#### THE INTERNATIONAL CADMIUM ASSOCIATION

**REGULATORY UPDATE**

**May 28, 2016**[[1]](#footnote-1)

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**FEDERAL ISSUES**

**CAA ISSUES**

**EPA Proposes Revisions To RMP Regulations**

EPA published a proposed rule on March 14, 2016, that would revise its RMP regulations to improve chemical process safety, assist local emergency authorities in planning for and responding to accidents, and improve public awareness of chemical hazards at regulated sources. The RMP regulations require covered facilities to develop and implement a risk management program. EPA shares RMP information with state and local officials to help them plan for and prevent chemical accidents and releases. The proposed amendments are intended to improve existing risk management plan requirements to enhance chemical safety at RMP facilities. A public hearing was held on March 29, 2016. During the hearing, industry representatives criticized the language concerning inherently safer technology. The proposed rule requires safer technology and alternative analysis to assess the feasibility of inherently safer technology for the paper, petroleum and coal products, and chemical manufacturing sectors in NAICS. EPA Assistant Administrator Mathy Stanislaus defended the language, however, stating before the meeting:

I think we’ve struck a very good balance in [the safer technology] requirement. We think it’s appropriate for facilities in the categories we’ve identified to conduct a hard look at those potential alternatives available to them and what are feasible. But . . . it’s inappropriate for the federal government to really mandate a particular decision by the chemical facility operators. We think we are in the best position evaluating what comes out of the safer alternatives analysis and other pertinent business considerations.

Certain industry stakeholders are pushing back on the proposed requirement for independent third-party audits, claiming the costs of this requirement are disproportionate to the benefit. EPA vigorously denies this. Comments were due May 13, 2016. Additional resources, including FAQs, are available on [EPA’s website](http://www.epa.gov/rmp/proposed-changes-risk-management-program-rmp-rule). According to an item in EPA’s Spring 2016 Regulatory Agenda, EPA intends to promulgate a final rule in **December 2016**.

**EPA Requests To Renew ICR For NESHAP Area Sources, Including Primary Nonferrous Metals-Zinc, Cadmium, And Beryllium**

As reported in our April 28, 2016, e-mail, on April 28, 2016, EPA submitted a renewal of an existing ICR, “NESHAP for Area Sources: Primary Copper Smelting, Secondary Copper Smelting, and Primary Nonferrous Metals-Zinc, **Cadmium**, and Beryllium.” EPA submitted the ICR to OMB for review and approval. This is a proposed extension of the ICR, which is currently approved through April 30, 2016. Comments are due **May 31, 2016**. Under the PRA, a federal agency generally cannot conduct a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB and displays a currently valid OMB Control Number. OMB authorization for an ICR cannot be for more than three years without renewal. As this type of notice concerns continuing a current collection of information, rather than enacting a new requirement, typically it is not worthy of comment.

**CERCLA ISSUES**

**Court Hears Oral Arguments In Appeal Concerning Arranger Liability Of Canadian Smelter**

On April 6, 2016, the U.S. Court of Appeals for the Ninth Circuit heard oral arguments in a case concerning whether a smelter in Canada is liable as a CERCLA arranger once the airborne contaminants touch down at a Superfund site in Washington. *Pakootas v. Teck Cominco Metals, Ltd*., No. 15-35228. In 2015, the U.S. District Court for the Eastern District of Washington found that Teck, the owner of a smelter in BC, is liable as an arranger for contaminants that traveled by air from the smelter’s smokestacks to the Upper Columbia River Superfund Site. Teck is appealing the decision, arguing that CERCLA is limited to disposals made directly onto land or into water. While the state of Washington, the Confederated Tribes of the Colville Reservation, and DOJ argue that CERCLA should not be read so narrowly, Canada filed an *amicus* brief in support of Teck, contending that Canada and the U.S. have established a treaty regime as the exclusive means of resolving disputes regarding air emissions from the smelter. During the oral arguments, the three-judge panel seemed disinclined to find the Canadian smelter liable as a CERCLA arranger. Judge Johnnie B. Rawlinson asked counsel whether the court was bound by the 2014 ruling in *BNSF*, in which the court limited the meaning of “disposal” of hazardous substances to solid waste discharged directly onto land or water. (*Ctr. for Cmty. Action & Envtl. Justice v. BNSF Ry. Co*., 764 F.3d 1019 (9th Cir. 2014).) Teck agreed that *BNSF* was binding, while the DOJ argued that *BNSF* does not apply because it involved a fact-specific application of RCRA not intended to apply to CERCLA. The court is expected to take several months to issue its decision.

**EPA Identifies Hard Rock Mining Facilities For Financial Responsibility Requirements**

According to an item in EPA’s Spring 2016 Regulatory Agenda, EPA intends to publish an NPRM by **December 2016** concerning financial responsibility requirements under CERCLA Section 108(b) for classes of facilities in the hard rock mining industry. EPA intends to include requirements for financial responsibility, as well as notification and implementation. On July 28, 2009, EPA published a priority notice of action identifying classes of facilities within the hard rock mining industry for which EPA will first develop financial responsibility requirements. EPA states that, for purposes of the notice, hard rock mining facilities “include those which extract, beneficiate or process metals (*e.g*., copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, and zinc) and non-metallic, non-fuel minerals (*e.g*., asbestos, gypsum, phosphate rock, and sulfur).” As reported in our March 28, 2016, Update, on January 29, 2016, the U.S. Court of Appeals for the District of Columbia Circuit approved a joint motion filed by the NGO petitioners and EPA for an order on consent. *In re Idaho Conservation League*, No. 14-1149. The agreement includes a schedule for a rulemaking for the hard rock mining industry and a timetable by which EPA would consider whether other industries would be involved with a financial assurance rulemaking. Under the agreement, EPA will begin the rulemaking process for the hard rock mining industry by **December 1, 2016**, and publish its notice of final action by **December 1, 2017**.

**CWA/SDWA ISSUES**

**EPA Updates Recommended Aquatic Life Ambient Water Quality Criteria For Cadmium**

As reported in our April 4, 2016, e-mail, on April 4, 2016, EPA published a *Federal Register* notice announcing the release of recommended aquatic life water quality criteria for **cadmium**. EPA updated the national recommended ambient water quality criteria for **cadmium** to reflect the latest scientific information and current EPA policies and methods. EPA’s water quality criteria for **cadmium** provide recommendations to states and tribes authorized to establish water quality standards under the CWA. In adopting water quality standards, states set exposure protections for aquatic life. According to EPA, acute exposure to **cadmium** results in lethality, while chronic exposure to **cadmium** negatively impacts growth, development, behavior, reproduction, and immune and endocrine systems in aquatic life. EPA states that **cadmium** enters the environment by natural and human processes, however, human sources, such as mining and urban processes, are responsible for contributing approximately 90 percent of the **cadmium** found in surface waters. More information is available in B&C®’s April 6, 2016, memorandum, “[EPA Issues Updated Recommended Water Quality Criteria for **Cadmium**](http://www.lawbc.com/regulatory-developments/entry/epa-issues-updated-recommended-water-quality-criteria-for-cadmium).”

**EPA Proposes Water Quality Criteria For Cadmium In Oregon**

As reported in our April 19, 2016, e-mail, on April 18, 2016, EPA published a proposed rule that would establish federal CWA aquatic life criteria for freshwaters under the state of Oregon’s jurisdiction “to protect aquatic life from the effects of exposure to harmful levels of copper and **cadmium**.” EPA determined in January 2013 that the freshwater **cadmium** criterion to limit acute adverse effects that Oregon adopted in 2004 did not meet CWA requirements to protect aquatic life in the state. Therefore, to protect freshwater aquatic life in Oregon from the adverse effects of **cadmium**, EPA is proposing criteria using the best available science on **cadmium** toxicity. In a [fact sheet](https://www.epa.gov/sites/production/files/2016-04/documents/oregon_cu_cd_proposal_fact_sheet_ost_3-29-16.pdf) on the rulemaking, EPA provides the following explanation of how it derived the proposed acute **cadmium** aquatic life criterion:

In 2016, EPA published revised CWA section 304(a) recommended criteria for **cadmium**, based on the latest science on **cadmium** toxicity. Ambient water hardness (determined by the presence of calcium and magnesium ions) affects the toxicity of **cadmium**, such that organisms show more sensitivity to **cadmium** in water with lower hardness. EPA’s freshwater 304(a) recommended **cadmium** criteria are equations to calculate protective **cadmium** criteria based on the relevant water body’s hardness. EPA is proposing to use the updated CWA section 304(a) recommended acute **cadmium** criterion equation to protect freshwater aquatic life in Oregon. EPA is also proposing a protective default hardness value to use in the equation when sufficient representative data to determine the water body’s hardness are not available.

EPA held public hearings on the proposed rule on May 16 and May 17, 2016. Comments are due **June 2, 2016**. EPA included an item its Spring 2016 Regulatory Agenda on the rulemaking, stating that it intends to promulgate a final rule in **January 2017**. If Oregon adopts and submits new or revised water quality criteria and EPA approves them before promulgating a final rule, EPA would not proceed with the final rulemaking for those waters and/or pollutants for which EPA approves Oregon’s new or revised criteria. If EPA promulgates a final rule, and Oregon subsequently adopts and submits new or revised criteria that EPA finds meet CWA requirements, EPA proposes that once it approves Oregon’s criteria, they would become effective for CWA purposes, and EPA’s corresponding promulgated criteria would no longer apply.

**TSCA ISSUES**

**EPA Publishes CDR Fact Sheet For Reporting Manufactured Chemical Substances From Metal Mining And Related Activities**

On May 13, 2016, EPA posted a “[TSCA Chemical Data Reporting Fact Sheet: Reporting Manufactured Chemical Substances from Metal Mining and Related Activities](https://www.epa.gov/chemical-data-reporting/tsca-chemical-data-reporting-fact-sheet-reporting-manufactured-chemical).” The fact sheet provides guidance on CDR rule requirements related to the reporting of mined metals, intermediates, and byproducts manufactured during metal mining and related activities. The fact sheet notes that reporting under the CDR rule is based on the manufacture (including import) of chemical substances. According to the fact sheet, mining “is a manufacturing activity, and as such is captured by the definition of manufacturing.” The fact sheet states: “It is important to note that the act of processing or using one chemical substance (including a naturally occurring chemical substance) may result in the manufacture of a reportable chemical substance. In such cases, persons who process or use chemical substances may be subject to reporting requirements under CDR: not with respect to the chemical substance that they processed or used, but with respect to the chemical substance that they manufactured.” EPA has also posted [2016 CDR FAQs](https://www.epa.gov/chemical-data-reporting/2016-chemical-data-reporting-frequent-questions) that are intended to clarify the reporting requirements for the **2016** reporting period.

**EPA Intends To Promulgate Final Nanoscale Materials Rule In October 2016**

According to an item in the Spring 2016 Regulatory Agenda, EPA is “developing a final rule related to” its April 6, 2015, proposal to require reporting and recordkeeping requirements under TSCA Section 8(a) for certain chemical substances when they are manufactured or processed at the nanoscale. EPA proposed to require persons that manufacture, import, or process, or intend to manufacture, import, or process these chemical substances to report to EPA certain information, including the specific chemical identity, production volume, methods of manufacture and processing, exposure and release information, and existing data concerning environmental and health effects. According to EPA, this information would facilitate its evaluation of the materials and a determination of whether further action is needed. While the item states that EPA intends to promulgate a final rule in **October 2016**, EPA has not indicated how it intends to address comments on the proposed rule. OIRA issued a memorandum concerning “[Regulatory Review at the End of the Administration](https://www.whitehouse.gov/sites/default/files/omb/assets/agencyinformation_circulars_memoranda_2015_pdf/regulatory_review_at_the_end_of_the_administration.pdf),” which states that “agencies should strive to complete their highest priority rulemakings by the **summer of 2016** to avoid an end-of-year scramble.” EPA has not yet submitted a final rule to OMB for review. As reported in our May 28, 2015, Update, the supporting materials in the rulemaking docket include a [list of chemical substances that could be nanomaterials](http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2010-0572-0025). The 85-page list includes **cadmium** and a number of **cadmium compounds**.

**House Passes Compromise TSCA Reform Bill**

On May 24, 2016, by a vote of 403 to 12, the House passed the Frank R. Lautenberg Chemical Safety for the 21st Century Act. The bill merges policy priorities from H.R. 2576, which the House passed on June 23, 2015, and S. 697, which the Senate passed on December 17, 2015. A May 23, 2016, House Energy and Commerce Committee [fact sheet](https://energycommerce.house.gov/news-center/fact-sheets/frank-r-lautenberg-chemical-safety-21st-century-act) states that the compromise bill will:

* Provide EPA the tools to ensure chemicals in commerce are safer for consumers;
* Create a new system for EPA to evaluate and manage risks associated with chemicals already on the market:
* Either EPA or a manufacturer (who is willing to pay the cost) may designate a chemical for risk evaluation;
* The risk evaluation must stand up to rigorous scientific standards set out in the legislation; and
* If unreasonable risk is determined, EPA must immediately draft a rule to manage the risk;
* Set deadlines for EPA to take action:
* Risk evaluations must be completed within three years; and
* Risk management rules must follow completion of risk evaluations by 90 days;
* Ensure user fees paid to EPA are used for chemical management activity:
* User fees will be deposited in a separate fund in the U.S. Treasury, and the fees charged and collected will match the cost of carrying out the specific purposes;
* Provide limited preemption of state law:
* Once EPA makes a final decision on whether a chemical poses an unreasonable risk, EPA action would generally apply in all states; and
* Prior state laws and private rights of action under tort or contract law, are preserved;
* Maintain protection of CBI:
* Certain state, local, and tribal government officials and health care professionals will now have access; and
* Confidentiality claims must be reclaimed after ten years.

The House Energy and Commerce Committee prepared a [summary](http://links.govdelivery.com/track?type=click&enid=ZWFzPTEmbWFpbGluZ2lkPTIwMTYwNTI0LjU5NDI2MTExJm1lc3NhZ2VpZD1NREItUFJELUJVTC0yMDE2MDUyNC41OTQyNjExMSZkYXRhYmFzZWlkPTEwMDEmc2VyaWFsPTE3MzA3OTE0JmVtYWlsaWQ9Y2h1dHRvbkBsYXdiYy5jb20mdXNlcmlkPWNodXR0b25AbGF3YmMuY29tJmZsPSZleHRyYT1NdWx0aXZhcmlhdGVJZD0mJiY=&&&104&&&http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/analysis/20160520TSCASummary.pdf) of the compromise bill. Although there was hope that the Senate would pass the bill before the Memorial Day recess, Senator Rand Paul (R-KY) objected to bringing the bill to the floor for a vote. Paul stated: “I think it deserves to be read, to be understood, and to be debated. And so I object to just rushing this through.” Senator David Vitter (R-LA) stated that he “regret[s] an objection to this very reasonable path forward.” Vitter noted that the final version of the bill has been available for almost a week, and it is “largely similar” to the bill the Senate passed unanimously in December 2015. A detailed review of the bill is available in B&C’s May 26, 2016, memorandum, “[An Analysis of Key Provisions and Fundamental Shifts in the Amended TSCA](http://www.lawbc.com/regulatory-developments/entry/tsca-reform-an-analysis-of-key-provisions-and-fundamental-shifts-in-the-ame).” B&C has collaborated with *Chemical Watch* to develop a series of complimentary webinars titled “‘The New TSCA’ -- What You Need to Know” with a faculty of TSCA experts representing the perspectives of industry, environmental organizations, and U.S. federal and state regulatory authorities. The first webinar in the series, “The New TSCA -- Overview and Summary of Major Changes: What to Expect and When to Expect It,” will be presented **Monday, June 13, 2016, 11:00 a.m. (EDT), 8:00 a.m. (PDT), 4:00 p.m. (BST)**, and will provide an overview of the new law and major changes to TSCA. [Click here to register](https://chemicalwatch.com/events_webinars#event47536). Later webinars will provide a deeper dive into how and when TSCA programs will change and adapt to “New TSCA.”

**MINING ISSUES**

**MSHA Preparing Rule Concerning Examination Of Working Places In Metal And Non-Metal Mines**

According to an item in MSHA’s Spring 2016 Regulatory Agenda, MSHA intends to issue an NPRM in **June 2016** that will propose to clarify the requirements for the abilities and experience of the competent person (examiner), and to specify recordkeeping requirements that will facilitate correction of hazardous conditions and to alert others at the mine of conditions that may recur or in other ways affect them.

**Gold King Mine Spill**

***EPA Memo Addresses EPA Work Activities At Abandoned Hardrock Mining And Mineral Processing Sites***

EPA has posted a March 29, 2016, [memorandum](https://www.epa.gov/goldkingmine/march-2016-memo-planning-removal-and-remedial-activities-hardrock-mining-and-mineral) from EPA Assistant Administrator Mathy Stanislaus concerning EPA work activities at abandoned hard rock mining and mineral processing sites in preparation for the FY **2016** construction season. The memorandum states that its purpose is to assist EPA regions planning for removal and remedial activities at hard rock mining and mineral processing sites with fluid hazards, and to share EPA’s expectations for the work that is done at these sites. According to the memorandum, because of the Gold King Mine spill, and because of the complexities involved in working at these types of mines, EPA “believes it is important to exercise extreme care before conducting field work to minimize the potential for uncontrolled fluid releases resulting from initiating and/or conducting response activities.”

***EPA Proposes To Add Bonita Peak Mining District To NPL***

On April 7, 2016, EPA published a *Federal Register* notice proposing to add several sites, including the Bonita Peak Mining District, which includes the Gold King Mine, to the NPL. The NPL is intended primarily to guide EPA in determining which sites warrant further investigation. These further investigations will allow EPA to assess the nature and extent of public health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate. Comments regarding the proposed listings are due **June 6, 2016**.

***Senate Committee Holds Hearing On EPA’s “Unacceptable Response” To Indian Tribes***

On April 22, 2016, the Senate Committee on Indian Affairs held a field oversight hearing on “[Examining EPA’s Unacceptable Response to Indian Tribes](http://www.indian.senate.gov/hearing/field-oversight-hearing-examining-epa-s-unacceptable-response-indian-tribes-april-22-2016).” According to Senator John Barrasso (R-WY), Committee Chair, EPA made critical mistakes in the aftermath of the Gold King Mine spill. Senator John McCain (R-AZ) stated that there was “no question of culpability and negligence” on the part of EPA officials. He called for a DOJ investigation. EPA Assistant Administrator Mathy Stanislaus defended EPA’s response, but he acknowledged that EPA learned the need for improved communication with state, local, and tribal officials after the spill occurred. Since the spill, according to Stanislaus, EPA has spent more than $22 million in response efforts and has allocated $465,000 to the Navajo Nation to monitor water quality conditions in the San Juan River, downstream of the Animas River. Tribal leaders expressed frustration over the funding and cleanup efforts, describing them as too little, too late.

***Senators Request DOJ Criminal Investigation Into EPA’s Responsibility For Gold King Mine Spill***

On May 3, 2016, Senators John Barrasso (R-WY), Chair of the Senate Committee on Indian Affairs, and Committee Member Senator John McCain (R-AZ) sent a letter to Attorney General Loretta Lynch requesting a DOJ criminal investigation into EPA’s responsibility for the Gold King Mine spill on Navajo Nation. According to the Committee’s [press release](http://www.indian.senate.gov/news/press-release/barrasso-mccain-request-doj-criminal-investigation-epa-s-responsibility-gold-king), in the letter, Barrasso and McCain point to “clear evidence that the EPA was responsible for the disaster, including from the Department of Interior’s own Technical Evaluation, which notes the EPA failed to conduct necessary water pressure tests before excavating a tunnel at the mine.” The press release states that, based on the facts confirming EPA’s direct responsibility for the spill and the widespread damage it has caused to the environment and people of the surrounding communities, Barrasso and McCain urge DOJ to conduct an independent investigation to determine whether any EPA manager, employee, or contractor may have committed a crime in connection with the spill.

***Senators Introduce Bill To Require EPA To Reimburse Gold King Mine Spill Costs Fully***

Senator Cory Gardner (R-CO) issued a May 18, 2016, [press release](https://www.gardner.senate.gov/newsroom/press-releases/gardner-hatch-introduce-bill-holding-epa-accountable-for-gold-king-mine-spill) announcing that he and Senator Orrin Hatch (R-UT) introduced the Gold King Accountability and Compensation for Taxpayers (ACT). According to the press release, the Gold King ACT “is a fiscally responsible bill” that requires EPA “to fully and expeditiously compensate all communities impacted by the Gold King Mine spill.” According to the press release, there are currently more than 60 federal tort claims relating to the Gold King Mine spill totaling nearly $5 million that EPA has not yet paid. The Gold King ACT requires EPA to pay for these claims out of its own budget. Additionally, the legislation expedites the payout of emergency response costs assumed by tribes, counties, and local governments. The bill requires the EPA to work in coordination with states and Indian tribes to develop and implement a program for long-term water quality monitoring of the Animas River, which includes collecting water quality samples and sediment data and releasing it to the public.

***New Mexico Files Suit Against EPA And Mine Owners***

On May 23, 2016, the New Mexico Attorney General and NMED filed suit in the U.S. District Court for the District of New Mexico against EPA, its contractor, and two Colorado mine owners. According to the Attorney General’s [press release](http://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/Attorney_General_Balderas_and_NM_Environment_Department_File_Suit_against_the_EPA_and_Colorado_Mine_Owners.pdf), New Mexico, in addition to the State of Utah, the Navajo Nation, and the Southern Ute Tribe, “suffered catastrophic environmental, public health and economic damage due to the release of hazardous substances into the Animas River.” The press release states that New Mexico and EPA “have not been able to mutually agree on a monitoring plan that appropriately protects New Mexico and surrounding tribal lands.” The press release describes the remediation and compensation amounts as “far too minimal,” and calls for “appropriate independent monitoring to prevent future dangers to public health and the economy.”

***House Subcommittee Holds Hearing On Exploring 21st Century Mining Safety, Environmental Control, And Technological Innovation***

On May 25, 2016, the House Natural Resources Subcommittee on Energy and Mineral Resources held a hearing on “[Exploring 21st Century Mining Safety, Environmental Control, and Technological Innovation](http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=400508).” Witnesses included:

* Mark Board, Vice President, Technology and Innovation, Hecla Mining Company;
* Carl Brackpool, Innovation Team Member, NTT Innovation Institute, Inc.;
* Andrew Watson, PE, Director of Business Development, MWH Global; and
* James (Jim) R. Kuipers, PE, Consulting Engineer, Kuipers & Associates, LLC.

The Subcommittee’s May 25, 2016, [press release](http://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=400640) on the hearing states that the panel stressed how modern mining is not only safe, but environmentally conscious and high tech. Despite heavy regulations placed on the industry at both a federal and state level, companies improve their environmental standards above what is expected. The continued advancements in the technological field has the potential to transform how mining takes place, but requires continued integration between technology and the industry.

**MISCELLANEOUS ISSUES**

**Chemical Footprint Project Intends To Set New Standard For Evaluating How Companies Manage Chemicals**

On May 19, 2016, the Chemical Footprint Project released its [first annual report](https://www.chemicalfootprint.org/news/article/chemical-footprint-project-first-report), highlighting the financial risks that companies face due to chemicals of high concern in their products and supply chains. The report includes findings from the Project’s 2015 survey, including an assessment of how companies manage the potential liabilities posed by hazardous chemicals and opportunities for improvement. Twenty-four companies, including both privately- and publicly-held companies, responded to the survey. Key findings from the survey include:

* Senior leadership matters: The 29 percent of firms with Board-level oversight or senior management incentives performed better overall than firms with no such accountability;
* Companies need comprehensive policies: Without policies that address chemical hazards in manufacturing, supply chains, and packaging, companies face hidden liabilities and chemical risks;
* Disclosure lags practice: Across every category, companies have more chemicals management practices in place than they share publicly. For example, 83 percent have a legally restricted substances list, but only 17 percent of those companies make that list public;
* “Design for Health” sets leading edge: Companies whose entire product portfolios are based on minimizing or eliminating chemicals of high concern performed well above average; and
* Chemical footprint measurement is new and challenging: Before they can reduce their chemical footprints, companies need to know the chemical ingredients in their products and identify chemicals of high concern, “so it’s no surprise that in this first year, companies scored low for measuring baseline chemical footprint.”

The report discusses redesign risks, or the potential costs related to the continued use of hazardous chemicals in products and manufacturing processes and not redesigning products before regulations change or markets shift. The report states: “Sony, for example, incurred over $150 million in redesign and recall costs when it failed to remove **cadmium** from its Playstation products.”

**OSHA And Health Canada Intend To Release Final RCC 2016-17 Work Plan For Workplace Chemicals In June**

According to the OSHA [website](https://www.osha.gov/dsg/hazcom/rcc_workplan.html), OSHA and Health Canada are continuing their collaborative work to align workplace hazard communication regulations in the U.S. and Canada. To further these discussions, OSHA and Health Canada representatives hosted a webinar on March 3, 2016, to discuss the draft RCC **2016-17** Work Plan for Workplace Chemicals. The objective of the Work Plan is to ensure that the requirements in the U.S. and Canada for hazard classification and communication can and will be met now and in the future, to the greatest extent possible, with one label and one SDS that would be acceptable in both countries, without reducing the level of safety or protection to workers. The U.S. and Canada intend to produce a Work Plan ready for final release at the **end of June 2016**.

**OSHA Examining Outdated PELs**

According to an item in OSHA’s Spring 2016 Regulatory Agenda, “[t]here is widespread agreement among industry, labor, and professional occupational safety and health organizations that OSHA’s PELs are outdated and need revising in order to take into account newer scientific data that indicates that significant occupational health risks exist at levels below OSHA’s current PELs.” On October 10, 2014, OSHA published an RFI to solicit comment from the public on approaches it may take to reduce the risk of developing illness caused by exposure to hazardous chemicals. OSHA notes that the RFI does not address PSM issues, “but rather lower, longer-term exposures.” Comments on the RFI were due October 9, 2015. The item lists “Analyze Comments” with a date of **September 2016**.

**OSHA Intends PSM SBREFA Panel To Complete Work In June**

According to an item in OSHA’s Spring 2016 Regulatory Agenda, OSHA intends the SBREFA panel to complete its work in **June 2016**. On December 9, 2013, OSHA issued an RFI to identify issues related to modernization of the PSM standard and related standards necessary to meet the goal of preventing major chemical accidents.

**STATE ISSUES**

***California***

**OEHHA Launches Proposition 65 Warnings Website**

OEHHA has launched a [Proposition 65 warnings website](https://www.p65warnings.ca.gov/). OEHHA states that it is establishing the website to provide the public with information on chemicals, products, and locations often associated with Proposition 65 warnings. These warnings inform Californians about their exposures to chemicals that cause cancer, birth defects, or other reproductive harm. A search for **cadmium** returned hits for [**cadmium**](https://www.p65warnings.ca.gov/chemicals/cadmium) and a [fact sheet for **cadmium** and **cadmium compounds**](https://www.p65warnings.ca.gov/fact-sheets/cadmium-and-cadmium-compounds).

***New York***

**New York Assembly Passes Child Safe Products Act, Would List Cadmium As Chemical Of High Concern And Priority Chemical**

On May 4, 2016, the New York State Assembly passed A.B. 5612, which is intended to provide greater regulation of children’s products. The bill would define children’s product as a product primarily intended for, made for, or marketed for use by children. The NYSDEC would be required to post lists of priority chemicals and chemicals of high concern on its website and to review the lists periodically. Manufacturers of children’s products that contain intentionally added priority chemicals would be required to report certain information to the NYSDEC. The sale of a children’s product containing a priority chemical would be prohibited as of **January 2019**. Under the bill, **cadmium and cadmium compounds** would be included on the list of chemicals of high concern, and **cadmium** would be included on the list of priority chemicals. The bill authorizes the NYSDEC to participate in an interstate chemicals clearinghouse to assist in carrying out the requirements of the bill. The bill was referred to the Senate.

**Westchester County Delaying Enforcement Of Children’s Products Safety Act**

The Toy Industry Association [announced](http://www.toyassociation.org/PressRoom2/News/2016_News/Enforcement_Delayed_for_the_Westchester_County__NY_Children_s_Products_Safety_Law_.aspx#.V0cdjdTD9p8) on May 17, 2016, that Westchester County is delaying enforcement of the Children’s Products Safety Act, which bans the sale of children’s products containing any level of formaldehyde, benzene, lead, mercury, antimony, arsenic, **cadmium**, or cobalt within Westchester County, New York. The Westchester County Executive’s Office confirmed to the Association that it will not enforce the Act, which took effect on May 15, 2016, until the Safe to Play Coalition and Albany County reach a settlement over similar legislation regarding children’s products in Albany County. As reported in our March 28, 2016, Update, Albany County amended its legislation to limit, rather than ban, metals such as **cadmium**. The amendment also allows for state or federal preemption.

***Oregon***

**OHA Completes Phase One Implementation Of The Toxic Free Kids Act**

OHA has created a [web page](https://public.health.oregon.gov/HealthyEnvironments/HealthyNeighborhoods/ToxicSubstances/Pages/Toxic-Free-Rules.aspx) concerning the Toxic Free Kids Act rules and implementation. The Act requires manufacturers of children’s products sold in Oregon to report products that contain one or more high priority chemicals of concern for children’s health, and ultimately remove these chemicals or seek a waiver. Phase 1 was to establish a list of high priority chemicals of concern for children’s health and criteria by which the list can be updated in the future. Under the Act, the initial list shall “include on the list chemicals that are listed on the Washington State Department of Ecology’s Reporting List of Chemicals of High Concern to Children.” WDOE’s list includes **cadmium** and **cadmium compounds**. OHA’s web page, “[Chemicals of Concern for Children’s Health](https://public.health.oregon.gov/HealthyEnvironments/HealthyNeighborhoods/ToxicSubstances/Pages/childrens-chemicals-of-concern.aspx),” includes **cadmium** and **cadmium compounds** on the list of high priority chemicals of concern for children’s health. The potential chronic health effects are “[l]ung, and other organ cancers; liver and kidney effects; reproductive system effects; central nervous system development effects; may damage DNA in cells.” Phase 2 is to detail manufacturer reporting requirements, and, according to OHA’s website, “[r]ule development and rules advisory committee meetings begin in **Spring 2016**.” Phase 3 is to detail requirements for manufacturers to remove chemicals of concern from products or seek waiver, and detail required components of waiver request and establish approved methods for alternative assessment. The status is “[r]ule development and rules advisory committee meetings begin in **2019**.”

**NGO Sues EPA For Failing To Promulgate Water Quality Criteria For Pollutants, Including Cadmium**

On April 6, 2016, the parties filed in the U.S. District Court for the District of Oregon a joint status report and motion for an extension of time to prepare a final consent decree. *NWEA v. EPA*, No. 3:15-cv-0663. NWEA filed suit against EPA for failing to promulgate replacement aquatic life toxics criteria for Oregon. According to the status report, the parties have reached agreement, subject to approval by senior management of EPA and DOJ, on all substantive terms of a proposed consent decree except for the issue of NWEA’s claim for attorneys’ fees pursuant to the CWA’s citizen suit provision. The status report states that the parties have exchanged several rounds of communications on this topic, and continue to negotiate in good faith to reach an agreement. The parties expect that by **June 1, 2016**, they will either (a) have reached an agreement with respect to NWEA’s claim for attorney’s fees that has obtained the necessary DOJ approvals such that a joint proposed consent decree may be filed with the court, or (b) conclude that no agreement is likely to be reached on the issue of attorneys’ fees, and will jointly propose a briefing schedule on that limited topic for the court’s consideration. On April 8, 2016, the court granted the motion for an extension until **June 1, 2016**, for the parties to file their anticipated joint proposed consent decree.

**ODEQ Announces Temporary Rules To Regulate Emissions From Colored Art Glass Manufacturers, Proposes To Make Temporary Rules Permanent**

As reported in our April 22, 2016, e-mail, on April 21, 2016, the EQC adopted temporary rules regulating air toxics emissions from colored art glass manufacturers. ODEQ states that based on sampling undertaken in October 2015, and in recent weeks, it has concluded that “uncontrolled furnaces used in such colored art glass manufacturing are more likely than not to emit potentially unsafe levels of certain metals, including arsenic, **cadmium**, hexavalent chromium and nickel.” The temporary rules are intended to protect the public health and the environment immediately by ensuring the air emissions from colored art glass facilities do not cause unsafe levels of metals in the air nearby. On May 17, 2016, ODEQ announced a [proposed rulemaking](http://www.oregon.gov/deq/RulesandRegulations/Pages/2016/Rartglass2016.aspx) that would make the temporary rules permanent. On May 27, 2016, a fiscal advisory committee reviewed the fiscal and economic impact related to the proposed rules. ODEQ states that, later in the rulemaking proceeding, it will invite public comments and hold a public hearing on the proposed rules.

**Technical Workgroup Formed For Cleaner Air Oregon Regulatory Reform**

ODEQ announced on May 26, 2016, that, together with OHA, it is convening a [technical workgroup](http://www.oregon.gov/deq/RulesandRegulations/Pages/2017/cleanerair2017w.aspx) for the [Cleaner Air Oregon Regulatory Reform](http://www.oregon.gov/deq/RulesandRegulations/Pages/2017/Rcleanerair2017.aspx), a new initiative to overhaul industrial air toxics regulations. According to ODEQ, the technical workgroup will discuss and provide an evaluation of human health risk-based air toxics programs for industrial facilities in other states, and discuss and evaluate key technical issues. All meetings will be held in Portland and are open to the public with time scheduled for public comment. The technical workgroup will meet on the following dates, and the location will be announced prior to the meetings:

* **June 29, 2016**: 9 a.m. to 5 p.m.;
* **June 30, 2016**: 9 a.m. to 5 p.m.;
* **July 27, 2016**: 9 a.m. to 5 p.m.; and
* **July 28, 2016**: 9 a.m. to 5 p.m.

The meeting duration times above may vary depending on topics and workgroup progress. On April 28, 2016, ODEQ [announced](http://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=1089) an “inspection blitz” of 316 facilities permitted to emit metals into the air and announced plans to inspect them all to collect and verify metals data. The list includes permitted facilities authorized to emit one or more of the following nine metals: arsenic, beryllium, **cadmium**, chromium, cobalt, lead, manganese, nickel, and selenium. ODEQ intends to begin inspections at one third of the facilities in **June 2016**.

***Texas***

**Texas Begins Comment Period On Proposed DSD For Cadmium And Cadmium Compounds**

As reported in our May 14, 2016, e-mail, on May 13, 2016, TCEQ announced a public comment period on the [proposed DSD](http://www.tceq.com/assets/public/implementation/tox/dsd/proposed/may2016/cadmium.pdf) for **cadmium** and **cadmium compounds**. The proposed DSD includes air monitoring comparison values for ambient air and permitting effects screening levels for **cadmium** and **cadmium compounds**. Comments are on the proposed DSD are due **August 19, 2016**. According to the TCEQ [website](http://www.tceq.texas.gov/toxicology/dsd/dsds_about.html), after the close of the public comment period, TCEQ will address and resolve “all relevant issues and make scientifically defensible changes to the DSD and toxicity values, if needed.” TCEQ will publish the final DSD with a response to comments, if applicable.

**INTERNATIONAL ISSUES**

**CANADA**

**Canada Publishes Overview Of Consumer Product Safety Program’s Risk Characterization Method**

On March 31, 2016, Health Canada released an [overview](http://www.hc-sc.gc.ca/cps-spc/legislation/pol/rcm-overview-apercu-mcr-eng.php) of the Consumer Product Safety Program’s risk characterization method. Health Canada states that, in many cases, a preliminary evaluation will identify the hazards and safety concerns associated with a consumer product, and often this is sufficient for the Consumer Product Safety Program to manage the risk. In other cases, for example when the hazard is complex or when an entire category of products is involved, the Program may conduct a more in-depth risk assessment. In these cases, when warranted, both the severity and likelihood are formally evaluated to create a risk characterization. The risk characterization method:

* Identifies an overall risk level (very high, high, medium, low) for a consumer product or cosmetic based on how severe an injury could be and how likely it is that an injury will happen; and
* Uses the same scale to evaluate different types of hazards (hazards can include mechanical, physical, electrical, flammability, and toxicological hazards).

Health Canada states that there are two kinds of risks from consumer products or cosmetics: (1) the risk to actual users of the product (user risk); and (2) the risk to people in the population of interest (population risk). Health Canada uses the following example to assess the risk of injury for a children’s toy of a specific brand and model:

1. The user risk is the risk that a child that has access to the product will be injured while playing with the toy; and

2. The population risk is the risk that a child in the population of interest (such as children in Canada aged three years or younger) will be injured by the product. The population risk will be lower than the user risk because a portion of children in the population may not have access to this product.

In the risk characterization method, the population that the Consumer Product Safety Program chooses to assess is based on who is most likely to be affected by the product hazard.

**CHINA**

**MEP Will Investigate Cadmium Water Pollution Incident**

On April 14, 2016, the MEP announced that it would investigate a high-**cadmium** water pollution incident in Jiangxi province. According to the MEP, untreated sewage and toxic waste flowed into Yuan River and Xiannu Lake, two of Xinyu City’s water sources, during a rainstorm on April 3, 2016, and the water supply was suspended in part of Xinyu City. The MEP stated that waste products in the water included **cadmium**, arsenic, and thallium. The waste came from a 2.5 km sewer set up secretly by Yichun Zhong’an Industry Co, which produces iron slag, dross, potassium chloride, and other products using toxic scrap. Jiangxi News reported that discharge from the sewer contained 4,655 mg of **cadmium** per liter, 46,550 times more than the national safety standard. Yichun Zhong’an Industry allegedly operated without an environmental protection license. The company did not respond to a request for comment.

**China Will Soon Begin Soil Pollution Prevention And Control Action Plan**

Chen Jining, Minister of Environmental Protection, stated on April 25, 2016, in a report to the Standing Committee of the National People’s Congress, that China will soon carry out a Soil Pollution Prevention and Control Action Plan, beginning with a national survey on soil pollution, and managing and controlling soil pollution. According to Chen, China will set national monitoring points on soil contamination, build a database on soil pollution, enact standards on soil protection, and promote pilot projects on decontaminating soil. According to an April 17, 2016, report on China Central Television, 493 students from Changzhou Foreign Language School, Jiangsu Province, developed abnormal blood illnesses ranging from dermatitis and eczema to leukemia and lymphoma. The report stated that the school was built next to a former toxic waste dump and that water and soil contamination caused the students’ illnesses. Changzhou authorities cited water and soil monitoring data and testing results to refute the report, claiming that no large amounts of chemicals and contamination were detected. A 2014 report released by MEP and MLR found that soil pollution is severe in three major industrial regions, and some regions in China have suffered deteriorating soil quality due to exposure to extensive industrial development and toxic emissions. The report stated that **cadmium**, nickel, and arsenic are the top pollutants detected in soil samples.

**MIIT Publishes FAQs On China RoHS2**

On May 16, 2016, MIIT [announced the availability](http://www.miit.gov.cn/n1146295/n1652858/n1653018/c4777618/content.html) of [FAQs on China RoHS2](http://www.actagroup.com/uploads/docs/00183841.PDF). According to the FAQs, products that are excluded from the scope of China RoHS2 include power generation, transmission, and distribution equipment; electric transportation devices; products for military uses; products for special circumstances or extreme conditions; export products, including components imported into China to manufacture products intended for export; second-hand products; packaging materials; sample products for R&D or exhibition but not for sale; and EEPs intended for non-electrical and electronic products, for example, monitors intended for airplanes or automobiles and components for power generators. There are 56 questions in the FAQs, including a decision tree for EEPs under the scope of China RoHS2 and a flow chart of the process and timeline for the implementation of China RoHS2. The FAQs address how to calculate the EPUP and indicate it on the product; the transition period for the implementation of China RoHS2; and whether manufacturers or component suppliers are responsible for non-compliant products. China RoHS2 expanded the coverage of the Regulation from EIPs to EEPs, defined as devices and accessory products with a voltage rating not exceeding 1,500V for direct current and 1,000V for alternating current that function by means of current or electromagnetic fields and generate, transmit, and measure such currents and electromagnetic fields. China RoHS2 restricts the following substances according to the national standard GB/T 26572-2011 “Requirements of Concentration Limits for Certain Restricted Substances in [EEPs],” which are the same as those restricted by the EU:

* **Cadmium and its compounds**: 0.01%;
* Mercury and its compounds: 0.1%;
* Lead and its compounds: 0.1%;
* Hexavalent chromium and its compounds: 0.1%;
* Polybrominated biphenyls: 0.1 %; and

* Polybrominated diphenyl ethers: 0.1 %.

The above maximum control values apply to each homogenous material rather than a product itself. The limits apply only to products listed in the Compliance Management Catalog, which has not yet been published. The Compliance Management Catalog will be published in batches with certain exemptions, and there will be a transition period for the implementation of the Compliance Management Catalog after it is published. Non-listed products or parts that contain certain hazardous substances exceeding the above limits may still be sold in China provided that the products are marked and the names and content of the hazardous substances are disclosed according to the electronics industry standard SJ/T 11364-2014 “Marking for the Restricted Use of Hazardous Substances in [EEPs].” The marking on EEP components intended for after-sales services of the product, however, is not required. More information on RoHS2 is available in Acta®’s January 28, 2016, memorandum, “[China Publishes Long Awaited RoHS2 Regulation](http://www.actagroup.com/regulatory-developments/entry/china-publishes-long-awaited-rohs2-regulation).”

**JAPAN**

**Japan Suggests Use Of Control Banding For Required Risk Assessments**

MHLW has suggested the use of control banding for the risk assessments that will be compulsory for [640 chemical substances](http://anzeninfo.mhlw.go.jp/anzen/gmsds/sds640.pdf), including **cadmium**. As the list is in Japanese, it may include the CAS RNs for one or more **cadmium compounds**. An amendment to ISHL, which will enter into force on **June 1, 2016**, will require companies to conduct risk assessments on substances currently subject to SDSs. MHLW created software, in Japanese, based on control banding, and has offered the software for free [on its website](http://anzeninfo.mhlw.go.jp/ras/user/anzen/kag/ras_start.html). Companies would input information on SDSs and other details, such as the amount of the chemical substances used in the workplace. MHLW has posted a [brochure](http://www.mhlw.go.jp/file/06-Seisakujouhou-11300000-Roudoukijunkyokuanzeneiseibu/0000099625.pdf) regarding the new risk assessment requirement, and plans to prepare more guidance.

**ASEAN-Japan Chemical Safety Database Now Available**

The [ASEAN-Japan Chemical Safety Database](http://www.ajcsd.org/chrip_search/html/AjcsdTop.html) was launched on April 28, 2016. The Database includes regulatory information and GHS classification results, which are provided by the government authorities of each member country, as well as SDSs voluntarily provided by private companies. Users can search the Database by CAS RN, chemical name, structural formula, molecular formula, molecular weight, country, and law/regulation. The [FAQs](http://www.ajcsd.org/chrip_search/html/AjcsdFAQ.html) note that just because a chemical is not found in the Database does not mean that the chemical is not regulated under any law or regulation. According to the FAQs, a chemical may not be found because the Database is CAS RN-based and contains only chemicals with CAS RNs. In addition, the Database has been developed on a voluntary basis, and “the information update may not be perfect.” The FAQs recommend using the Database as a reference tool. The FAQs state that the detail and the practical information may be inquired from the contact information page to each country.

**SOUTH KOREA**

**MOE Publishes Model Agreement Guidelines For Joint Submission Of K-REACH Registration Documents**

On April 8, 2016, the MOE Task Force for K-REACH [announced](http://www.chemnavi.or.kr/chemnavi/spboard/noticedetail.do?idx=9682) the availability of a [model agreement for the joint submission of registration documents](http://www.lawbc.com/uploads/docs/00181309.PDF). The model agreement is intended to help lead registrants of the 510 [PECs](http://www.actagroup.com/uploads/docs/00162853.PDF), including **cadimium** [sic] **oxide**; **cadmium sulfide**; **cadimium** [sic] **selenide**; **cadmium octanoate/cadmium di(octanoate)**; **octadecanoic acid cadmium salt/cadmium stearate**; **cadmium 2-ethylhexanoate**; **benzoic acid cadmium salt**; **p-tert-butylbenzoic acid cadmium salt**; **cadimium** [sic]; **cadmium dioleate**; **antimony compound with cadmium (2:3)**; **cadmium zinc sulfide ((CdZn)S)**; **cadmium sulfoselenide orange**; **cadimium** [sic] **hydroxide**; **neodecanoic acid cadmium salt**/**cadmium neodecanoate**; **fatty acids, (C=8-18) and (C=18)-unsatd., cadmium salts**; and **cadmium bis(o-nonylphenolate)**. It includes chapters on:

* General provisions: Definitions, appointment of lead registrants, and their responsibilities;
* Preparation and submission of registration documents for joint submission: Scope, obligations of collaboration, collection, selection and ownership of test data, development of registration documents, submission, rights to share registration documents, and cost sharing;
* Agreement Management: Administration of costs;
* Confidentiality: CBI protection; and
* Miscellaneous: Competition law compliance, legal personality, duty of due diligence and indemnification, term and termination, transfer of rights and obligations, and dispute resolution and applicable laws.

\* \* \* \* \*

Unless otherwise noted, if you have questions about any item summarized above, please call or e-mail Lynn L. Bergeson at (202) 557-3801 or lbergeson@lawbc.com, or Carla N. Hutton at (202) 557-3809 or chutton@lawbc.com.

## ACRONYMS

**Acta** -- The Acta Group

**ASEAN** -- Association of South East Asian Nations

**B&C** -- Bergeson & Campbell, P.C.

**BC** -- British Columbia

**CAA** -- Clean Air Act

**CAS RN** -- Chemical Abstracts Service Registry Number

**CBI** -- Confidential Business Information

**CDR** -- Chemical Data Reporting

**CERCLA** -- Comprehensive Environmental Response, Compensation, and Liability Act

**China RoHS2** -- Administrative Measures for the Restriction of the Use of Hazardous Substances in Electrical and Electronic Products

**CWA** -- Clean Water Act

**DOJ** -- United States Department of Justice

**DSD** -- Development Support Document

**EEP** -- Electrical and Electronic Parts

**EIP** -- Electronic Information Product

**EPA** -- United States Environmental Protection Agency

**EPUP** -- Environmental Protection Use Period

**EQC** -- Environmental Quality Commission

**EU** -- European Union

**FAQ** -- Frequently Asked Question

**FY** -- Fiscal Year

**GHS** -- Globally Harmonized System of Classification and Labeling of Chemicals

**ICdA** -- International Cadmium Association

**ICR** -- Information Collection Request

**ISHL** -- Industrial Safety and Health Law

**km** -- Kilometer

**K-REACH** -- Act for the Registration and Evaluation of Chemicals

**MEP** -- Ministry of Environmental Protection

**mg** -- Milligram

**MHLW** -- Ministry of Health, Labor, and Welfare

**MIIT** -- Ministry of Industry and Information Technology

**MLR** -- Ministry of Land and Resources

**MOE** -- Ministry of the Environment

**MSHA** -- Mine Safety and Health Administration

**NAICS** -- North American Industrial Classification System

**NESHAP** -- National Emission Standards for Hazardous Air Pollutants

**NGO** -- Non-Governmental Organization

**NMED** -- New Mexico Environment Department

**NPL** -- National Priorities List

**NPRM** -- Notice of Proposed Rulemaking

**NWEA** -- Northwest Environmental Advocates

**NYSDEC** -- New York State Department of Environmental Conservation

**ODEQ** -- Oregon Department of Environmental Quality

**OEHHA** -- Office of Environmental Health Hazard Assessment

**OHA** -- Oregon Health Authority

**OIRA** -- Office of Information and Regulatory Affairs

**OMB** -- Office of Management and Budget

**OSHA** -- Occupational Safety and Health Administration

**PEC** -- Priority Existing Chemical

**PEL** -- Permissible Exposure Limit

**PRA** -- Paperwork Reduction Act of 1995

**PSM** -- Process Safety Management

**R&D** -- Research and Development

**RCC** -- Regulatory Cooperation Council

**RCRA** -- Resource Conservation and Recovery Act

**RFI** -- Request for Information

**RMP** -- Risk Management Program

**SBREFA** -- Small Business Regulatory Enforcement Fairness Act of 1996

**SDS** -- Safety Data Sheet

**SDWA** -- Safe Drinking Water Act

**TCEQ** -- Texas Commission on Environmental Quality

**TSCA** -- Toxic Substances Control Act

**V** -- Volt

**WDOE** -- Washington Department of Ecology

1. This Update addresses significant federal, state, and international environmental and occupational safety and health regulatory issues and ongoing advocacy efforts pertinent to the ICdA member companies. A list of acronyms used in this Update is provided. [↑](#footnote-ref-1)