with perfunctory "see attached section __," statements that refer the reviewer back to the main document. In such cases, the form may be of little value to either the Agency or the notifier. As both industry and the Agency gain experience with the form, APC offers to work with the Agency to ensure that the form has a clearly identified value and is used so as to maximize its value.

Environmental Review

APC fully supports the Agency's final rule on extending the categorical exclusions from the requirement for an environmental assessment (EA) to FCN's. 65 Fed. Reg. 30352 (May 11, 2000). For the same reasons categorical exclusions are appropriate for many food additive petitions and threshold of regulation requests, the exclusions are appropriate for FCN's. Absent extraordinary circumstances, allowing an FCN to become effective is not anticipated to have a significant effect on the environment, and thus an exclusion from the requirement for an EA is warranted. Although most FCN's will no longer require an EA, APC continues its strong advocacy of the need for FDA to publish its guidelines on the preparation of an EA. On those occasions where an EA is required, such guidance is critical to allow industry to be certain it is addressing those factors the Agency considers relevant. Guidance should also be provided on situations where a categorical exclusion would normally, and would not normally, apply. In addition, APC supports the Agency in its process of establishing new categories of categorical exclusions from the requirement for an EA.

Who May File an FCN

APC does not agree with the Agency's statement in the Administrative Guidance that "[a]nyone may submit to FDA a notification for a new use of an FCS." Administrative Guidance, Section II.A., p.4. Section 409(h)(1) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) states "a manufacturer or supplier of a food contact substance may, . . . notify the Secretary of the identity and intended use of the food contact substance." In reviewing the various proposals that led up to the creation of that provision, it is significant that an earlier proposal contained the language "[a]ny person . . . may submit to the Secretary . . . a notification." Report of the Committee on Labor and Human Resources on the Food and Drug Administration Performance and Accountability Act of 1995, S. Rep. No. 104-284, 104th Cong., 2d Sess. 105 (1996). This was later changed to "a manufacturer or supplier of a food contact substance may . . ." S. Rep 105-43, 105th Cong., 1st Sess. 117. It may be inferred from this that Congress intended that rather than

"any person," only "manufacturers and suppliers of food contact substances" may submit notifications.

There are several practical issues that arise from allowing "[a]nyone [to] submit to FDA a notification for a new use of an FCS." One is that the linkage between the manufacturing process and the use of a material as an FCS may be weak or nonexistent. In the event that the manufacturer is aware of the notification, unwelcome burdens could be imposed on the manufacturer. In the event that the manufacturer is not aware of the notification, changes to the manufacturing process that are relevant to the use of the material as an FCS may unknowingly be made. Another issue is that a manufacturer may not have complete knowledge or control of the uses of its products as food contact substances. Once an FCN for a specific FCS is on file, anyone may refer to the data in that FCN. Thus, all a non-manufacturer party need do is demonstrate that the cumulative exposure to the FCS, including their proposed use, falls below the ADI for the FCS. Manufacturers could see the available exposure allowed by current safety data used up by others filing for uses of their choosing, not the manufacturer's. This was not the intent of the FCN system. The history of FDAMA makes clear that Congress intended for "a manufacturer or supplier of a food contact substance" to file an FCN, which would avoid these issues. APC believes that FDA should not attempt to go beyond this Congressional intent by expanding the list of potential notifiers to include "[a]nyone."

Transferability of an FCN

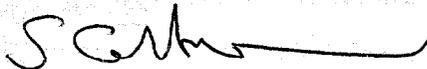
APC notes that one of the economic realities in industry today is that companies and divisions will sometimes undergo name changes in connection with mergers, acquisitions, restructuring, or the transfer of product responsibilities. This is particularly relevant in the context of an FCN in that the notification is only effective for the manufacturer named in the notification. FD&C Act, Section 409(h)(2)(C). Accordingly, APC requests that FDA provide an opportunity for a company to notify the Agency of any change in name or corporate structure subsequent to its filing an FCN. Upon receipt of such notification, FDA will update the name of the company on the list of effective notifications on its web site, and reissue the confirmation letter to advise of the new name of the notifier.

APC also requests that the Agency clarify its position on the issue of transferability of FCN's. Under the FD&C Act, an FCN is a private license for an FCS manufactured by a named manufacturer to be used in specifically enumerated food contact situations. Thus, it is a property right, not unlike a New Drug Application (NDA) or New Animal Drug Application (NADA). It is undisputed that the rights conferred by an NDA or an NADA may be licensed, sold, or otherwise transferred to others. Similarly, it is APC's position that transferring the rights granted under an FCN to another company should be allowed, provided FDA is advised of the transfer, and the regulations should reflect this. Licensing the manufacture would maintain the safety of the FCS as it would continue to be manufactured in the manner reviewed by the Agency, and would still be cleared only for the same uses.

Ongoing Matters

APC continues to support the Agency's efforts to publish a database of cumulative estimated daily intakes (CEDI's) and acceptable daily intakes (ADI) on FDA's web site. It is becoming increasingly evident that this information is vital to the proper preparation of an FCN, as well as for planning product development directions. If a material is currently being used at close to its maximum safe level, the potential for expanding the market for the product may be limited. This information would be very useful to industry members, and APC requests the Agency devote its full efforts to publishing this information in the near future. Also, APC commends the Agency for its consideration of an all-electronic submission format for FCN's, and extends its offer for its members to participate in any pilot testing program of an electronic submission system. APC considers electronic submission an important step in reducing the burden of the FCN system on both industry and the Agency, and would like to facilitate the development of such a system.

Sincerely,



Steven G. Hentges, PhD
American Plastics Council