

Tuesday, May 15, 2018

Office of Land and Emergency Management (5304P)  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

**Re: EPA Docket No. EPA-HQ-OLEM-2017-0463**  
**Proposed Rule: "Increasing Recycling: Adding Aerosols Cans to Universal Waste Regulations"**  
**83 Fed. Reg. 11,654 (March 16, 2018)**

Walmart is pleased to provide the attached comments in response to the proposal of the U.S. Environmental Protection Agency (EPA) entitled "Increasing Recycling: Adding Aerosols Cans to Universal Waste Regulations", which was published in the Federal Register on March 16, 2018. See 83 Fed. Reg. 11,654.

Should EPA have questions about the comments or any technical difficulties, please contact either of the undersigned below.

Sincerely,



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Attachment



**Walmart Inc. Comments to Proposed Rule  
Increasing Recycling: Adding Aerosol Cans to the Universal Waste Regulations**

**Docket ID No. EPA-HQ-OLEM-2017-0463**

**83 Fed. Reg. 11,654 (March 16, 2018)**

Walmart Inc. ("Walmart") thanks the U.S. Environmental Protection Agency ("EPA") for the opportunity to provide comments on the proposed "Increasing Recycling: Adding Aerosols Cans to Universal Waste Regulations" ("Proposed Rule") dated March 16, 2018. Walmart strongly supports EPA allowing generators to manage consumer aerosol cans as Universal Waste. However, the definition of an "aerosol can" and the overbroad exclusions of aerosol cans that "show evidence of leakage, spillage, or damage" in the Proposed Rule will significantly blunt the Proposed Rule's benefits unless those provisions are modified. Walmart's support and concerns are detailed in this response.

In addition to filing these comments, Walmart also fully supports the comments submitted by the Retail Industry Leaders Association, the Food Marketing Institute, and the National Association of Chain Drug Stores (collectively the "Retail Associations").<sup>1</sup> As the largest retailer in the United States, Walmart plays a significant role in the various retail associations and was involved in the review and submittal of the Retail Associations' Comments. However, because this Proposed Rule significantly impacts our business, Walmart submits these additional comments on its own behalf.

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<sup>1</sup> Comments of the Retail Associations on EPA's Proposal to Add Aerosol Can Wastes to the Universal Waste Regulations (May 14, 2018).

## **Introduction**

Walmart strives to be an environmental leader and believes everyone benefits when we work with regulators to develop policies and regulations that achieve environmentally protective results. Walmart is committed to environmentally sustainable business practices and has been recognized as one of the world's leading companies in the sustainability arena.<sup>2</sup>

Domestically, Walmart operates more than 5,000 retail facilities, employs over 1.4 million associates, and serves over 140 million customers every week. Walmart retail facilities are comprised of a mix of grocery, general merchandise, pharmacy, and membership-oriented stores. Walmart is privileged to do business in the United States and understands that compliance with environmental laws is a pre-requisite to the success and sustainability of our business.

As EPA recognized in the Retail Notice of Data Availability, significant challenges exist for the Retail Sector regarding the Resource Conservation and Recovery Act's ("RCRA") application to consumer products.<sup>3</sup> Domestically, Walmart sells over 100 billion consumer products per year and has millions of different kinds of consumer products in inventory. Applying RCRA to all of these consumer products, when analyzing waste management and disposal requirements, is complicated, burdensome, and often unnecessary.<sup>4</sup>

While proud of its RCRA compliance program, Walmart believes that much of its efforts are largely unnecessary to protect human health and environment since the vast majority of the wastes it generates are derived from common household consumer products, many of which are specifically designed and regulated for safe human consumption through ingestion or topical application. By their very nature, common consumer products purchased from a retail store do not pose significant risks to human health or the environment. Consumers do not want to buy products that present a serious danger to themselves and their families, and solid waste landfills are specifically designed to handle consumer product wastes in a manner that is protective of the environment. While Walmart goes to extraordinary lengths to comply with the hazardous waste regulations of RCRA, the extraordinary lengths are required because the application of RCRA's complicated regulatory scheme was not designed with consumer products and the Retail Sector in mind. RCRA regulations, designed for industrial sources, have little practical application to retail, yet as set out in the Proposed Rule, retail is now the largest RCRA regulated industry segment.

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<sup>2</sup> Walmart has three aspirational sustainability goals: 1) Create Zero Waste; 2) Be Powered by 100% Renewable Energy; and 3) Sell Products that Sustain People and the Environment. For information on Walmart's sustainability initiatives, accomplishments, and commitments, please visit [walmartsustainabilityhub.com](http://walmartsustainabilityhub.com).

<sup>3</sup> EPA, *Hazardous Waste Management and the Retail Sector: Providing and Seeking Information on Practices to Enhance Effectiveness to the Resource Conservation and Recovery Act Program, Notice of Data Availability*, 79 Fed. Reg. 8926 (Feb. 14, 2014) ("NODA").

<sup>4</sup> See Walmart's Comments to the NODA.

Walmart appreciates EPA for recognizing the challenges faced by the Retail Sector and commends EPA for undertaking this rulemaking process. Walmart supports EPA's proposal to regulate hazardous waste aerosol cans as universal wastes under RCRA. Walmart believes that, if modified as suggested in our comments, this Proposed Rule will significantly advance the resource conservation and recovery goals of RCRA while ensuring that the products are managed in an environmentally protective manner.

The universal waste regulations include eight factors to consider in evaluating whether a waste is appropriate for inclusion, including, if the waste is generated by a wide variety of generators, if the waste is generated in relatively small quantities, and if risks posed by the waste during accumulation and transport are relatively low compared to risks posed by other hazardous waste.<sup>5</sup> While not every factor must be met for a waste to be appropriately regulated under the universal waste program, EPA found that waste aerosol cans comported with each of the factors, and Walmart agrees with EPA's analysis.

Unfortunately, certain provisions in the Proposed Rule, without modification, will have a deleterious impact that severely undermines EPA's goals of sustainable materials management and will not achieve EPA's noted benefits of "improved implementation of and compliance with the hazardous waste program and increased recovery and recycling of aerosol cans."<sup>6</sup> Specifically, Walmart believes that the definition of an aerosol can is too restrictive as is the exclusion of certain aerosols from universal waste management. As written, Walmart believes these provisions of the Proposed Rule erode not only the purpose of the rule but also significantly lessen its environmental benefit.

An aerosol in good condition rarely becomes waste at a retail store or in reverse distribution processes. Such cans are sold, donated, or returned to a supplier. Conversely, aerosol cans specifically excluded from the rule because of their condition are the aerosols most often managed as waste in the Retail Sector. Aerosols that are stained, dented, damaged, or empty, become wastes; however, those cans are unnecessarily excluded from the Proposed Rule. The end result is a Proposed Rule that may in reality achieve little. Walmart believes that is not the result EPA desires and hopes these comments can help the Agency rethink the definition of an aerosol and the exclusionary language in the Final Rule.

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<sup>5</sup> 40 C.F.R. §273.81.

<sup>6</sup> 83 Fed. Reg. 11654, 11656.

## **Background Facts Regarding Walmart and Aerosols**

In 2017, Walmart facilities generated approximately 4.32 million pounds<sup>7</sup> of waste aerosol cans. Aerosol waste represents more than 52% of the total 8.26 million pounds of hazardous waste generated at all Walmart facilities. Currently, Walmart manages almost all of these aerosols as hazardous waste because it is difficult for employees to discern which specific aerosols are technically RCRA regulated.<sup>8</sup> As a result, Walmart pays a hazardous waste service provider to remove and dispose of a significant amount of aerosol cans as hazardous waste.

Managing aerosol cans as hazardous wastes costs Walmart tens of millions of dollars per year. Walmart would obviously rather send the aerosol cans for environmentally beneficial recycling either as commercial chemical products being reclaimed or as universal waste than to pay more money to wastefully incinerate them, especially when the extra costs are not mitigating any risk to human health or the environment. If the Proposed Rule is revised as detailed below, the ability to manage aerosol cans as universal waste will support our sustainability goals, decrease program costs, and significantly increase efficiencies related to generator status, storage space, and service frequency. In fact, if Walmart is able to send 100% of our aerosol waste for recycling or reclamation, and therefore remove that waste amount from counting toward our hazardous waste generator status, Walmart estimates that 83% of retail facilities will be Very Small Quantity Generators (VSQG) in all months, and 97% of retail facilities will be VSQG in 10 or more months.

## **Comment on the Definition of an Aerosol Can**

EPA is proposing to define an aerosol can as “*an intact container in which gas under pressure is used to aerate and dispense any material through a valve in the form of a spray or foam.*”<sup>9</sup> Walmart believes that the word “intact” must be removed from the definition as it is unnecessarily restrictive and ambiguous.

Defining an aerosol can as “intact” raises many questions. Does intact mean that no product has leaked from the can, or does it mean that the cap is not broken or that the actuator is still in place? Does it mean no product has been dispensed? Is a partially used aerosol can “intact”? In addition, “intact” seems superfluous, since the gas would not be “under pressure” if the can was not structurally intact. In other words, there are no “non-intact” container designs that can maintain pressure.

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<sup>7</sup> This weight is attributable to almost 5 million aerosol cans.

<sup>8</sup> Given the uncertainty regarding which aerosols might actually be considered RCRA waste, Walmart has concluded it is less risky to manage them all as hazardous. For example, EPA’s equivocation about whether aerosol cans are characteristically reactive helps explain Walmart’s conservative position. See Environmental Law Institute, *RCRA and Retail: Considering the Fate of Consumer Aerosols* (May 2018), Attachment 1 at 11, n. 43.

<sup>9</sup> 83 Fed. Reg. at 11659-60.

Given the myriad of ways “intact” could be interpreted and applied to aerosol cans, leaving this word in the definition or using a similar restrictive descriptor in EPA’s proposed definition will lead to inconsistent and potentially overly exclusive application of the Proposed Rule. Additionally, EPA’s focus on “intact” and “maintaining gas under pressure” seems misplaced for a **general** definition of an aerosol can. To a retail associate, a non-intact aerosol can is still an aerosol can. It will not transform into something that is not an aerosol can simply because of nuanced differences in its physical condition. As a corollary, consider that, to most people, a “tire” is still a “tire” regardless of whether it has a leak or not. The same is true for aerosol cans; minor differences in physical condition will not turn it into something else. Therefore, the regulatory definition of an aerosol can, for the purposes of the Proposed Rule, should focus on the design and functional elements of the can and not its current condition.

As noted by EPA, four states - California, Colorado, New Mexico, and Utah - have universal waste aerosol programs in place. EPA states that its proposed definition is the same definition used by these States. However, none of these States use the word “intact” or any similar conditional descriptive term in defining aerosol cans. California, Colorado, New Mexico, and Utah<sup>10</sup> all define an aerosol can as “*a container in which gas under pressure is used to aerate and dispense any material through a valve in the form of a spray or foam.*”<sup>11</sup>

Walmart respectfully suggests the following definition that incorporates the States’ definition with revisions that allow for functional elements of aerosols:

***A container-like device designed to maintain its contents under pressure used to aerate or dispense material through a valve in the form of a gas, spray, or foam.***<sup>12</sup>

Walmart believes that, in order to drive consistency and remove ambiguity, EPA should remove the word “intact” from the proposed definition of an aerosol can, and use Walmart’s proposed definition or at least adopt what is currently used by California, Colorado, New Mexico, and Utah in their universal waste aerosol programs. In the alternative, Walmart also supports the Retail Associations’ Comments proposing that EPA adopt the aerosol definition used in international dangerous goods regulations.<sup>13</sup>

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<sup>10</sup> Utah does exclude aerosols of more than 24 ounces in its definition of an aerosol can. However, Walmart sees no reason for EPA to adopt that limitation. Walmart supports EPA’s position to not include a size limitation on universal waste aerosol cans in this Proposal, and agrees that aerosols can be safely managed under the universal waste system and are an appropriate candidate for universal waste, without a size limitation, as indicated by EPA’s application of the eight factors set out in 40 C.F.R. §273.81.

<sup>11</sup> Cal. Health & Safety Code § 25201.16(a)(1) (2018); 6 Colo. Code Regs. § 1007-3:273.9 (2018); N.M. Code R. § 20.4.1.1001(A)(1) (2018); Utah Admin. Code r.315-273-9(a) (2018).

<sup>12</sup> Walmart also added the terms ‘or’ instead of “and” between aerate and dispense because some common aerosols, like shaving cream, may not aerate as that term is commonly understood. Walmart also added “gas” to the list of materials that might be dispensed to cover aerosols that dispense compressed air.

<sup>13</sup> See Comments of the Retail Associations on EPA’s Proposal to Add Aerosol Can Wastes to the Universal Waste Regulations, at 14-16.

### **Exclusion of Damaged Aerosol Cans**









The Proposed Rule also excludes aerosol cans that “*show evidence of leakage, spillage, or damage that could cause leakage under reasonably foreseeable conditions*”.<sup>14</sup> This language as proposed effectively eliminates Walmart’s ability to manage hazardous waste aerosols as universal waste and provides little relief to the Retail Sector as a whole.

Almost all aerosol cans become waste specifically because they have some “evidence of leakage, spillage, or damage.” Otherwise, the product would be on the store shelf, returned to the supplier, or donated. Most waste aerosols result from customer returns or store damage. Customers may spray an aerosol to make sure the actuator is working or take home a can of paint to see if they like the color and then return it if they do not. In these circumstances, there is likely to be some product or paint on the aerosol can itself, which could be construed as evidence of leakage or spillage. Moreover, aerosol caps can break and actuators can be clogged or removed. Cans may have dents from being dropped or knocked off shelves, and because those cans are not in saleable condition, they are removed from retail shelves.

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<sup>14</sup> 83 Fed Reg. at 11660.

### Examples of Damaged Aerosol Cans

Aerosols with Broken Caps		
		
Aerosol with Missing Actuator		
		
Aerosols with Dents		
		
Product On Can Or Discharged		
		

EPA's proposed language creates unnecessary restrictions on aerosols that could be managed as universal waste and effectively undermines the goals of the Proposed Rule. Again, Walmart submits that the current State programs provide sufficient parameters for the safe management of aerosols as universal waste and use much of the same language that EPA is proposing but without the restrictive exclusions.

California, Colorado, New Mexico, and Utah require universal waste handlers to manage universal waste aerosol cans in a way that prevents release of any contents or propellant to the environment. Universal waste handlers must contain universal waste



aerosol cans that show evidence of leakage, spillage, or damage that could cause leakage in reasonably foreseeable conditions.<sup>15</sup> Universal waste handlers are required to accumulate aerosol cans in containers that are structurally sound, compatible with the contents, and show no evidence of leaks, spills, or damage that could cause leaks.<sup>16</sup> Walmart submits that EPA should adopt the reasonable approach followed by California, Colorado, New Mexico, and Utah.

EPA indicated in the Proposed Rule that it was informed by waste management officials in these states that their programs have been operating well and achieving their objective of facilitating safe management of waste aerosol cans. “In particular, state officials from both California and Colorado stated to EPA that their respective aerosol universal waste programs have been in effect since 2002, and they have not identified any problems with compliance with the standards.”<sup>17</sup>

Furthermore, even though universal waste aerosols will not be shipped under a hazardous waste manifest, they must still be shipped in accordance with Hazardous Materials Regulations. The Department of Transportation requires all hazardous material items to be packaged to prevent leaking in transit.<sup>18</sup> There are specific requirements for shipping aerosols for recycling or disposal.<sup>19</sup> Moreover, aerosols that cannot be prevented from leaking in transit can still be shipped to a recycling or disposal facility if additional requirements are met.<sup>20</sup> Walmart has programs in place to compliantly ship aerosols.

Walmart believes there are sufficient regulatory safeguards and requirements in place to safely manage aerosols that “show evidence of leakage, spillage, or damage that could cause leakage” without having to exclude them from being managed as universal waste. Exclusion of these aerosols from universal waste would result in a final rule that provides little benefit to the regulated community and will result in many aerosol cans continuing to needlessly be incinerated as hazardous waste.

It should be noted that recycling of RCRA hazardous waste is supported by the independent, non-partisan Environmental Law Institute (“ELI”) which, in a March/April 2018 Environmental Forum article “Waste Not, Want Not – An Instruction for Regulatory Reform?”, stated that “. . . the regulatory system that has emerged and prevailed under the statute has always been preoccupied with guaranteeing proper disposal, and this preoccupation has at times pushed deployable secondary material toward end of life rather than recycling and reuse.”<sup>21</sup> The article then highlights what is happening in the retail sector with discarded aerosol cans as a prime example. ELI amplifies this position

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<sup>15</sup> Cal. Health & Safety Code § 25201.16(e),(f)(1)(A); 6 Colo. Code Regs. § 1007-3:273.13(d)(1); N.M. Code R. § 20.4.1.1001(D)(2); Utah Admin. Code r.315-273-13(f)(1),(2) .

<sup>16</sup> *Id.*

<sup>17</sup> 83 Fed.Reg. at 11659.

<sup>18</sup> See 49 C.F.R. Part 173, Subpart B and Subpart E.

<sup>19</sup> 49 C.F.R. §173.306(k)(1) (2017).

<sup>20</sup> *Id.* at §173.306(k)(2).

<sup>21</sup> Attachment 2.

in its white paper “RCRA and Retail: Considering the Fate of Consumer Aerosol Cans.”  
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## **Conclusion**

For the reasons discussed above, Walmart strongly urges EPA to issue a Final Rule that promotes resource conservation and recovery by removing the word “intact” from the definition of an aerosol can and removing the language that prohibits damaged aerosol cans from being managed as universal waste. Leaving such restrictions in the Final Rule will, in effect, promulgate a regulation that provides no relief for the Retail Sector.

Walmart believes that the adoption of its comments would ultimately result in moving the bulk of the retail industry’s largest waste stream from end-of-life incineration to material recovery and reclamation. As discussed in the attached ELI article and white paper, the resource recovery and smart materials management principles and processes envisioned for RCRA would be well-served by allowing the metals, propellant, and even some product from waste aerosol cans to be recovered and reintroduced into commerce. The Proposed Rule, if revised, has the potential to provide the Retail Sector substantial relief from application of regulations that EPA has acknowledged were not designed with retailers in mind while also providing substantial environmental benefit.

Walmart appreciates the opportunity to provide comments to this Proposed Rule and offers to continue to work with EPA, as appropriate, to further the Agency’s understanding of the Retail Sector’s challenge with the intersection of RCRA and consumer products.

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<sup>22</sup> Attachment 1.