

EPA Proposes TSCA Reporting and Recordkeeping Requirements for Asbestos

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Government Regulation

On May 6, 2022, the U.S. Environmental Protection Agency (EPA) proposed reporting and recordkeeping requirements for asbestos under Section 8(a) of the Toxic Substances Control Act (TSCA). [87 Fed. Reg. 27060](#). EPA proposes to require certain persons that manufactured (including imported) or processed asbestos and asbestos-containing articles (including as an impurity) in the four years prior to the date of publication of the final rule to report electronically certain exposure-related information. The proposed rule would result in a one-time reporting obligation. EPA “emphasizes that this proposed requirement would include asbestos that is a component of a mixture.” According to the notice, the information sought includes quantities of asbestos (including asbestos that is a component of a mixture) and asbestos-containing articles that were manufactured (including imported) or processed, types of use, and employee data. EPA and other federal agencies will use reported information in considering potential future actions, including risk evaluation and risk management activities. EPA requests public comment on all aspects of the proposed rule and also has identified items of particular interest for public input. Comments are due **July 5, 2022**.

Action EPA Is Taking

EPA proposes to require asbestos manufacturers (including importers) and processors to report to EPA certain information known to or reasonably ascertainable by those entities. EPA states that for this action, the term “asbestos” includes various forms of asbestos, including Libby Amphibole asbestos. The following is a brief list of the primary data requirements being proposed:

- **Asbestos Domestic Manufacturers (Asbestos Mine and Mill):** The provisions in the proposed rule would require asbestos domestic manufacturers to provide the quantity manufactured per asbestos type, use, and employee exposure information to EPA. This would include situations in which asbestos is being mined or milled as an intentional or non-intentional impurity, such as in vermiculite and talc.
- **Asbestos Importers:** The provisions in the proposed rule would require importers of asbestos to provide the quantity imported per asbestos type, use, and employee exposure information. This includes importers of mixtures containing asbestos, articles containing asbestos components, and impurities (in articles, bulk materials, or mixtures, such as in talc and vermiculite).

- **Asbestos Processors:** The provisions of the proposed rule would require processors of asbestos (including processors of mixtures or articles) to provide the quantity processed per asbestos type, use, and employee exposure information. This includes both primary processors and secondary processors of asbestos. This would include situations in which asbestos is appearing as an intentional or non-intentional impurity, such as in vermiculite and talc.

Chemical Substances that Would Be Reportable under the Rule

EPA proposes to require the reporting of information on specific asbestos forms, or if specific information is not known or reasonably ascertainable, reporting on “asbestos” as it is more generally listed on the TSCA Inventory. EPA also proposes to require the reporting of information related to asbestos as it is manufactured (including imported) or processed in bulk, as a component of a mixture, in an article, or as an impurity in bulk materials or products.

Asbestos Forms

EPA proposes to obtain manufacturing (including importing) and processing information associated with the following different asbestos forms, and therefore is proposing to require that reporting be completed for each of the forms, to the extent that the information is known or reasonably ascertainable. If the specific asbestos type is unknown, a submitter would provide information under the general asbestos form (Chemical Abstracts Service Registry Number (CAS RN) 1332-21-4).

Asbestos -- CAS RN 1332-21-4	Amosite -- CAS RN 2172-73-5
Chrysotile -- CAS RN 132207-32-0	Anthophyllite -- CAS RN 77536-67-5
Crocidolite -- CAS RN 12001-28-4	Tremolite -- CAS RN 77536-68-6
Actinolite -- CAS RN 77536-66-4	Libby Amphibole Asbestos -- CAS RN not applicable (mainly consisting of tremolite [CAS RN 77536-68-6], winchite [CAS RN 12425-92-2], and richterite [CAS RN 17068-76-7])

Asbestos as an Impurity

EPA states that “impurity” means a chemical substance that is unintentionally present with another chemical substance, citing 40 C.F.R. Section 704.3. According to EPA, asbestos may occur naturally as an impurity in other products such as talc, vermiculite, and potentially other substances. These products are distributed and used in commerce in the United States. If all other reporting conditions are met, these products would be subject to reporting under this rule. EPA proposes to collect data on asbestos as an impurity because EPA may lack data on the extent to which asbestos as an impurity occurs in products under TSCA jurisdiction that are currently being manufactured (including imported) or processed. EPA notes that data on asbestos as an impurity could better inform the Part 2 asbestos risk evaluation where EPA will determine and then evaluate the relevant conditions of use of asbestos in talc.

Articles Containing Asbestos

The rule would require reporting on articles containing asbestos (including as an impurity). EPA notes that an “article” is defined in 40 C.F.R. Section 704.3 as “a manufactured item (1) which is formed to a specific shape or design during manufacture, (2) which has end-use function(s) dependent in whole or in part upon its shape or design during end use, and (3) which has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article, and that result from a chemical reaction that occurs upon end use of other chemical substances, mixtures, or articles; except that fluids and particles are not considered articles regardless of shape or design.” EPA proposes to collect more data on imported articles containing asbestos. According to EPA, these data could inform Part 2 of the TSCA Risk Evaluation for Asbestos where EPA will determine and then evaluate the relevant conditions of use of such articles containing asbestos. Articles included in Part 1 of the TSCA Risk Evaluation for Asbestos included brake blocks for use in the oil industry, rubber sheets for gaskets used to create a chemical-containment seal in the production of titanium dioxide, certain other types of preformed gaskets, and some vehicle friction products (Ref. 18); EPA states that it “is interested in identifying if there are other articles or if there is information about specific forms of asbestos in these articles.”

Asbestos that Is a Component of a Mixture

EPA states that under TSCA Section 3(10), the term “mixture” means “any combination of two or more chemical substances if the combination does not occur in nature and is not, in whole or in part, the result of a chemical reaction; except that such term does include any combination which occurs, in whole or in part, as a result of a chemical reaction if none of the chemical substances comprising the combination is a new chemical substance and if the combination could have been manufactured (including imported) for commercial purposes without a chemical reaction at the time the chemical substances comprising the combination were combined.” EPA proposes to collect data on asbestos in circumstances where it is a component of a mixture to inform Part 2 of the TSCA Risk Evaluation for Asbestos. In the Part 2 Evaluation, EPA will determine the relevant conditions of use of asbestos in talc; EPA will use the results to evaluate asbestos exposures and associated risks.

Reporting Requirements for Small Businesses

EPA notes that although TSCA Section 8(a)(1) provides an exemption for small manufacturers (including importers) and processors, TSCA Section 8(a)(3) enables EPA to require small manufacturers (including importers) and processors to report pursuant to TSCA Section 8(a) with respect to a chemical substance that is the subject of a rule proposed or promulgated under TSCA Section 4, 5(b)(4), or 6, an order in effect under TSCA Section 4 or 5(e), a consent agreement under TSCA Section 4, or relief that has been granted under a civil action under TSCA Section 5 or 7. According to EPA, six of the asbestos types subject to the proposed rule (chrysotile, crocidolite, amosite, anthophyllite, tremolite, and actinolite) are subject to a TSCA Section 6 rule under the Asbestos Ban and Phaseout rule of 1989, and therefore EPA is proposing that these forms of asbestos are not eligible for a small manufacturer (including importer) or processor exemption. EPA states that Libby Amphibole asbestos is not subject to an applicable proposed or promulgated rule, order, or consent agreement, and is not the subject of relief that has been granted under a civil action under TSCA Section 5 or 7. Therefore, EPA proposes that Libby Amphibole asbestos continue to be eligible for such an exemption.

EPA’s experience with the TSCA Risk Evaluation for Asbestos Part 1: Chrysotile Asbestos indicates that small businesses are associated with certain identified conditions of use associated with asbestos. Because EPA has much less information on the activities of small businesses, it is

concerned that certain conditions of use for which it lacks detailed information may be conducted largely or entirely by small businesses. EPA states that it believes that exempting all small businesses from reporting may exclude most or all of the reporting for some conditions of use, severely hindering EPA's risk evaluation or risk management activities. As a result, EPA is proposing that small businesses -- small manufacturers (including importers) and processors of asbestos and asbestos mixtures (other than Libby Amphibole asbestos) -- will need to maintain records and report under this action.

At the time of the proposed rule, Libby Amphibole asbestos is not the subject of any of the activities described in TSCA Section 8(a)(3) and therefore manufacturers (including importers) and processors of that substance may be eligible for a small business exemption.

The Proposed Reporting Standard

EPA proposes to use the reporting standard used for certain other TSCA Section 8(a) reporting requirements, including Chemical Data Reporting (CDR). EPA states that this standard requires that manufacturers (including importers) and processors report information to the extent that the information is known to or reasonably ascertainable by the manufacturer (including importer) or processor. "Known to or reasonably ascertainable by" includes "all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know." According to EPA, this reporting standard requires reporting entities to evaluate their current level of knowledge of their manufactured products (including imports) or processed products, as well as evaluate whether there is additional information that a reasonable person, similarly situated, would be expected to know, possess, or control. This standard carries with it an exercise of due diligence, and EPA notes that the information-gathering activities that may be necessary for manufacturers (including importers) and processors to achieve this reporting standard may vary from case-to-case.

Under this standard, submitters conduct a reasonable inquiry within the full scope of their organization (not just the information known to managerial or supervisory employees). This may also entail inquiries outside the organization to fill gaps in the submitter's knowledge. According to EPA, examples of the types of information that are considered to be in a manufacturer's (including importer's) or processor's possession or control, or that a reasonable person similarly situated might be expected to possess, control, or know include: files maintained by the manufacturer (including importer) or processor such as marketing studies, sales reports, or customer surveys; information contained in standard references showing use information or concentrations of chemical substances in mixtures, such as a safety data sheet (SDS) or a supplier notification; and information from CAS or from Dun & Bradstreet (D-U-N-S). It may also include knowledge gained through discussions, conferences, and technical publications.

EPA states that it "acknowledges that it is possible that a manufacturer (including importer) or processor, particularly an importer of articles containing asbestos (including as an impurity), may not have knowledge that they have imported asbestos and thus not report under this rule, even after they have conducted their due diligence under this reporting standard as described previously." According to EPA, such an importer should document its activities to support any claims it might need to make related to due diligence. In the event that a manufacturer (including importer) or processor does not have actual data (e.g., measurements or monitoring data) to report to EPA, the manufacturer (including importer) or processor would be required to make "reasonable estimates" of such information. "Reasonable estimates" may rely, for example, on approaches such as mass balance calculations, emissions factors, or best engineering judgment.

Timing of Reporting

The proposed rule would result in a one-time reporting obligation. EPA proposes reporting for persons who have manufactured (including imported) or processed asbestos at any time during the four complete calendar years prior to the effective date of the final rule. EPA anticipates that the four calendar years would be 2019 to 2022. EPA states that these entities would report during a three-month submission period that EPA proposes would begin six months following the effective date of the final rule. Therefore, according to EPA, manufacturers (including importers) and processors would have up to nine months following the effective date of the final rule to collect and submit all required information to EPA.

EPA states that it believes that providing six months between the effective date of the rule and the start of the submission period allows sufficient time for both EPA to prepare the final reporting tool and for submitters to familiarize themselves with the rule and compile the required information. Since this TSCA Section 8(a) reporting rule would result in the collection of similar information to that collected under CDR, EPA anticipates some submitters would be familiar with the types of information requested and how to report. EPA “believes that three months would be adequate time for submissions, in addition to the six-month period between the effective date and the start of the submission period.” EPA requests public comment on the submission period start date and duration, as well as alternative compliance timelines for small businesses.

Reporting of Information

EPA proposes different reporting requirements based on a two-part knowledge-based reporting approach to obtain as complete a picture as possible of the manufacturing (including importing), processing, and use of asbestos. EPA notes that because asbestos can be included in small quantities in some products, it expects that using a threshold concentration for reporting would eliminate much of the information that may be useful to support EPA’s TSCA risk evaluation and risk management efforts. Therefore, EPA proposes that reporting would be required whenever the presence of asbestos is known or reasonably ascertainable. EPA states that it is also aware that there may be circumstances under which a manufacturer (including importer) or processor is unable to provide a reliable quantity of the asbestos in their products because the percentage of asbestos in their products is not known or reasonably ascertainable by them. For those situations, EPA proposes a short form (Form A) for attestation purposes. For other situations, submitters that can determine or estimate the quantity would provide more detailed information in the full form (Form B). EPA anticipates that most submitters would know or be able to estimate the quantity of the asbestos and would complete the full form.

Request for Comments

EPA requests comment on the content of the proposed rule and the Economic Analysis prepared in support of it. In addition, EPA provides a list of issues on which it is specifically requesting public comment. EPA encourages all interested persons to submit comments on these issues, and to identify any other relevant issues as well. EPA requests that commenters making specific recommendations include supporting documentation where appropriate. The list of issues EPA has identified include:

- EPA solicits comment on the total number of manufactures (including importers) and processors that will be impacted by the promulgation of the rule, and on the related burden

and costs for reporting. In addition, due to the lack of information on the extent to which asbestos occurs as an impurity, EPA states that it was unable to determine the number of potential manufacturers (including importers) or processors of asbestos as an impurity that would report under this rule. EPA requests comment on the number of manufacturers (including importers) and processors that may be subject to the proposed rule due to the presence of impurities in their products, and on the related burden and cost for reporting.

- Because there is no existing small processors definition that would be applicable under TSCA Section 8(a), EPA requests comment on how best to provide guidance for small processors of Libby Amphibole asbestos.
- EPA seeks comment on what additional guidance, if any, might be useful for helping entities, including small businesses, understand the reporting standard, as well as how the reporting standard would apply to impurities. EPA requests public comment on the submission start date and duration, including for small businesses.
- EPA requests comment on whether there should be a threshold for reporting using Form B and, if so, whether the threshold should be concentration-based (e.g., a certain percentage) or annual volume-based. In addition, EPA requests comment on whether any submitter under the threshold should alternatively report using Form A. According to EPA, having a threshold for Form B may decrease burden on certain submitters while still allowing EPA to obtain information on all bulk materials, mixtures, and articles with known asbestos content. The substances subject to the rule can occur naturally as impurities in other products that may be handled in very large volumes, such as talc, vermiculite, and potentially other substances. EPA notes that a *de minimis* concentration could reduce the compliance determination and reporting burdens. Comments suggesting threshold levels should include the justification for that particular level.
- EPA requests comment on whether there should be other end product types listed in Table 4 in proposed 40 C.F.R. Section 704.180(e)(4)(iv)(B). In addition, EPA is interested in whether the units of measure listed with the product types are appropriate.
- EPA identifies additional data elements related to employee data, wastewater discharge and waste disposal, air emissions data, and customer sites data considered for this proposed rule and solicits public comment on whether any of the additional data elements should be included in the action. While EPA believes the proposed data elements provide sufficient information for use by EPA and other federal agencies in potential actions involving asbestos, EPA seeks comment on whether any additional data elements should be included in this action.
- EPA seeks comment on what additional guidance, if any, might be useful.

Commentary

As EPA did in its proposed per- and polyfluoroalkyl substances (PFAS) Section 8(a) reporting rule, EPA is narrowing the exemptions available. In this case, EPA is voiding the article exemption (40 C.F.R. § 711.10(b)), the impurity exemption (40 C.F.R. § 711.10(c) by reference to 40 C.F.R. § 720.30(h)(1)), and the naturally occurring substance exemption (40 C.F.R. § 711.6(a)(3)) to CDR reporting. As proposed, the research and development (R&D) exemption would be available. As EPA

argues, the existing Section 6 rule on asbestos already voids the small business exemption (40 C.F.R. § 711.9).

While seeking information on asbestos that may be present in articles or may be present as an impurity, EPA must recognize that seeking the information retrospectively will likely yield little different information than if EPA were to seek the information prospectively.

EPA oddly asserts that this rule will garner information that has not been reported previously under CDR, especially from entities that have not had to report, and that reporters will be familiar with the CDR reporting tool. Bergeson & Campbell, P.C. (B&C[®]) expects that there will be many potential reporters, at least hundreds, if not thousands, that have never had to report because the products they manufacture, import, or process have been exempt, because of either the article or the impurity exemption. These new reporters will not be familiar with the CDR reporting tool or the CDR policies and guidance. Stakeholders, including individual companies, trade associations, and other non-governmental organizations (NGO), and EPA will address these issues to ensure non-traditional reporters are engaged. Guidance from EPA will be critically important: What is EPA's expectation of the level of due diligence to document that an importer (of an article or a substance) has met its obligation to determine if asbestos is present in a product or article and document that reporting is not required or if reporting is required that a particular data element is not known or reasonably ascertainable?

Stakeholders are strongly urged to comment on whether a *de minimis* threshold (either as a quantity or a percentage, or both) is appropriate, either for neat asbestos, asbestos as part of a mixture, or asbestos as part of an article. For example, if a company imports 100 grams of asbestos, should that be a reportable event? Or if an importer knows that asbestos is not present above 100 parts per million in, for example, talc, but does not know if asbestos is or is not present below that threshold, should that import be reported? Similarly, what extent of knowledge is expected for imported articles? Suppliers may not be willing to certify that no asbestos is present at any level, especially in complex goods. Should an importer that receives that response report the presence/absence of asbestos as not known or reasonably ascertainable or not report at all?

We do not question that EPA has a legitimate need for information related to manufacturing, import, or processing of asbestos and asbestos-containing products and articles. We hope that stakeholders comment on the balance between the burden that EPA imposes under the proposal on potential reporters and the likelihood of such burden garnering meaningful information that will actually contribute to EPA's risk evaluation and risk management. We hear stakeholders state that "EPA needs to know what is in products." While true, it is reasonable to take the position that potential reporters "should have known" what was in products when there was no requirement to develop and document such knowledge until EPA proposed this rule. Now EPA asks for such potential reporters to go back in time and see what information might have been available, and offers the option to report that the information was not known or reasonably ascertainable without acknowledging that the significant burden is not filling out the form, it is researching the information that might have to be included in the form. Imagine if EPA imposed this burden on individuals -- that each individual would have to search records of each product purchased online in a four-year period to see if there was any information provided by the supplier whether asbestos was present or not and, if present, at what level. The search would likely turn up little that is meaningful, so there would be little to report, but it is the search that would be the greatest burden.

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