

Asbestos Reporting and Regulation to be a TSCA Focal Point for EPA in 2021

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A flurry of asbestos-related activity in the last weeks of 2020 will require the United States Environmental Protection Agency (EPA) to devote significant regulatory attention to asbestos in 2021. The incoming Biden Administration will need to address these Toxic Substances Control Act (TSCA) developments, and the scope of that response will determine whether regulatory implications extend beyond asbestos to other chemical substances.

Background

Since 2016, the EPA has analyzed asbestos under the TSCA risk evaluation process. Legal challenges have plagued the process, with several groups accusing EPA of conducting too narrow of an analysis based on too little information. Those challenges, coupled with significant administrative delays wrought by COVID-19, left the scope and status of the asbestos risk evaluation—which had been due in June 2020—outstanding for most of 2020.

Though EPA released the first part of its final risk evaluation on December 30, 2020, a federal district court decision issued just 8 days earlier could eventually force EPA to go back to the drawing board. EPA will need to decide whether to appeal the ruling, a decision the Biden EPA would need to support given that it is unlikely the Trump EPA could brief the appeal in the Ninth Circuit Court of Appeals before the administration change.

Unless successfully appealed, the district court's decision will require EPA to amend its TSCA Chemical Data Reporting (CDR) Rule to require additional reporting from companies using asbestos and raw materials that may be contaminated with asbestos, such as talc. The data gathered through the additional reporting may require EPA to revise its conclusions or conduct yet another evaluation. At the same time, EPA must move forward in 2021 with developing regulations addressing the “unreasonable risks” it has already identified for current uses of chrysotile asbestos and begin its risk

evaluation for “legacy” uses of asbestos (those that are no longer “ongoing”).

EPA’s attention on asbestos in 2021 could have significant consequences for companies, particularly those in the cosmetic industry and other industries utilizing talc and other raw materials that may be contaminated with asbestos.

EPA Ordered to Close CDR Rule “Loopholes”

On December 22, 2020, a Northern District of California judge ordered EPA to close asbestos reporting “loopholes” in its CDR Rule to gather additional information about current uses of asbestos. In its [order](#), the Court held that EPA “arbitrarily and capriciously” denied two TSCA Section 21 petitions filed by NGOs and a coalition of states seeking asbestos-related amendments to the Rule, leaving the Agency with insufficient CDR reporting information on which to base its TSCA asbestos risk evaluation.

Specifically, the Court ordered EPA to make significant changes to its CDR Rule with respect to asbestos reporting to close the following “loopholes”:

- **Exemption for “asbestos-containing articles.”** The Court observed that there was significant evidence that EPA had omitted many potential uses of asbestos from the scope of its TSCA risk evaluation, and that the uses EPA did analyze “appear to be only the tip of the iceberg.” In the Court’s view, EPA will have more fulsome information about potential uses of asbestos for its risk evaluation if “asbestos-containing articles” were removed from the current CDR exemption for substances imported as part of an article.
- **Exemption for “impurities.”** Under the current CDR Rule, the manufacture or import of asbestos as an impurity—a substance unintentionally present with another substance, mixture, or article and which has no separate commercial purpose—is exempt from reporting. EPA had argued that reporting of asbestos impurities was impractical and would impose a testing requirement on companies. The Court rejected EPA’s position, observing that companies might have access to third party testing information or could use “their considerable resources” to obtain testing for asbestos impurities.
- **Exemption for “processors.”** Plaintiffs had asked EPA to expand the scope of asbestos CDR reporting to “processors” of asbestos-containing articles because many importers would be unable to provide use and exposure information in the sole possession of the companies using those products. The Court agreed that processors should be required to report, noting that “importers will often be relatively uninformed about downstream uses of their products.”

Asbestos Risk Evaluation

Just over one week after the decision in the CDR litigation, on December 30, 2020, EPA released Part 1 of its [final asbestos risk evaluation](#) under Section 6 of TSCA. Part 1 evaluated only ongoing uses of chrysotile asbestos. EPA’s final conclusions remained unchanged from its draft conclusions, with the Agency determining that the following “conditions of use” pose an unreasonable risk to human health:

Occupational Uses

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- Processing and industrial use of chrysotile asbestos diaphragms in the chlor-alkali industry
 - Processing and industrial use of chrysotile asbestos-containing sheet gaskets in chemical production
 - Industrial use and disposal of chrysotile asbestos-containing brake blocks in the oil industry
 - Commercial use and disposal of aftermarket automotive chrysotile asbestos-containing brakes/linings
 - Commercial use and disposal of other chrysotile asbestos-containing vehicle friction products
 - Commercial use and disposal of other asbestos-containing gaskets

Consumer Uses

- Aftermarket automotive chrysotile asbestos-containing brakes/linings
- Other chrysotile asbestos-containing gaskets

EPA also concluded that the following conditions of use do not pose an unreasonable risk to human health:

- Import of chrysotile asbestos and chrysotile asbestos-containing products
- Distribution of chrysotile asbestos-containing products
- Use of chrysotile asbestos-containing brakes for a specialized, large NASA transport plane
- Disposal of chrysotile asbestos-containing sheet gaskets processed and/or used in the industrial setting and asbestos-containing brakes for a specialized, large NASA transport plane

TSCA requires EPA to promulgate final risk management rules addressing the unreasonable risks it has identified by December 30, 2022, unless it successfully invokes an extension under TSCA.

EPA also announced that it expects to release the scoping document for Part 2 of its asbestos risk evaluation in mid-2021. Part 2 will address “legacy” uses of asbestos and associated disposals (i.e., those that are no longer “ongoing,” such as asbestos insulation). Although EPA initially chose to exclude these uses from its analysis, the Ninth Circuit Court of Appeals ordered EPA to include them following a successful legal challenge lodged by consumer groups in *Safer Chemicals Healthy Families, et al. v. EPA*, No. 17-72260 (9th Cir. Nov. 14, 2019).

Considerations for Companies

Companies—particularly those in the cosmetic industry and other industries using talc or other raw

materials which can be contaminated with low levels of asbestos—should pay close attention to EPA's activities in 2021.

First, EPA's amendments to the CDR Rule will likely require more companies to report than the current rule. Due to the long-standing CDR exemptions for processors, articles, and impurities, many of these companies may also be new to the reporting process, the complexity of which can cause significant compliance headaches even for those well versed with the program. How EPA approaches expanding the CDR Rule for asbestos should also be monitored for insights into ways the Agency could expand the program for other “chemicals of concern” in future CDR reporting cycles.

Second, EPA may choose to include potential risks from asbestos present as an “impurity” in other substances or articles in Part 2 of its asbestos risk evaluation. Although EPA has not yet signaled that it will do so—instead only committing to an analysis of legacy uses and associated disposals as ordered by the Ninth Circuit—it has the flexibility to expand the scope of the risk evaluation if it chooses. As the CDR litigation and current asbestos personal injury litigation trends make clear, consumer groups and plaintiffs are focused on products that contain asbestos-contaminated talc and are likely to pressure EPA to analyze those uses and regulate (or ban) them. If EPA chooses to exclude de minimis and impurity uses from Part 2 of its risk evaluation, it may face further legal challenges from interested groups.

Finally, the Northern District of California's ruling in the CDR litigation noted that EPA's TSCA risk evaluation for asbestos suffered from information gaps created by the “loopholes” in the CDR Rule. Even if EPA amends the CDR Rule as directed by the Court, reporting data will not be immediately available. Whether EPA will revisit either Part 1 or Part 2 of its asbestos risk evaluation when that data is available—or whether it will be compelled to do so by consumer group challenges—remains to be seen.

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