



## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

### **Comments of Asbestos Disease Awareness Organization on Proposed Reporting and Recordkeeping Requirements for Asbestos under Section 8 of the Toxic Substances Control Act**

**EPA-HQ-OPPT-2021-0357  
87 Federal Register 27060  
(May 6, 2022)**

The [Asbestos Disease Awareness Organization](#) (“ADAO”) is pleased to comment on the Environmental Protection Agency (“EPA”) proposed reporting rule for asbestos under section 8 of the Toxic Substances Control Act (“TSCA”).

Launched in 2004, ADAO is now the largest independent non-profit organization in the U.S. dedicated to eliminating asbestos-caused diseases. ADAO is far more than an asbestos victims’ organization; our cutting-edge research, ongoing product testing, and educational efforts have enabled us to be a leading stakeholder in prevention policy. We have been a strong and outspoken advocate for a comprehensive US ban on asbestos, championing enactment of the Alan Reinstein Ban Asbestos Now Act (“ARBAN”), which would expeditiously eliminate the importation and use of raw asbestos and asbestos-containing products.

#### **EXECUTIVE SUMMARY**

Asbestos is likely the most hazardous substance in commercial use since the industrial revolution and is responsible for millions of deaths worldwide. It causes lung cancer, mesothelioma, other cancers and debilitating non-cancer diseases like asbestosis. Asbestos is universally recognized to have no safe level of exposure and US deaths linked to asbestos total nearly 40,000 per year despite large reductions in current asbestos use.

A longstanding ADAO priority has been comprehensive “right to know” reporting on asbestos importation, use and exposure under TSCA. In 1982, EPA finalized a rule entitled “Asbestos Reporting Requirements” under section 8(a)(1) of TSCA.<sup>1</sup> Six years later, Congress augmented this rule by enacting the Asbestos Information Act of 1988, imposing a one-time requirement for current and former manufacturers and processors to report asbestos-containing products to EPA.<sup>2</sup>

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<sup>1</sup> 47 Federal Register 33198 (August 30, 1982).

<sup>2</sup> Pub. L. 100-577. To implement the law, EPA published a notice on April 18, 1989 (54 Fed. Reg. 15622) establishing a process and schedule for reporting information required by the Act. A subsequent notice informed submitters that EPA would not accept confidentiality claims for reported information. 54 Fed. Reg. 38736 (Sept. 20,

The extensive information submitted under these reporting initiatives played a major role in developing EPA's 1989 asbestos ban rule, which was unfortunately overturned in a 1991 court decision.

After TSCA was amended in 2016, EPA again prioritized asbestos for risk evaluation and risk management. By this time, however, no reporting rule was in place that applied to asbestos, and the Agency failed to promulgate asbestos-specific reporting requirements as it had in 1982. This resulted in serious gaps in EPA's knowledge of asbestos use and exposure. The Agency itself acknowledged these gaps in the problem formulation for its Part 1 risk evaluation and the evaluation itself and they were of concern to the EPA Scientific Advisory Committee on Chemicals ("SACC").

In 2018, ADAO petitioned EPA under TSCA section 21 to address these gaps by requiring reporting on asbestos under section 8(a). Denial of the petition in 2019 resulted in lawsuits by ADAO, partner organizations, and several states. In late 2020, Judge Edward Chen of the Northern District of California granted summary judgment to the plaintiffs and ordered EPA to require reporting under section 8(a) to address the deficiencies in its asbestos-knowledge base.<sup>3</sup> EPA's obligations under the decision were spelled out in a June 2021 settlement agreement with ADAO that set a schedule for rulemaking under TSCA section 8(a) and defined the scope of the proposed rule.

The proposed rule fulfills EPA's responsibilities under Judge Chen's decision and the settlement agreement. According to the proposal preamble, it "has been nearly 40 years since the 1982 rule was implemented, and EPA needs an updated data collection to better understand the universe of asbestos types in commerce and the specific entities presently manufacturing (including importing) and processing asbestos, including asbestos-containing products." 87 Fed. Reg. at 27063.

The preamble emphasizes that "[u]nderstanding the health risks of asbestos and protecting the public, including potentially exposed or susceptible subpopulation, from these risks is a priority for EPA." 87 Fed. Reg. at 27065. It explains that reporting will "provide EPA with baseline information needed to assess whether certain 'conditions of use' of asbestos pose an unreasonable risk to health or the environment under TSCA section 6(b)" and will also be "useful in the risk management stage because EPA would consider potential risk management actions taking into account relevant information obtained through this rulemaking." *Id.*

ADAO strongly supports the goals and many elements of EPA's proposal. We urge EPA to reject any weakening of the proposal that would undermine the benefits of reporting and retreat

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1989). EPA collected extensive information under the law, which it released to the public on February 13, 1990. 55 Fed. Reg. 5144.

<sup>3</sup> *Asbestos Disease Awareness Org. v. Wheeler*, 508 F. Supp. 3d 707 (N.D. Cal. 2020).

from Judge Chen’s decision and the settlement agreement between EPA and ADAO. We also recommend a number of strengthening changes in the EPA proposal to assure that it obtains all the information it needs for sound risk evaluation and risk management and to fully inform the public about the risks of asbestos.

As ADAO emphasizes in its comments:

- Under Judge Chen’s decision and the EPA-ADAO settlement, the Agency must require reporting on:
  - Importation and use of raw asbestos
  - Importation and use of asbestos-containing mixtures and articles
  - Processing of raw asbestos and articles and mixtures
  - Presence of asbestos contaminants in other articles, substances and mixtures (including talc)

This information will enable EPA to fill critical gaps in its Part I risk evaluation and make risk determinations in Part 2 for conditions of use (“COUs”) and pathways of exposure of the six asbestos fibers that it failed to address in Part 1.

- Critical gaps in Part 1 that must be addressed in the reporting rule include:
  - A full understanding of all chrysotile-containing articles and mixtures imported into the US, how they are used and processed, and their pathways of exposure
  - The presence of asbestos contaminants in mixtures and articles, including talc-based consumer and industrial products subject to regulation under TSCA
  - COUs and related pathways of exposure for the five asbestos fiber types that were excluded from Part 1
  - COUs for the hazardous Libby Amphibole asbestos which caused widespread harm to the population of Libby, Montana and workers producing vermiculite insulation
- EPA should not weaken the rule by exempting articles and mixtures containing *de minimis* levels of asbestos. There is no scientific, health-based justification for setting a concentration or volume-based threshold below which the presence of asbestos in a mixture or article would be presumed “safe” and too insignificant to warrant evaluation under TSCA.
- While submitters who cannot quantify the amount of asbestos in their products may be unable to provide many of the Form B data elements, we recommend that EPA develop only one reporting form that calls for all the information that the Agency needs, but expressly recognizes that information which is not known or reasonably ascertainable need not be reported. A single reporting form would be simpler and more straightforward than the proposed tiered approach and avoid confusion about when the different forms are required.
- The draft Form B in EPA’s proposal calls for reporting the amount of asbestos in the article or mixture, the percent of asbestos present, the type of asbestos, the number of exposed workers at the submitter’s site, the type of processing or use activity, the total annual

production quantity of end products manufactured or processed, the disposition of these products and available test data on their asbestos content.

- These reporting elements are all critical and should be included in the final rule.
  - However, EPA should expand reporting to call for additional information on worker exposure, waste disposal, air emissions and the number and locations of processing and use sites.
  - EPA should also require submitters to report all citations of OSHA violations and submit all records of allegations of significant adverse reactions to health or the environment subject to TSCA section 8(c)
- The lookback period for reporting should be increased to 10 years from the 4 years in the proposed rule. A longer time-horizon for reporting would better capture trends and fluctuations in asbestos-related import activities. This may identify asbestos-containing mixtures and articles that are imported on a recurring but episodic basis and should be subject to risk evaluation and risk management.
  - Instead of one-time reporting, EPA should require submission of reports at twelve month intervals until the completion of the Part 2 risk evaluation and risk management rulemaking under TSCA. This will assure that EPA is not forced to rely on outdated information but has current data on asbestos use and exposure on which to base risk determinations and risk reduction measures during Part 2.
  - Records documenting information reported under the rule should likewise be retained until the completion of Part 2.
  - Many entities subject to reporting will be importers of asbestos-containing mixtures and articles and talc or other mineral-based products contaminated by asbestos. TSCA requires these importers to report all information which is “known” or “reasonably ascertainable.”
    - Under this standard, importers are responsible for reaching out to foreign suppliers both to ascertain whether asbestos is present in the imported product and to request any available test data or other information on the levels of asbestos present.
    - EPA should strongly encourage importers to fulfill this responsibility through a written communication to the supplier seeking confirmation that asbestos is present in the imported mixture or article and copies of available test data **or** a written certification that the imported product does not contain asbestos.
  - EPA’s estimate that only 18 entities will report under the rule is unrealistically low and unjustifiably assumes that ongoing asbestos importation and processing in the US is limited to the six conditions of use addressed in the Part 1 rule.
    - To avoid making this a self-fulfilling prophecy and to assure that the rule achieves its intended goals, EPA must conduct strong and extensive outreach to the regulated community so that importers and processors are aware of their duty to report and the

scope of reporting.

- Reports submitted under EPA’s rule will not only meet the Agency’s data needs under section 6 of TSCA, but will provide essential “right to know” information to communities with potential exposure to asbestos. EPA must strive for maximum public disclosure of asbestos reports consistent with the Confidential Business Information (CBI) protections in section 14 of TSCA.
- Under section 8(a)(3) of TSCA, small manufacturers and processors may be required to report under section 8 on substances, like asbestos, which are subject to risk management restrictions under section 6. EPA should exercise this authority here. EPA cannot fully protect the public unless it has complete information on all conditions of use, including those involving small businesses.
- Since the Part 2 risk evaluation is already underway and must be completed in 2.5 years, obtaining reports is an urgent priority so EPA has sufficient time to review information reported and incorporate it in its analysis of asbestos use and exposure. EPA should accelerate the timetable for reporting so the compliance deadline is four months after the effective date of the rule.

## **I. EPA’s Reporting Proposal Seeks to Remedy Information Collection Deficiencies In EPA Risk Evaluation and Risk Management Activities for Asbestos under the Amended Law**

### **A. Lack of Reporting on Asbestos to Support Risk Evaluation and Risk Management under the New Law**

Based on growing concern about the dangers of asbestos, preventing exposure under TSCA was a top EPA priority in the 1980s. EPA’s efforts culminated in the promulgation of regulations in 1989 banning most uses of asbestos.<sup>4</sup> However, a court decision in 1991 overturned these regulations because EPA had not fully complied with TSCA.<sup>5</sup> As a consequence, mining and importation of asbestos and most uses remained lawful in the US even as asbestos was banned in numerous countries around the world.

The 2016 bi-partisan amendments to TSCA were strongly motivated by EPA’s inability under the existing law to ban asbestos. As a result, Congress removed the statutory barriers to regulation that formed the basis for the 1991 court decision. After the new law took effect, EPA selected asbestos as one of the first 10 substances to undergo risk evaluations. It then issued its Part 1 risk evaluation for chrysotile asbestos on January 4, 2021,<sup>6</sup> initiated its Part 2 evaluation

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<sup>4</sup> 54 Fed. Reg. 29460 (July 12, 1989).

<sup>5</sup> *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5<sup>th</sup> Cir. 1991).

<sup>6</sup> 86 Fed. Reg. 89.

on December 29, 2021,<sup>7</sup> and proposed a Part 1 risk management rule for chrysotile asbestos on April 12, 2022.<sup>8</sup>

## **B. 2018 Petitions for Reporting under Section 21**

Although EPA had issued a TSCA reporting rule to obtain information to support its 1989 asbestos ban, it did not use its reporting authority again when it began to address asbestos under amended TSCA in 2016.

Accordingly, on September 25, 2018, ADAO and five other public health and environmental organizations petitioned EPA to promulgate reporting requirements for asbestos under section 8(a) of TSCA. The petition, based on section 21 of TSCA, was prompted by EPA's admission in its problem formulation for its asbestos risk evaluation that it lacked fundamental information necessary for an informed understanding of asbestos use and exposure. The petitioners asked EPA to require mandatory reporting under TSCA section 8(a) so that it could fully assess and reduce asbestos risks in its upcoming risk evaluation and risk management rulemaking. The goal was to obtain comprehensive information on asbestos manufacture, use and exposure to inform TSCA risk evaluation and management

The petition emphasized that the reporting requirements under TSCA that applied to other substances did not cover asbestos because, as EPA advised a major asbestos importer (Occidental Chemical) on July 28, 2017, asbestos is exempt from reporting under the TSCA Chemical Reporting Rule ("CDR") because it is a "naturally occurring substance." The petition asked EPA to close this reporting loophole by amending and expanding the CDR rule to assure that it captured basic information about the importation and use of asbestos and asbestos-containing products that would inform the asbestos risk evaluation.

On January 31, 2019, a similar petition to require asbestos reporting under section 8(a) of TSCA was filed by 18 Attorneys General ("AGs") representing 17 states and the District of Columbia. The AG petition likewise cited the need for additional information to inform the asbestos risk evaluation.

EPA denied the ADAO petition on December 21, 2018, asserting that it had "conducted extensive research and outreach" and already obtained all the information about asbestos use and exposure it needed for an informed risk evaluation.<sup>9</sup> The Agency denied the state AG petition on similar grounds on April 30, 2019.<sup>10</sup>

On February 19, 2019, ADAO and its co-petitioners filed suit to challenge the petition denial in the United States District Court for the Northern District of California. The AGs also challenged the petition denial and their case and the ADAO case were consolidated.

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<sup>7</sup> 86 Fed. Reg. 74088

<sup>8</sup> 87 Fed. Reg. 21706

<sup>9</sup> 84 Fed. Reg. 3396 (February 12, 2019).

<sup>10</sup> 84 Fed. Reg. 20062 (May 8, 2019).



### C. Draft Part 1 Risk Evaluation and SACC Review

While the case was pending, EPA's [draft risk evaluation](#) for asbestos was released on April 3, 2020. The draft suffered from the same information gaps identified in the ADAO petition and, contrary to the petition denial, expressly acknowledged these gaps. Throughout the draft risk evaluation, EPA admitted that it did not know the quantities of asbestos involved in the conditions of use ("COUs") addressed in the draft evaluation, the companies and number of facilities using asbestos-containing products, the nature of these use operations and the number of workers and consumers exposed.

Thus, the Executive Summary of the draft evaluation noted that:<sup>11</sup>

"Only two workers were identified for stamping sheet gaskets, and two [Titanium Dioxide] manufacturing facilities were identified in the U.S. who use asbestos-containing gaskets. However, EPA is not certain if asbestos-containing sheet gaskets are used in other industries and to what extent. For the other COUs, no estimates of the number of potentially exposed workers were submitted to EPA by industry or its representatives."

Similarly, EPA qualified its risk determinations by acknowledging that:<sup>12</sup>

"while there may be some knowledge about the potential number of workers/consumers in a particular COU, there is a lack of information/details on the market share of asbestos-containing products available to both workers and consumers. This makes it difficult to assess level of both certainty and confidence estimating the potential number of impacted individuals using asbestos for the COUs (except for chlor-alkali) in this draft risk evaluation. For ONUs and bystanders, there is a similar lack of understanding of the potential number of potentially impacted individuals."

Overall, because only EPA received only a "handful" of voluntary submissions from industry, the draft evaluation recognized that "there are many uncertainties with respect to the extent of use, the number of workers and consumers involved and the exposures that might occur from each activity."<sup>13</sup>

The draft evaluation was reviewed by the EPA Science Advisory Committee on Chemicals ("SACC"). The central conclusion in the SACC's [August 28, 2020 report](#) was that: "Overall, EPA's environmental and human health risk evaluation for asbestos was not considered adequate and resulted in low confidence in the conclusions." SACC made numerous recommendations to strengthen the draft evaluation, including that EPA "[a]ctively collect more data on imported products suspected of containing asbestos instead of relying exclusively on voluntary reporting" and "[r]equire reporting of numbers of potentially exposed workers from industrial facilities that process asbestos."

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<sup>11</sup> Draft Risk Evaluation at 22-23.

<sup>12</sup> Id at 203.

<sup>13</sup> Id at 193.

## **D. Judge Chen’s Summary Judgment Order**

On December 22, 2020, Judge Edward Chen (N.D. Cal.) granted summary judgment in favor of ADAO and its co-plaintiffs.<sup>14</sup> He emphasized that, “[d]espite the strong enforcement powers at its disposal and the importance of complete and adequate information, the EPA, in this instance, has declined to collect all reasonably available information concerning the risks posed by asbestos conditions of use. . . . EPA cannot know what information is ‘reasonably ascertainable’ to submitters, and thereby ‘reasonably available’ to EPA, without knowing the full range of potentially available information to be reported.” Judge Chen found that EPA had “little information . . . about the quantities of asbestos-containing products in the U.S. chain of commerce and the overall consumer and occupational exposure for downstream uses of asbestos.” On this basis, he held that the denial of the ADAO and state petitions:

“stands in the face of [EPA’s] significant statutory authority to require that this information be reported . . . and runs contrary to its obligation to collect reasonably available information to inform and facilitate its regulatory obligations under TSCA.”

As he elaborated:

“EPA declined the petition’s request to collect more information about asbestos containing articles even though the petition accurately described how little information EPA has about the quantities of asbestos-containing products in the U.S. chain of commerce and the overall consumer and occupational exposure for downstream uses of asbestos. EPA declined to collect more information about asbestos impurities without seriously analyzing whether companies had access to reasonably ascertainable third-party testing from suppliers. And EPA declined to collect more information about asbestos processors, instead of relying on the type of voluntary reporting that its scientific advisors deem inadequate.”

Judge Chen ordered EPA to require reporting under section 8 of TSCA to “address the information-gathering deficiencies identified herein.”

EPA issued its final Part 1 risk evaluation (“FRE”) for asbestos on January 4, 2021. The FRE did not remedy the information gaps demonstrated in the ADAO and state petitions, the SACC report and Judge Chen’s summary judgment order.

## **II. Two Judicial Settlements Between EPA and ADAO Create the Framework for EPA’s Asbestos Reporting Rule**

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<sup>14</sup> *Asbestos Disease Awareness Org. v. Wheeler*, 508 F. Supp. 3d 707 (N.D. Cal. 2020).



Following Judge Chen’s Order and further legal actions by ADAO and its partners, ADAO and EPA entered into two settlement agreements that define the objectives and scope of EPA’s TSCA section 8(a) asbestos reporting proposal.<sup>15</sup>

The first [settlement agreement](#), dated June 7, 2021, carries out the obligations imposed by Judge Chen’s summary judgment order. The agreement commits EPA to propose a rule under section 8(a) requiring “the maintenance of records and submission to EPA of reports by manufacturers, importers and processors of asbestos and mixtures and articles containing asbestos (including as an impurity) that address the information-gathering deficiencies identified in the Court’s Summary Judgment Order.” Under the agreement, EPA is obligated to publish a proposed reporting rule by April 14, 2022 (a deadline that slipped to May 6, 2022) and take final action by early December of this year.

The [second settlement](#), entered into on October 12, 2021, resolves [ADAO’s January 26, 2021 challenge](#) in the Ninth Circuit Court of Appeals to the Agency’s Part I Asbestos Risk Evaluation. ADAO and leading public health groups and scientists filed this case to remedy the gaps and omissions in the Part 1 evaluation which resulted in an incomplete picture of asbestos’ risks to public health. The settlement agreement commits EPA to expand the Part 2 evaluation to address the deficiencies in Part 1. The Agency agreed to:

- include all of the six asbestos fiber types plus Libby Amphibole asbestos rather than only chrysotile asbestos;
- address any known, intended, or reasonably foreseen conditions of use of asbestos that were omitted from the Part 1 evaluation;
- evaluate the association between exposure to asbestos in talc and talc-containing and commercial and industrial products and human health hazard endpoints;
- assess health risks to potentially exposed or susceptible subpopulations, including individuals who may be more susceptible to the hazards of asbestos.

Taken together, the two settlements will assure that EPA has the information necessary to inform the Part 2 risk evaluation and subsequent risk management, including full information on:

- Importation and use of raw asbestos
- Importation and use of asbestos-containing mixtures and articles
- Processing of raw asbestos and articles and mixtures
- Presence of asbestos contaminants in other articles, substances and mixtures (including talc)

As described below, this information will include any COUs that were not considered in Part 1, including COUs for both chrysotile asbestos, the five other fiber types and Libby Amphibole asbestos. It will also include test data and related information about asbestos contamination of

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<sup>15</sup> A third settlement agreement resulted in a consent decree, approved by the District Court for the Northern District of California on October 13, 2021, requiring EPA to complete its Part 2 asbestos risk evaluation by December 1, 2024.

TSCA-regulated talc and other products. As required by the Part 2 settlement agreement and as confirmed in the draft scoping document for Part 2, the reports submitted would inform asbestos risk determinations in EPA's Part 2 evaluation and subsequent risk management rulemaking.

**A. Using the Reporting Rule, EPA Should Be Able to Evaluate in Part 2 the Risks of Chrysotile Conditions of Use that Were Not Addressed in Part 1**

The proposed reporting rule will require industry to identify asbestos-containing articles and mixtures imported into the US and provide information on how they were used and processed and pathways of exposure. Under the October 12, 2021 settlement agreement, the Part 2 risk evaluation would need to address:

“[a]ny circumstances of known, intended, or reasonably foreseen manufacture, processing, distribution in commerce, use, or disposal not evaluated in Part 1, if any such conditions of use are identified through forthcoming reporting requirements under TSCA section 8(a) pursuant to the settlement agreement in *Asbestos Disease Organization v. EPA* (ND Cal. No. 19-CV-00871) or other reasonably available information.”

Filling these gaps in Part 1 using reports submitted under the proposed rule is critical to address all ongoing and foreseeable asbestos-related risks to human health.

In its section 21 petition and submissions to Judge Chen, ADAO and its experts consistently emphasized that the six conditions of use addressed in Part 1 do not comprise the full universe of currently imported chrysotile-containing products. Based on import records and EPA's own analyses, asbestos-containing mixtures and articles potentially overlooked in Part 1 include the following:

- knitted fabrics (woven products)
- asbestos cement products
- compressed asbestos fiber
- jointing paper, millboard and felt
- building materials
- sealants
- yarn and thread
- cords and string
- products for use in civil aircraft.
- crocidolite footwear
- asbestos paper
- compressed asbestos fiber jointing in sheets
- window glazing
- recycled asphalt shingle scrap

The SACC's August 28, 2020 report likewise expressed concern about EPA's inadequate identification of chrysotile COUs:

“[S]everal members searched online and found information that at least suggests that asbestos bearing products are in circulation, including chats, how-to videos, junkyard parts listings, online advertisements of wholesale quantities, etc.”

“Given USGS data on imports, the following HTS codes were not specifically addressed in the DRE: 6812.99.0004 (yarn and thread); 6812.99.0004 (crocidolite products except footwear); 6812.91.9000 (clothing except footwear); 6812.99.0025 (building materials).” “The completeness of the characterization of PESS concerns the possibility that asbestos-containing construction materials are still in commerce and as a result potentially identify certain construction workers as a PESS. Table 2-3 in U.S.EPA (2017) provides samples of products that contains asbestos and indicates that some of these building materials may contain asbestos. Table 2-3 includes a link to the website for the Fields Coatings and Mastics which in turn points to the MSDS for the product C200 Roofbond, which contains 4 to 12% asbestos by weight. Another asbestos-containing product is Dissco 540 mastic from Denver Industrial Supplies and Coatings (DISSCO). Information on their website reports that this product is 5 to 20% asbestos. The question then is whether EPA was able to determine that this material is still in commerce, as it is listed on the company website. “

Similarly, Judge Chen’s summary judgment order underscores EPA’s failure to fully document imports of asbestos-containing articles:

“[T]he EPA has missed substantial reasonably available information. First, the asbestos-containing articles which EPA identified appear to be only the tip of the iceberg. The United States Geological Survey identifies, in its 2015 and 2017 Minerals Yearbook for asbestos, a number of asbestos-containing articles which EPA does not account for in its 2017 DRE Scoping Document or its 2019 Problem Formulation: cement products; clothing; compressed asbestos fiber jointing paper; millboard; felt; yarn and thread; cords and string; woven or knitted fabric; asbestos articles for use in civil aircraft; crocidolite footwear; accessories and headgear; asbestos paper; compressed asbestos fiber jointing in sheets or rolls; asbestos woven or knitted fabric; wallboard and floor tiles; window caulking; recycled asphalt shingle scrap; adhesive mastic; gaskets for motorcycles and pads for ATV’s and scooters. . . . USGS is unable to determine the quantity of asbestos-containing articles entering the country. *See id.* These findings by USGS indicate that EPA is not accounting for certain asbestos-containing articles that are imported into the U.S., for which quantity information is unknown.”

508 F. Supp. 3d at 725. The Order adds that EPA failed to:

“expressly capture with any specificity the multitude of building materials containing asbestos (*e.g.* wallboard and floor tiles, window caulking, recycled asphalt shingle scrap, adhesive mastic). As to the "Woven Products" category, the "Use Example" for Woven Products ("Imported Textiles") does specifically capture the consumer products which Plaintiff organizations identified (*e.g.* yarn, thread, and woven/knitted fabric). Nor is there any information about the *downstream use* of asbestos-containing yarn and fabric by, *e.g.* , retail distributors who sell these products to the general public.”

*Id.* at 727.

Filling these information gaps on asbestos-containing articles and mixtures is a central goal of EPA's reporting proposal and its final rule must require reporting on mixtures and articles. Reporting obligations should be placed on both importers/manufacturers and processors of mixtures and articles so that EPA receives all the use and exposure information necessary to make informed risk determinations on additional chrysotile COUs identified as a result of reporting.

## **B. Reporting on Asbestos Impurities in Mixtures and Articles Is Critical to Meet EPA's TSCA Responsibilities and Implement Judge Chen's Order**

EPA's Part I risk evaluation also failed to address the documented presence of asbestos contamination in TSCA-regulated talc-based products and raw materials and other commercial mineral products. The SACC report on the draft Part I evaluation was critical of this failure to consider talc-related pathways of exposure and Judge Chen's December 2020 Order underscored EPA's obligation to require reporting by importers and processors of mixtures and articles containing asbestos impurities.

The Order notes that ADAO's "petition cited several studies demonstrating the presence of asbestos contamination in makeup, crayons and other children's toys made from talc (a mineral often found in deposits also containing asbestos), raising the possibility that thousands of asbestos-contaminated talc-based consumer products may be entering the US." 508 F. Supp. 3d at 728. The Court then concluded that:

"EPA does not know what information regarding asbestos impurities is reasonably ascertainable for submitting companies unless it requires that information to be reported under the [section 8] rule. It might be that submitters have, for instance, ready access to information from third-party testing for their products. Either way, EPA cannot know until it mandates this information. For instance, EPA might find that large companies like Johnson & Johnson could use their considerable resources to obtain testing on the asbestos impurities present in their products. EPA's definition of "reasonably ascertainable" includes "all information that a reasonable person similarly situated might be expected to possess, control, or know." 40 CFR § 720.3(p). EPA cannot know what submitters are "expected to possess, control, or know" unless and until it requests that they submit their test results on asbestos impurities."

Id.

EPA TSCA regulations define impurity as "a chemical substance which is unintentionally present with another chemical substance." 40 CFR § 720.3(m). There is no doubt that a chemical's presence as an impurity in a substance, mixture or article is a "condition of use" of that chemical which must be addressed in the TSCA risk evaluation on the chemical.<sup>16</sup> Thus, the

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<sup>16</sup> It has always been EPA's policy to treat contaminants found in substances or mixtures as manufactured for commercial purposes under TSCA, regardless of whether the contaminant is "intended" to be present. Thus, EPA's premanufacture notice (PMN) regulations under section 5 require manufacturers of "new chemicals" to notify EPA of "impurities" found in these substances (40 CFR § 720.45(b)) and EPA has used its authorities under section 5 of

October 12, 2021 settlement agreement between EPA and ADAO remedies the omission of asbestos impurities from Part 1 by committing that the Part 2 evaluation will address “[a]ny reasonably available information concerning the association between exposure to asbestos in talc and talc-containing products and human health hazard endpoints.”

The draft scoping document for the Part 2 evaluation confirms that it will address asbestos contamination of talc:<sup>17</sup>

“Talc is a hydrous magnesium silicate mineral that is of commercial interest because of several properties including its chemical inertness, high dielectric strength, high thermal conductivity, and low electrical conductivity. Some talc deposits and articles containing talc have been shown to contain impurities that pose potential health risk, including asbestos. Thus, it is recognized that certain uses of talc may present the potential for asbestos exposure. Where EPA identifies reasonably available information demonstrating the presence of asbestos for talc COUs that fall under TSCA authority, these will be evaluated in Part 2 of the Risk Evaluation for asbestos. (p. 31)”

The scoping document properly recognizes that, while studies by the Food and Drug Administration (“FDA”) and others have documented the presence of asbestos in a variety of talc-based personal care products and cosmetics such as baby powder and certain brands of makeup, these products are within the jurisdiction of FDA and therefore exempt from TSCA.

However, several talc-based consumer products are subject to TSCA and there is considerable data documenting the presence of amphiboles and other asbestos fibers in a number of these products:

- In 2000, the Seattle Post Intelligencer confirmed that asbestos had been found in crayons.<sup>18</sup>
- In 2007, the ADAO’s product testing confirmed asbestos in five consumer products, including a child’s toy.<sup>19</sup>
- In 2015, the Environmental Working Group’s (EWG) product testing confirmed four brands of crayons contained asbestos, all of them manufactured in China: Amscan Crayons, Disney Mickey Mouse Clubhouse 10 Jumbo Crayons, Nickelodeon Teenage Mutant Ninja Turtle Crayons, and Saban’s Power Rangers Super Megaforce 10 Jumbo Crayons.<sup>20</sup>

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TSCA to restrict these impurities where they may present unreasonable risks to health or the environment. The PMN regulations state that the term “manufacture or import for commercial purposes” applies to “substances that are produced coincidentally during the manufacture, processing, use, or disposal of another substance or mixture, including byproducts that are separated from that other substance or mixture and impurities that remain in that substance or mixture.” 40 CFR §720.3(r).

<sup>17</sup> EPA, Draft Scope of the Risk Evaluation for Asbestos Part 2: Supplemental Evaluation Including Legacy Uses and Associated Disposals of Asbestos December 2021, [https://www.epa.gov/system/files/documents/2021-12/asbestos\\_part2\\_draftscope\\_epa-hq-oppt-2021-0254.pdf](https://www.epa.gov/system/files/documents/2021-12/asbestos_part2_draftscope_epa-hq-oppt-2021-0254.pdf). (Draft Scoping Document).

<sup>18</sup> <https://www.cpsc.gov/PageFiles/108033/crayons.pdf>.

<sup>19</sup> <https://www.asbestosdiseaseawareness.org/archives/364>

<sup>20</sup> <https://www.ewg.org/release/alert-tests-find-high-levels-asbestos-children-s-makeup-kit>

- In 2018, U.S. Public Interest Research Group tested six kinds of crayons from various brands. Green Playskool crayons were found to contain tremolite asbestos fibers.<sup>21</sup>

The presence of asbestos in these products is of particular concern because of their use by children.

Talc also has extensive industrial uses which are subject to TSCA. According to Geology.com,<sup>22</sup> these uses include:

- **Plastics** -- In 2011, about 26% of the talc consumed in the United States was used in the manufacturing of plastics. It is mainly used as a filler.
- **Ceramics** -- In the United States in 2011, about 17% of the talc consumed was used in the manufacturing of ceramics products such as bathroom fixtures, ceramic tile, pottery, and dinnerware.
- **Paint** -- Most paints are suspensions of mineral particles in a liquid. The liquid portion of the paint facilitates application, but after the liquid evaporates, the mineral particles remain on the wall. Talc is used as an extender and filler in paints.
- **Paper** -- Most papers are made from a pulp of organic fibers. This pulp is made from wood, rags, and other organic materials. Finely ground mineral matter is added to the pulp to serve as a filler. Talc as a mineral filler can improve the opacity, brightness, and whiteness of the paper. Talc also can also improve the paper's ability to absorb ink. In 2011, the paper industry consumed about 16% of the talc used in the United States.
- **Roofing Materials** -- Talc is added to the asphaltic materials used to make roofing materials to improve their weather resistance. It is also dusted onto the surface of roll roofing and shingles to prevent sticking. In 2011, about 6% of the talc consumed in the United States was used to manufacture roofing materials.
- **Other Uses** -- Ground talc is used as a lubricant in applications where high temperatures are involved. It has also been used in the rubber industry to prevent rubber products from sticking. Talc powder is used as a carrier for insecticides and fungicides. It can easily be blown through a nozzle and readily sticks to the leaves and stems of plants. Its softness reduces wear on application equipment.

These industrial uses likely expose thousands of workers to talc powder by inhalation and dermal contact. The extent to which this talc contains asbestos is not known, but typically industrial-grade talc undergoes less extensive processing than talc used in personal care products and is more likely to contain impurities. Given the link between talc-based baby powder and mesothelioma and ovarian cancer in women, industrial talc exposure may well be an important cause of asbestos-related disease and death.

To fulfill its commitment to address this risk in the Part 2 risk evaluation, EPA must have a comprehensive understanding of the extent of the presence of asbestos impurities in talc-based

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<sup>21</sup> <https://uspirg.org/blogs/blog/usp/back-school-asbestos-crayons>

<sup>22</sup> <https://geology.com/minerals/talc.shtml>.



consumer and industrial products subject to TSCA. The proposed asbestos reporting rule is essential to obtain this understanding because it will provide test data and other critical information about substances, articles and mixtures contaminated by asbestos. These reporting requirements must be included in the final rule.

### **C. Reporting on the Five Asbestos Fiber Types Excluded from Part 1 Is Critical for Effective Risk Determinations and Risk Management on Asbestos**

The Trump EPA made an unfortunate decision to only address chrysotile asbestos in its Part 1 risk evaluation. The narrow scope of the draft evaluation was heavily criticized by EPA's SACC as well as by ADAO and many scientists, but the Biden EPA was forced to accept this approach or else delay asbestos risk management for several years. As a result, neither the Part 1 risk evaluation nor the proposed Part 1 risk management rule accounts for the five other asbestos fiber types: crocidolite, amosite, anthophyllite, tremolite, and actinolite.

Leading health authorities have consistently recognized that these fibers, as well as chrysotile, cause cancer of the lung, larynx, and ovaries, and mesothelioma (a cancer of the pleural and peritoneal linings).<sup>23</sup> Exposure to all six fibers is also responsible for other diseases such as asbestosis (fibrosis of the lungs), and plaques, thickening and effusion in the pleura.

In its September 12, 2021 settlement agreement with ADAO, EPA agreed to expand the Part 2 evaluation to include all six asbestos fiber types. While EPA has maintained that there are no ongoing COUs of asbestos fibers other than chrysotile, the inclusion of all six fibers in the asbestos definition in the proposed reporting rule will be critical in determining whether such COUs exist.<sup>24</sup> The main focus of Part 2 will be the risks of "legacy asbestos" – i.e. discontinued building materials and other asbestos-containing products that remain in place – but any COUs for the five other fiber types identified by the reporting rule could be addressed in the Part 2 evaluation as well.

### **D. The Proposed Reporting Rule Properly Applies to Libby Amphibole Asbestos as well as the Six Recognized Asbestos Fibers**

Consistent with the Part 2 scoping document and the September 12, 2021 settlement agreement, the definition of asbestos in the proposed reporting rule includes "Libby Amphibole (mainly consisting of tremolite [CASRN 77536–68–6], winchite [CASRN 12425–92–2], and richterite

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<sup>23</sup> <https://www.who.int/news-room/fact-sheets/detail/asbestos-elimination-of-asbestos-related-diseases>

<sup>24</sup> There is an inconsistency between the discussion of the asbestos definition in the preamble to the proposed rule and the proposed rule text. According to the preamble, the proposed rule defines asbestos -- "to include the asbestiform varieties included in the definition of asbestos in TSCA Title II (added to TSCA in 1986), section 202 and Libby Amphibole asbestos. 'Asbestos' is defined in TSCA Title II, section 202 as the asbestiform varieties of six fiber types—chrysotile (serpentine), crocidolite (riebeckite), amosite (cummingtonite-grunerite), anthophyllite, tremolite or actinolite."

87 Fed. Reg. at 27062. However, the text of the asbestos definition in proposed § 704.180(a) does not track the AHERA definition precisely, failing to specify that the definition is limited to the "asbestiform varieties" of the six fibers.

[CASRN 17068–76–7]).” See proposed § 704.180(a). Libby Amphibole caused widespread harm to the environment and human health as a result of the now-discontinued WR Grace mining operations in Libby, Montana. Its serious cancer and non-cancer effects on human health have been demonstrated in a comprehensive [assessment](#) by EPA’s Integrated Risk Information System (“IRIS”). ADAO strongly supports inclusion of Libby Amphibole in the asbestos reporting rule. The Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919 to 1990. There was also a deposit of asbestos at that mine, so the vermiculite from Libby was contaminated with asbestos (tremolite, winchite and richterite). According to [EPA](#), vermiculite “is a naturally-occurring mineral composed of shiny flakes, resembling mica. When heated to a high temperature, flakes of vermiculite expand as much as 8-30 times their original size. The expanded vermiculite is a light-weight, fire-resistant, and odorless material and has been used in numerous products, including insulation for attics and walls.”

For decades, vermiculite mined in Libby was used throughout the U.S. to produce Zonolite attic insulation, which is estimated to be in as many as 35 million US homes, buildings, and offices.<sup>25</sup> During its investigations at the Libby mine, EPA obtained over 80,000 vermiculite concentrate shipping invoices from W.R. Grace for the period that the company owned the mine (1964–1990). An analysis of EPA’s summary of these invoices indicated that a total of approximately 6,109,000 tons of vermiculite concentrate were shipped to 245 sites across the country where they were used to produce Zonolite.<sup>26</sup>

Zonolite (or “ZAI”) is potentially harmful to residents because it is considered “friable”, i.e., easily disturbed and distributed into the air. EPA advises homeowners that:

“Any disturbance could potentially release asbestos fibers into the air. If you absolutely have to go in your attic and it contains vermiculite insulation, you should limit the number of trips you make and shorten the length of those trips in order to help limit your potential exposure.”

EPA emphasizes that “you ***should never*** attempt to remove the insulation yourself. Hire professionals trained and certified to safely remove the material.”

To our knowledge, vermiculite is no longer mined or imported in the US and its use in attic insulation has ceased. However, because there is no prohibition in TSCA on the resumption of these activities, including Libby Amphibole in EPA’s asbestos reporting rule will assure that they are reportable to EPA should they occur. As EPA states in the proposal preamble, it “does not anticipate that there is ongoing manufacture (including import) or processing of the Libby Amphibole asbestos, but to help confirm this understanding has included this substance in the scope of this proposed rule.” 87 Fed. Reg. at 27063.

### **III. EPA Should Not Weaken the Rule by Exempting Articles and Mixtures Containing De Minimis Levels of Asbestos**

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<sup>25</sup> <https://www.usgs.gov/news/usgs-scientists-develop-new-tool-determine-if-vermiculite-insulation-contains-asbestos>.

<sup>26</sup> [https://www.atsdr.cdc.gov/asbestos/sites/national\\_map/Summary\\_Report\\_102908.pdf](https://www.atsdr.cdc.gov/asbestos/sites/national_map/Summary_Report_102908.pdf).

Although the proposed rule would require reporting on mixtures and articles regardless of the level of asbestos present, the preamble requests comments on “whether there should be a threshold for the amount of asbestos when determining whether to report . . . and, if so, whether the threshold should be concentration-based (*e.g.*, a certain percentage of asbestos in the product) or annual volume-based (*e.g.*, the total volume of asbestos manufacture imported or processed).” 87 Fed. Reg. at 27068.

As EPA notes, “[b]ecause asbestos can be included in small quantities in some products, having a threshold concentration for reporting would be expected to eliminate much of the information that may be useful to support EPA’s TSCA risk evaluation and risk management efforts.” 87 Fed. Reg. at 27067. We share this concern and agree with EPA that “reporting should be required whenever the presence of asbestos is known or reasonably ascertainable.” *Id.*

The International Agency for Research on Cancer (IARC),<sup>27</sup> the Occupational Safety and Health Administration (OSHA),<sup>28</sup> the Department of Health and Human Services,<sup>29</sup> the National Institute for Occupational Safety and Health (NIOSH),<sup>30</sup> the World Health Organization (WHO)<sup>31</sup> and a number of other regulatory and public health bodies classified asbestos as a human carcinogen decades ago.

In a monograph on asbestos published in 2012, IARC found the following cancers in humans to be causally related to asbestos exposure: lung cancer, malignant mesothelioma, ovarian cancer, and cancer of the larynx.<sup>32</sup> There is considerable evidence in the scientific literature of causal associations with gastrointestinal cancers and kidney cancer. Non-malignant diseases are also caused by asbestos. These include asbestosis and asbestos-related pleural thickening. All fiber types in commercial use have been linked causally with each of these diseases and have been stringently regulated by EPA, OSHA and other government agencies on this basis.

Despite the elimination of many asbestos products due to liability concerns, the US death toll from asbestos exposure remains alarmingly high. At the 14th Annual Asbestos Disease Awareness Conference in Washington D.C. in 2018, Dr. Jukka Takala DSc, MSc, BSc, President of the International Commission of Occupational Health (ICOH) and colleagues, reported a shocking increase in previous estimates of asbestos-related deaths, underscoring the escalating and critical need for action by government. According to the study entitled “*Global Asbestos Disaster*”, asbestos-related diseases cause 39,275 deaths in the United States annually—more than double the previous estimates of 15,000 per year.<sup>33</sup>

There is overwhelming consensus in the scientific community that there is no safe level of

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<sup>27</sup> <http://monographs.iarc.fr/ENG/Monographs/vol100C/mono100C.pdf>.

<sup>28</sup> <https://www.osha.gov/laws-regs/federalregister/1994-08-10>.

<sup>29</sup> <https://ntp.niehs.nih.gov/ntp/roc/content/profiles/asbestos.pdf>

<sup>30</sup> <https://www.cdc.gov/niosh/docs/2011-159/pdfs/2011-159.pdf>

<sup>31</sup> [https://www.who.int/ipcs/assessment/public\\_health/chrysotile\\_asbestos\\_summary.pdf](https://www.who.int/ipcs/assessment/public_health/chrysotile_asbestos_summary.pdf)

<sup>32</sup> [https://www.who.int/ipcs/assessment/public\\_health/Elimination\\_asbestos-related\\_diseases\\_EN.pdf](https://www.who.int/ipcs/assessment/public_health/Elimination_asbestos-related_diseases_EN.pdf)

<sup>33</sup> <http://monographs.iarc.fr/ENG/Monographs/vol100C/mono100C.pdf>

exposure to asbestos. As noted by WHO:<sup>34</sup>

Bearing in mind that there is no evidence for a threshold for the carcinogenic effect of asbestos, including chrysotile, and that increased cancer risks have been observed in populations exposed to very low levels, the most efficient way to eliminate asbestos-related diseases is to stop using all types of asbestos.

WHO recently “reiterate[d] its policy, which remains unchanged, that the most efficient way to eliminate asbestos-related diseases is to stop the use of all types of asbestos.”

Thus, there is no scientific, health-based justification for setting a concentration or volume-based threshold below which the presence of asbestos in a mixture or article would be presumed “safe” and too insignificant to warrant scrutiny by EPA. As EPA’s Part 1 chrysotile risk evaluation and proposed risk management rule show, COUs that expose workers or consumers to “small” levels of asbestos nonetheless present cancer risks that EPA deems “unreasonable” under TSCA, warranting a ban of the COU under section 6(a). With a de minimis exemption from reporting, EPA would never learn of these COUs and have no ability to evaluate their risks and take risk management action to prevent exposure. This would defeat EPA’s goal “to ensure EPA has a complete picture of the status of asbestos in the U.S.” 87 Fed. Reg. at 27068.

As noted in the preamble, “EPA 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.” Id. A de minimis exemption from reporting would encourage such firms to make “guesstimates” of asbestos levels in their products to justify opting out of reporting, even though the guesstimate is highly imprecise.

EPA suggests that, even it does not warrant a full exemption from reporting, any submitter under the threshold might be allowed to report using an abbreviated “Form A.” Abbreviated reporting, according to EPA, would arguably “decrease burden on certain submitters while still allowing EPA to obtain information on all instances where asbestos is a component of a mixture and all articles with known asbestos content.” Id.

We oppose this approach. Because any level of exposure to asbestos can cause death or serious disease, there is no justification for scaling back the information EPA obtains on the basis of the quantity of asbestos in a mixture or article. An abbreviated report would thus limit EPA’s ability to conduct a meaningful risk evaluation and, in all likelihood, require it to undertake a second round of reporting which places additional burdens on EPA and the submitter. If the submitter is in possession of reportable information, providing it to EPA will not be resource-intensive; if the information is unavailable, the submitter can simply note its absence on the reporting form.

In sum, a reporting threshold is unwarranted – either as a full exemption from reporting or a basis to submit less information – and should not be included in EPA’s final rule.

#### **IV. EPA Should Expand the Information Which is Reportable**

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<sup>34</sup> [https://www.who.int/ipcs/assessment/public\\_health/chrysotile\\_asbestos\\_summary.pdf](https://www.who.int/ipcs/assessment/public_health/chrysotile_asbestos_summary.pdf).

### **A. EPA Should Develop Only One Reporting Form**

As noted above, EPA is proposing a two-tier reporting system. A limited Form A would be used for “entities that are aware of asbestos in their products but unable to determine or estimate the quantity manufactured (including imported) or processed.” Where entities know or can reasonably ascertain the amount of asbestos in their articles or mixtures, they would submit a more detailed Form B providing fuller quantitative information and greater specificity about their asbestos import, processing and use activities.

While we recognize that submitters who cannot quantify the amount of asbestos in their products will be unable to provide many of the Form B data elements, we recommend that EPA develop only one reporting form which calls for all the information that the Agency needs but expressly recognizes that information which is not known or reasonably ascertainable need not be reported. This approach would be simpler and more straightforward and avoid confusion about when the different forms apply.

### **B. The Data Elements in Form B Are a Good Start but EPA Must Require Reporting of More Information**

The draft Form B in EPA’s proposal calls for reporting the amount of asbestos in the article or mixture, the percent of asbestos present, the type of asbestos, the number of exposed workers at the submitter’s site, the type of processing or use activity, the total annual production quantity of end products manufactured or processed, the disposition of these products and available test data on their asbestos content. See proposed § 704.180(e).<sup>35</sup>

We agree that all these data elements are essential. However, we are concerned that EPA is proposing not to require other essential information that it needs for risk evaluation and risk management. The scope of reporting under EPA’s rule should be informed by the shortcomings in available information that impeded the analysis of risk and exposure in the Part 1 risk evaluation. Judge Chen’s Order and the SACC report highlight many of these deficiencies and should guide EPA in selecting reportable information. The goal should be to assure that the reporting rule not only brings to light additional asbestos COUs that were not addressed in Part 1 but enables EPA to characterize these COUs in sufficient detail to make robust risk determinations in the Part 2 evaluation. A related goal is to provide communities with a full understanding of how and where asbestos is being used in the US, who is being exposed, and the pathways and levels of exposure.

From this perspective, EPA should expand its reporting form to seek the information categories that are identified in the preamble to its proposal (87 Fed. Reg. at 27069-70) but omitted from the proposed rule:

#### **1. Workplace Exposure.** The SACC report (page 69) on the draft Part 1 evaluation

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<sup>35</sup> The proposal rule specifies that, where the submitter has test data on the presence of asbestos in a mixture or article as an intended component or an impurity, it should indicate “how often testing was conducted on the presence of asbestos in your bulk material and what method and type of test was used for determining asbestos content, and provide the test results.” See proposed § 704.180(e)(4)(i)(A)(4). This is critical information and should be included in the final rule.

stressed that EPA’s “reliance on industry-generated data and their limited documentation . . . is problematic [and] [t]he lack of details provided by companies on the sampling methods undermines confidence in the sampling results.” SACC recommended (p.37) that EPA “use statutory authority granted under TSCA to request additional data on occupational exposures to fill knowledge gaps” and should “obtain all sampling data from” industry. Judge Chen’s summary judgment order likewise emphasized that the “predictive efficacy” of EPA’s modeling of worker exposure was undermined because EPA lacked “the comprehensive raw data necessary to make accurate assessments.” 508 F. Supp. 3d at 731.

EPA should not make this mistake again. First, it should “collect a more detailed breakdown of the number and types of employees by work category that would . . . enable the agency to consider exposures to employees conducting different types of work at a site, including those conducting production, shipping or receiving, maintenance, waste management, or other activities.” 87 Fed. Reg. at 27070. Second, because of the importance of actual monitoring data in assessing workplace risks, EPA should obtain “employee exposure information, including 8-hr time-weighted average exposures, 15- or 30-minute peak or maximum exposures, related statistical data (medians, arithmetic means, standard deviations, etc.), levels of detection and non-detectable measurements, and descriptions of sampling and analysis, such as sampling and analytical chemistry methods.” *Id.* Finally, EPA should require reporting on the use of personal protective equipment (“PPE”), including the workplace activities for which it is used and the types of respirators or other PPE worn by employees.

For significant users of asbestos like the chlor-alkali industry, providing this information should not be burdensome. Where the information is not known to or reasonably ascertainable by reporting entities, they could simply inform EPA that it is unavailable.

2. **Waste Disposal Data.** Asbestos waste—much of which is from the chlor-alkali industry—continues to be generated and managed in the U.S. in significant quantities. According to [reports](#) submitted for the Toxic Release Inventory (TRI), total friable asbestos releases during 2018-2020 were 59,578,684 pounds, the bulk of which were to land disposal facilities at production sites or landfills. Because of limitations in the scope of TRI reporting, the quantity of asbestos waste released to such disposal facilities is probably much larger. Both chlor-alkali plants and disposal facilities managing asbestos wastes are located in disadvantaged areas with large minority populations and disproportionately high levels of industrial pollution. Exposure to asbestos wastes generated by the chlor-alkali industry is thus another significant health risk to workers and the public.

The preamble to EPA’s rule expresses concern about “the anticipated burden for reporters” from submitting detailed data on wastewater discharge and waste disposal activities. *Id.* However, the draft Form B requires submitters to indicate whether disposition of the asbestos they use or process includes “Dispos[al] within the U.S.” In this event, EPA should be requiring explanatory information, including the identity of the end product being disposed, the form of the waste, the quantity of asbestos in the waste, the type of land disposal facility (*e.g.*, impoundment, waste pile, landfill, injection well), whether



disposal is on- or off-site, the address of the disposal site, and the mode of transporting the waste from the submitter's site to the disposal facility.<sup>36</sup>

3. **Air Emission Data.** Air emissions of asbestos can pose a serious threat to communities near emitting facilities. To understand these risks, it is important for EPA to obtain data on air emissions where they are available. Where entities possess such data, submitting it to EPA should not require significant time and effort. To prevent undue burdens, EPA should make clear that emissions data that does not relate specifically to asbestos is not reportable and submitters may comply with the rule by submitting summaries of data.
4. **Site Information.** A serious limitation of the Part 1 risk evaluation was the lack of information about the number of downstream sites where asbestos-containing mixtures and articles were used. This made it difficult for EPA to reliably estimate the magnitude of overall exposure and risk to workers and consumers and led SACC to express concern that, for some COUs, "there is insufficient information to even put bounds on potential numbers of exposed individuals." Accordingly, we recommend that EPA require manufactures (including importers) and processors of asbestos that are selling a mixture or article that contains asbestos to report the number of customer sites and estimate the number of proposed workers per site. Similar information is now required for a much larger universe of chemicals under EPA's Chemical Data Reporting (CDR) rule.<sup>37</sup>

To assure that EPA has a full picture of worker and consumer protection measures by reporting entities, it should also require submissions of all citations for OSHA violations and all records of asbestos-related allegations of significant adverse reactions to health or the environment subject to TSCA section 8(c).

## **V. The Rule Should Require a Ten-Year Lookback Period for Reporting**

The proposed rule would require a four year "lookback" by reporting entities. As described by EPA, reporting would be required by "persons who have manufactured (including imported) or processed asbestos 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." 87 Fed. Reg. at 27067.

We recommend that EPA enlarge the lookback period to 10 years, thereby requiring reporting entities to submit information for the 10 years preceding the effective date of the rule. Import data and USGS annual reports reflect considerable year-by-year variation in the types and amounts of asbestos-containing products entering the US. Requiring reporting over a longer time-horizon would better capture trends and fluctuations in asbestos-related import activities. This may identify asbestos-containing mixtures and articles that are imported on a recurring but episodic basis. Even if such imports may have ceased for several years, the possible resumption of importation, processing or distribution in commerce could be considered "reasonably

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<sup>36</sup> The preamble to the rule indicates (87 Fed. Reg. at 27070) that much of this information is already required by Form B but we were unable to find it in the draft rule text.

<sup>37</sup> See 40 CFR § 711.15(b)(4)(i)(F) requiring submitters to estimate the total number of workers that are reasonably likely to be exposed to the chemical substance at sites that process or use the substance, including sites that are not under the submitter's control.

foreseen,” which would bring them within the definition of “conditions of use” in section 3(4) of TSCA and require EPA to evaluate their contribution to asbestos exposure and risk.

We also support requiring reportable information to be broken out for each year in the reporting period so that EPA is informed of year-by-year variations in asbestos importation and use that may shed light on patterns of asbestos exposure and risk.

## **VI. Instead of One-Time Reporting, Reports Should be Submitted Every Twelve Months until Completion of the Part 2 Risk Evaluation and Risk Management under TSCA**

A one-time reporting requirement as proposed by EPA would mean that the Agency is not informed of asbestos-related activities that occur after the 2019-2022 lookback period. However, a central purpose of the reporting rule is to identify COUs of any of the covered asbestos fibers that were not included in the Part 1 risk evaluation and should be addressed in Part 2. As discussed above, Part 1 only encompasses one asbestos fiber – chrysotile – and six COUs and the reporting rule may reveal several additional COUs of chrysotile and/or the other five fibers.

EPA took the first step in undertaking the Part 2 evaluation – publication of a scoping document – on December 29, 2021.<sup>38</sup> Under the consent decree agreed to by EPA and ADAO, EPA has until December 1, 2024 to complete the evaluation. Given EPA’s recent announcement of extensive delays in meeting deadlines for both risk evaluations and risk management rulemakings under TSCA, there is a high likelihood that this deadline may be extended significantly. As a result, a risk management rulemaking building on the Part 2 evaluation could well be postponed until late in this decade or even beyond 2030.

In light of the lengthy amount of time that EPA may be working on Part 2, the EPA rule should require the annual submission of reports until the completion of the Part 2 evaluation and risk management rulemaking. This will assure that EPA is not forced to rely on outdated information but has current data on asbestos use and exposure on which to base risk determinations and risk reduction measures during Part 2. EPA can minimize reporting burdens by recognizing that information in previous reports need not be resubmitted.

Because it may be several years until EPA completes all aspects of Part 2, requiring the retention of records documenting information in reports for merely five years as proposed by EPA is unjustified. 87 Fed. Reg. at 27072. Part 2 will likely still be underway five years after reporting under the rule is completed and EPA will lose access to data it needs for risk evaluation and risk management if reporting entities no longer have an obligation to maintain records. We recommend that EPA require the retention of records until Part 2 is completed. As EPA states, “the burden of retaining these records, which are likely electronic, is minimal.” Id.

## **VII. EPA Should Provide Clear Direction to Submitters on the Due Diligence Necessary to Identify and Obtain Known and Reasonably Ascertainable Information**

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<sup>38</sup> 86 Fed. Reg. 74088 (December 29, 2021)

Section 8(a) of TSCA requires the submission of reportable information “insofar as known to the person making the report or reasonably ascertainable.” Under EPA regulations, to satisfy this standard, entities must report “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.” 40 CFR § 704.3.

The preamble to the reporting rule underscores that this obligation “carries with it an exercise of due diligence” and that reporting entities must undertake “information-gathering activities” to ascertain both “their current level of knowledge” and the availability of “additional information” from others in the supply chains for their products 87 Fed. Reg. at 27067. Thus, EPA explains that “submitters must conduct a reasonable inquiry within the full scope of their organization (not just the information known to managerial or supervisory employees)” and make “inquiries outside the organization to fill gaps in the submitter’s knowledge.” Such inquiries could “include phone calls or email inquiries to upstream suppliers or downstream users or employees or other agents of the manufacturer (including importer) or processor.” Id.

Many entities subject to the asbestos reporting rule will be importers of asbestos-containing mixtures and articles and talc or other mineral-based products contaminated by asbestos. In many cases, the presence of asbestos may be unknown to the importer unless it conducts due diligence with its foreign supplier. In its final rule and in outreach to industry, EPA must underscore the responsibility of importers to reach out to foreign suppliers both to ascertain whether asbestos is present in the imported product as an intended product component or impurity and to request any available test data or other information on the levels of asbestos present.

EPA should strongly encourage importers to fulfill this responsibility through a written communication to the supplier seeking confirmation that asbestos is present in the imported mixture or article and copies of available test data **or** a written certification that the imported product does not contain asbestos. EPA has utilized a similar certification procedure under section 13 of TSCA to provide assurance that imported chemicals are listed on the TSCA Inventory and do not require premanufacture notification under section 5. EPA should make clear that, if the importer fails to make such a written request to the supplier or the supplier does not respond and the imported product is later found to contain asbestos, the importer will be in violation of the EPA reporting rule. EPA should also underscore that the importer is obligated to “document its activities to support claims it might need to make related to due diligence” (id.) and that if it lacks such documentation for an imported product that contains asbestos, EPA will conclude that the importer failed to obtain “known or reasonably ascertainable” information and thereby violated the reporting rule.

Since talc is known to have the potential for asbestos contamination, overseas suppliers and domestic producers and processors of raw talc and talc-based products should be on notice of the need to assure that these products are asbestos-free. The best way to provide this assurance is through a written certification that the talc or talc-containing product has been tested and found not to contain asbestos. We strongly urge EPA to recommend such a certification process along with a testing method that the Agency deems accurate and reliable for detecting the presence of asbestos.

Where the presence of asbestos in a product is “known or reasonably ascertainable” but there are no test data establishing the precise levels at which asbestos is present, the submitter must estimate asbestos concentrations using available methodologies. As EPA states in the preamble to its rule:

In the event that a manufacturer (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 actors, or best engineering judgment.

87 Fed. Reg. at 27067. EPA should make sure that industry recognizes its obligation to submit estimates where test data are unavailable and provide guidance on recommended methodologies for estimating asbestos levels in mixtures and articles.

### **VIII. A Robust Outreach and Education Initiative Is Needed to Assure Broad Awareness of and Compliance with Reporting Obligations by the Regulated Community**

According to the proposal, “EPA estimates that at least 18 firms may submit reports for 27 sites based on the intentional manufacturing (including importing) or processing of asbestos, including mixtures and articles containing asbestos.” 87 Fed. Reg. at 27062. The basis for this estimate is not explained in the preamble to the rule. However, it appears to be based on the assumption that the only ongoing COUs for the six asbestos fibers are the six COUs addressed in the Part 1 chrysotile risk evaluation and that the only asbestos importers and processors to be impacted by the reporting rule are those few entities identified in Part 1 on the basis of voluntary information sharing by industry.

The fallacy of this assumption was underscored in the SACC report on the Part 1 draft and in Judge Chen’s summary judgment order. According to the order, “it is evident that the EPA does not know what it does not know, and its conclusion that closing the loopholes [in reporting] would yield nothing useful is not an informed one.” 508 F. Supp. 3d at 723. The order directed EPA to use its mandatory reporting authority under TSCA because “EPA cannot know what information is ‘reasonably ascertainable’ to submitters, and thereby ‘reasonably available’ to EPA, without knowing the full range of potentially available information to be reported” and this cannot be determined without requiring reporting. *Id.* at 723-724.

The ample evidence cited in ADAO’s petition, Judge Chen’s order and the SACC report that EPA failed to account for numerous asbestos COUs demonstrates that the number of reporting entities is likely to be far larger than 18. A more realistic estimate of the size of the reporting universe is important to avoid downplaying the importance of the proposed rule and leading firms to erroneously conclude that they are unlikely to be subject to the rule and need not pay any attention to it.

As EPA recognizes, its estimate of how many entities will file reports does not include articles

and mixtures that contain asbestos as an impurity because it “does not currently have information on the extent to which asbestos occurs as an impurity in products that are currently manufactured (including imported) or processed in the U.S.” 87 Fed. Reg. at 27062. Here too, firms that should be reporting may not submit reports if they are unaware of EPA’s rule or incorrectly believe it is inapplicable. Because public health requires a sound understanding of the pervasiveness of asbestos contamination in talc-based consumer and industrial products, it is in EPA’s interest to conduct aggressive outreach and education across the supply chain of potentially impacted industry sectors.

In sum, to assure compliance with the rule, extensive outreach to and education of the regulated community is essential. The proposed rule does not indicate what, if any, plans EPA has to conduct these activities. We strongly recommend that EPA’s implementation plan for the final rule include a robust outreach and education component.

## **IX. EPA Must Strive for Maximum Public Disclosure of Asbestos Reports Consistent with Section 14 of TSCA**

Reports submitted under EPA’s section 8(a) rule will not only meet the Agency’s data needs under section 6 of TSCA, but will provide essential “right to know” information to communities with potential exposure to asbestos. The information to be reported – including the identities of asbestos-containing articles and mixtures, the quantities and levels of asbestos they contain, the asbestos fibers present, how raw asbestos and asbestos products are used, their sites of importation, manufacture and processing, and the number of exposed workers per site -- will provide a unique picture of asbestos exposure pathways and risks across the US. Given the unique dangers of asbestos to health and the absence of any safe level of exposure, this picture will be of great interest to public health professionals, workers and unions, state and local agencies, other parts of EPA and ordinary citizens.

For this reason, EPA should make sure that asbestos reports are posted on its website as soon as possible and can be easily accessed by the public, similar to TRI and CDR reports. EPA should also issue a report compiling and analyzing the information reported to highlight overall trends and concerns regarding asbestos use, importation and exposure.

We recognize that public access to reported information will be constrained by the CBI requirements of TSCA section 14. Certain information contained in reports, however, cannot be withheld from disclosure under section 14(b). This includes “health and safety studies,” a category that encompasses data from testing on the presence of asbestos in substances, mixtures and articles as an intended component or impurity. Moreover, as EPA notes, section 14 requires substantiation of CBI claims and sets deadlines for reviewing the validity of these claims and rejecting them if they are not adequately justified. It will be important for EPA to conduct this review as expeditiously as possible so information that does not qualify as CBI can be promptly disclosed to the public. Finally, as EPA notes, CBI claimants must submit sanitized versions of their reports so that the public has access to all non-CBI information.

## **X. EPA Should Require Reporting by Small Businesses on the Six Recognized Asbestos**

## Fibers Previously Regulated under TSCA Section 6

TSCA section 8(a)(1) generally requires EPA to exempt “small” manufacturers (including importer) and processors from reporting rules. However, section 8(a)(3) authorizes EPA to require small manufacturers and processors to report under such rules if they apply to chemicals which are subject to risk management restrictions under section 6. The six recognized asbestos fibers fall in this category because EPA regulated them under its 1989 Asbestos Ban and Phaseout rule (40 CFR 763.160 *et seq.*) and portions of that rule remain in effect despite the 1991 court decision striking down most of its requirements.<sup>39</sup>

Exercising its discretion under section 8(a)(3), EPA proposes to subject small businesses to asbestos reporting because “exempting all small businesses from reporting would exclude most or all of the reporting for some conditions of use, which could severely hinder EPA’s risk evaluation and risk management activities.” 87 Fed. Reg. at 27066. As EPA explains:

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. For some conditions of use, EPA identified a single business engaged in each of the activities and, in two cases, the companies were small businesses. In addition, EPA identified multiple conditions of use for which it was unable to identify a single company engaged in the condition of use. Because of the low number of companies found to be involved in specific conditions of use, it is possible that companies associated with other conditions of use that need to be considered in the Part 2 TSCA Risk are small businesses.

*Id.* We strongly support this approach. In light of the serious health impacts of asbestos and the lack of a safe level of exposure, EPA cannot fully protect the public unless it has complete information on all conditions of use, including those involving small businesses. Even a partial exemption for small businesses or delay in reporting would create gaps in understanding of asbestos use and exposure that could compromise the protectiveness of risk evaluation and risk management.

## **XI. The Deadline for Reporting under the Rule Should Be Four Months from its Effective Date**

Under the proposed rule, “entities would report to EPA during a three month submission period, which EPA proposes would begin six months following the effective date of the final rule.” 87 Fed. Reg. at 27067. We disagree that industry and EPA need six months to prepare for reporting. We recommend that EPA instead provide only a 30-day period before initiation of the reporting period. This would still afford companies four months to determine the applicability of the rule, review records, compile reportable information and prepare and file reports.

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<sup>39</sup> As EPA points out, however, the 1989 rule does not apply to Libby Amphibole Asbestos and small businesses manufacturing, importing or processing these fibers are not required to report.



Since the Part 2 risk evaluation is already underway and must be completed in 2.5 years, obtaining reports under the rule as soon as possible is an urgent priority so EPA has sufficient time to review information reported and incorporate it in the Agency's analysis of asbestos use and exposure. Even if EPA meets its December 2022 deadline for issuing a final rule, the proposed reporting timetable would mean that reports need not be submitted until September of 2023.<sup>40</sup> This is too long to wait. EPA should accelerate the reporting deadline to four months after the rule takes effect

## CONCLUSION

ADAO strongly supports EPA's proposed asbestos reporting rule. We urge EPA to resist any weakening of the proposal and to make several strengthening changes. Robust outreach and education are essential to assure widespread compliance with the rule. We look forward to continuing to work with the Agency as it completes this rulemaking.

Respectfully submitted,

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<sup>40</sup> Assuming a 30-day effective date for the rule, the proposed reporting deadline would fall in September 2023.