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EPA Proposes Ban of Chrysotile Asbestos in Historic TSCA Risk Management Rule

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On April 12, 2022, the United States Environmental Protection Agency (EPA) announced a sweeping proposed ban on ongoing uses of chrysotile asbestos, the only form of asbestos known to still be imported into the United States. EPA's proposed ban is the first risk management rule issued under the Toxic Substances Control Act (TSCA) since the 2016 Lautenberg Act overhauled the statute to give EPA new powers to review and regulate existing chemicals.

Given the potential precedent set by the breadth of the proposed ban, companies who manufacture, import, process, or distribute any of the chemicals EPA is analyzing under TSCA (or products containing those chemicals) should pay close attention as EPA moves to finalize its asbestos risk management rule. Companies may be particularly interested in the approach EPA has taken in developing the regulatory alternative provided in the proposed rule. EPA has developed an Existing Chemicals Exposure Limit (ECEL) for occupational use of chrysotile asbestos that is significantly lower than the existing Permissible Exposure Limit (PEL) provided by the Occupational Safety and Health Administration.

The proposed ban would prohibit the manufacture (including import), processing, distribution in commerce, and commercial use of:

- Chrysotile asbestos used in bulk or in asbestos diaphragms in the chlor-alkali industry beginning two years after the effective date of the final rule;
- Chrysotile asbestos-containing sheet gaskets in chemical production beginning two years after the effective date of the final rule;

- Chrysotile asbestos-containing brake blocks used in the oil industry;
- Chrysotile asbestos-containing aftermarket automotive brakes/linings and other friction products, including for consumer use; and
- Chrysotile asbestos-containing gaskets, including for consumer use.

The ban would be enforceable 180 days following the effective date of the final rule for all uses except those relevant to the chlor-alkali and chemical production industries. The ban for those uses will not be enforced until two years following the effective date of the final rule. EPA's proposed ban would also impose disposal and recordkeeping requirements on regulated parties.

EPA's proposed ban aligns with the "whole chemical" approach recently announced by the Biden EPA. TSCA requires that EPA put in place mitigations "only to the extent necessary to address the identified risks." In its asbestos risk evaluation, EPA determined that 16 of the 32 uses of chrysotile asbestos posed unreasonable risk to human health. The remaining uses—including importation and distribution of products—were found not to pose an unreasonable risk to human health. However, EPA is also proposing to ban the importation and distribution of asbestos despite not making an explicit finding of unreasonable risk. Notably, EPA does provide an exception for a specialized NASA transport plane based on the Agency's findings of "no unreasonable risk" in the final risk evaluation. We have previously discussed whether EPA's approach to TSCA rulemaking comports with the statute or aligns with public health principles.

EPA's broad ban of chrysotile asbestos—even though it found that half of the uses it analyzed did not pose an unreasonable risk—signals that EPA will be aggressive in its continued efforts to regulate asbestos. EPA is also currently conducting "Part 2" of its asbestos risk evaluation. In Part 2, EPA plans to analyze "legacy" uses of chrysotile asbestos (i.e., uses that are not ongoing, but may still be present in commerce, such as asbestos-containing insulation installed in already-built homes), uses associated with the other five asbestos fiber types (actinolite, amosite, anthophyllite, crocidolite, and tremolite), and the potential presence of asbestos in talc and talc-containing products. EPA is currently evaluating public comments on the proposed scope for the risk evaluation, and the actual final risk evaluation for Part 2 is due by December 1, 2024.

Is EPA Trading One "Problem" for Another?

Notably, the proposed rule states that the combined quantified national benefits of avoided cancer (including lung cancer, mesothelioma, ovarian cancer, and laryngeal cancer) is $1,200- $3,100 per year, depending on the discount rate used. On the cost side of the equation, EPA finds that replacing the asbestos diaphragms that are used for water treatment will require an incremental investment of $1.8 billion across all nine facilities that use these diaphragms today.

While EPA also acknowledges unquantified benefits, the low quantified benefits are likely due to the fact that use of asbestos and products containing asbestos is rare and has largely been phased out in the United States. EPA estimates exposures of workers, occupational non-users, and consumers to be under 900 people, in total.

But, while EPA's focus in conducting its cost-benefit analysis was on asbestos, it has acknowledged that many companies may turn to per- and polyfluoroalkyl substances (PFAS) to replace asbestos once the ban becomes effective. Asbestos diaphragms are used to produce chlorine and caustic

soda that are necessary for water treatment. EPA has noted that replacing these asbestos diaphragms could require an increased amount of PFAS compounds. EPA has been closely studying PFAS compounds and has taken a number of actions in recent years aimed at restricting and regulating their use. The proposed rule notes that there are “significant uncertainties” regarding the extent to which the proposed regulation will lead to increased usage and release of PFAS.

Despite these uncertainties, EPA still believes the benefits of banning chrysotile asbestos outweigh the costs, both quantified and unquantified, and despite the known alternatives.

Next Steps

Comments on the proposed rule, including comments on the alternative, are due to EPA on June 13.

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