

**THE ATTORNEYS GENERAL OF MASSACHUSETTS, CALIFORNIA,  
CONNECTICUT, HAWAII, MAINE, MARYLAND, MINNESOTA, NEW JERSEY, NEW  
YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON,  
AND THE DISTRICT OF COLUMBIA**

January 31, 2019

*Via electronic and certified mail*

Andrew Wheeler, Acting Administrator  
U.S. Environmental Protection Agency  
Mail Code:1101A  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460  
[Wheeler.andrew@Epa.gov](mailto:Wheeler.andrew@Epa.gov)

***Re: Petition of the Commonwealths of Massachusetts and Pennsylvania, the States of California, Connecticut, Hawaii, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia under Section 21(a) of TSCA, 15 U.S.C. § 2620(a), for EPA to Issue an Asbestos Reporting Rule to Require Reporting under TSCA Section 8(a), 15 U.S.C. § 2607(a), of Information Necessary for EPA to Administer TSCA as to the Manufacture (including Importation), Processing, Distribution in Commerce, Use, and Disposal of Asbestos***

Dear Acting Administrator Wheeler:

On behalf of their respective states and district, the Attorneys General of Massachusetts, California, Connecticut, Hawaii, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia hereby petition the Acting Administrator under Section 21(a) of the Toxic Substances Control Act (TSCA)<sup>1</sup> to initiate rulemaking under TSCA Section 8(a)<sup>2</sup> to issue a new asbestos reporting rule to address infirmities in asbestos reporting under the U.S. Environmental Protection Agency's (EPA) Chemical Data Reporting rule (CDR), 40 C.F.R. Part 711, to ensure that data as to the importation and use of asbestos and asbestos-containing products in the United States that are necessary for EPA to administer TSCA are adequately reported to EPA.<sup>3</sup> The facts establishing

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<sup>1</sup> 15 U.S.C. § 2620(a).

<sup>2</sup> *Id.* § 2607(a).

<sup>3</sup> On September 25, 2018, the Asbestos Disease Awareness Organization (ADAO), American Public Health Association, Center for Environmental Health, Environmental Working Group, Environmental Health Strategy Center, and Safer Chemicals Healthy Families, submitted their *Petition Under TSCA Section 21 to Require Reporting on Asbestos Manufacture, Importation and Use under TSCA Section 8(a)* (NGO Petition, available at <https://www.epa.gov/sites/production/files/2018-10/documents/adao-asbestos-cdr-petition-all.pdf>), seeking similar relief, which petition the undersigned Attorneys General support. By letter dated December 21, 2018, EPA advised

that it is necessary for EPA to conduct a rulemaking as requested herein are set forth below.

The new asbestos reporting rule that this petition seeks is necessary for EPA to comply with its mandate to conduct risk evaluations for asbestos under TSCA Section 6(b)(4)(A)<sup>4</sup> and to adopt requirements under TSCA Section 6(a)<sup>5</sup> for the manufacture (including importation<sup>6</sup>), processing, distribution in commerce, use, and disposal of asbestos to prevent unreasonable risks to health and the environment. It also would be an important right-to-know tool to give our states and the public access to information that may be critical for avoiding potentially dangerous exposures to asbestos-containing products.<sup>7</sup>

Specifically, the undersigned Attorneys General petition the Acting Administrator to initiate a rulemaking and issue a new asbestos reporting rule to: (i) eliminate any applicability of the “naturally occurring substance” (NOCS) exemption in the CDR for asbestos reporting;<sup>8</sup> (ii) apply the CDR reporting requirements to processors of asbestos, as well as manufacturers, including importers, of the chemical substance;<sup>9</sup> (iii) ensure that the impurities exemption in the CDR does not apply to asbestos; and (iv) require reporting with respect to imported articles that contain asbestos. Without a new rule requiring adequate reporting regarding the manufacture and use of asbestos, EPA will be unable to comply with its statutory mandate to prevent unreasonable risks to health and the environment presented by this highly hazardous chemical that unfortunately continues to be in widespread use in the United States and poses ongoing dangers to the residents of our states.

## INTRODUCTION AND SUMMARY OF PETITION

Asbestos is a known human carcinogen and there is no safe level of exposure to this highly toxic material ubiquitous in our built environment.<sup>10</sup> The potential for harm posed by

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ADAO counsel that EPA is denying the NGO Petition (*available at* [https://www.epa.gov/sites/production/files/2018-12/documents/petition\\_response.pdf](https://www.epa.gov/sites/production/files/2018-12/documents/petition_response.pdf)), and EPA issued a prepublication copy of the agency’s reasons for the denial (EPA NGO Petition Response, *available at* [https://www.epa.gov/sites/production/files/2018-12/documents/prepublication\\_copy\\_of\\_petition\\_fr\\_notice.pdf](https://www.epa.gov/sites/production/files/2018-12/documents/prepublication_copy_of_petition_fr_notice.pdf)).

<sup>4</sup> 15 U.S.C. § 2605(b)(4)(A).

<sup>5</sup> *Id.* § 2605(a).

<sup>6</sup> Under TSCA, “manufacture” means “to import into the customs territory of the United States . . . , produce or manufacture.” *Id.* § 2602(9). References herein to “manufacture,” “manufacturing,” and “manufacturer,” thus include import, importing, or importer respectively.

<sup>7</sup> Under TSCA Section 14(d)(4), a state may qualify for access to reported information even if the information is claimed to be confidential business information. *Id.* § 2613(d)(4).

<sup>8</sup> In petitioning for this new asbestos reporting rule, the undersigned Attorneys General do not concede that asbestos as imported into the U.S. meets the CDR’s criteria for a “naturally occurring substance” and reserve all claims that asbestos as imported into the U.S. is not such a “naturally occurring substance.”

<sup>9</sup> The CDR currently does not require processors of asbestos to report and instead relies on manufacturers (importers) to report on processing activities. However, TSCA Section 8(a)(1)(A) unambiguously requires, in relevant part, that the “Administrator shall promulgate rules under which . . . each person . . . who manufactures or processes or proposes to manufacture or process a chemical substance . . . shall maintain such records, and shall submit to the Administrator such reports, as the Administrator may reasonably require [to implement the law] . . . .” *See* 15 U.S.C. § 2607(a)(1)(A).

<sup>10</sup> *See Safety and Health Topics: Asbestos*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/SLTC/asbestos/>.

asbestos is universally recognized and addressing its risks was a priority in reforming TSCA:

Asbestos, for example, is one of the most harmful chemicals known to humankind, and it takes 15,000 lives a year. It is linked to a deadly form of lung cancer called mesothelioma. People can breathe in these fibers deep into their lungs where they cause serious damage.<sup>11</sup>

In 1989, EPA concluded that asbestos is a highly potent carcinogen regardless of the type of asbestos or the size of the fiber.<sup>12</sup> And EPA has long possessed an abundance of information that supports aggressive regulatory actions to protect the public from asbestos disease risks.<sup>13</sup> According to EPA, “asbestos is one of the most hazardous substances to which humans are exposed in both occupational and non-occupational settings . . . [and] [t]here is wide agreement that all types of asbestos fibers are associated with pulmonary fibrosis (asbestosis), lung cancer, and mesothelioma. Gastrointestinal cancer and other cancers at extrathoracic sites, as well as other lung disorders and diseases, have also been associated with asbestos exposure . . . . All of these asbestos-related diseases are life-threatening or disabling and cause substantial pain and suffering . . . . [These] conclusions regarding the health effects of asbestos exposure represent a widely accepted consensus of opinion of health agencies, scientific organizations, and independent experts.”<sup>14</sup> Accordingly, asbestos is one of the ten chemical substances (Initial Ten TSCA Chemicals) that EPA chose for its initial chemical risk evaluations under the 2016 amendments to TSCA.<sup>15</sup>

Robust reporting of the importation and use of asbestos in the U.S. is necessary for EPA to satisfy its statutory mandate under TSCA Section 6(a) to establish requirements to ensure that asbestos does not present an unreasonable risk of injury to health or the environment and for states and the public to have access to data necessary to themselves evaluate such risks.<sup>16</sup> As such, it is critical from a public health perspective, and necessary from a TSCA-compliance perspective, that, in regulating asbestos under TSCA Section 6, EPA: (i) considers the knowable universe of potential exposure pathways presented by the manufacture, processing, distribution in commerce, use, or disposal of asbestos; and (ii) eliminates all human exposure to this uniquely dangerous chemical substance. Neither of these goals can be accomplished if EPA does not possess the necessary comprehensive data with respect to the manufacture (including import) and

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<sup>11</sup> Sen. Barbara Boxer speaking in support of H.R. 2576, the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act, 114<sup>th</sup> Congress, Second Session, 162 Cong. Rec. S3511 (Jun. 7, 2016).

<sup>12</sup> See *Final Rule: Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions*, 54 Fed. Reg. 29,460, 29,467 (Jul. 12, 1989); see also *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1217 (5th Cir. 1991) (“The EPA . . . [in issuing the rule] believed that there was no asbestos exposure level for which the risk of injury or death was zero.”).

<sup>13</sup> See *Corrosion Proof Fittings*, 947 F.2d at 1211 n. 9 (noting that EPA did not need to convene panel of experts for its asbestos rulemaking because it already had sufficient information regarding risks).

<sup>14</sup> 54 Fed. Reg. at 29,468-69.

<sup>15</sup> See *Designation of Ten Chemical Substances for Initial Risk Evaluations Under the Toxic Substances Control Act*, 81 Fed. Reg. 91,927 (Dec. 19, 2016).

<sup>16</sup> 15 U.S.C. § 2605(a).

use of asbestos in the U.S. on which to act—data that currently EPA is not collecting under the CDR as EPA concedes in the EPA NGO Petition Response.<sup>17</sup>

This rulemaking is necessary because the CDR does not generate such comprehensive data. The CDR exempts imported raw asbestos as a “naturally occurring substance,”<sup>18</sup> and exempts asbestos as an impurity<sup>19</sup> and as a chemical substance imported as part of an article<sup>20</sup>; moreover, the CDR applies to those who manufacture asbestos, but not those who process asbestos.<sup>21</sup> These limitations deprive the agency of crucial information regarding asbestos exposure pathways necessary for the agency to fulfill its statutory mandate to prevent unreasonable risks of injury. Any TSCA risk evaluation that EPA conducts without access to accurate and complete asbestos data cannot satisfy TSCA’s risk evaluation criteria, including TSCA’s requirement that EPA use the “best available science” in carrying out TSCA’s mandate to eliminate unreasonable risk of injury to health or the environment presented by the manufacture (including importation), processing, distribution in commerce, use, or disposal of a toxic chemical substance. Moreover, without EPA gathering such information about asbestos, our states are hampered in their ability to design and implement programs necessary to protect the public’s health from this highly toxic chemical.

On August 3, 2018, many of the undersigned Attorneys General submitted comments for their respective states (Problem Formulation Comments)<sup>22</sup> on EPA’s *Problem Formulation of the Risk Evaluation for Asbestos* (Asbestos Problem Formulation).<sup>23</sup> The comments criticized the Asbestos Problem Formulation as presenting an incomplete array of conditions of use of asbestos contrary to TSCA’s plain language and Congress’ intent that EPA’s risk evaluations assess each chemical in its entirety, based on all identifiable conditions of use, including ongoing and legacy uses such as the ubiquitous continued use of asbestos. The comments also faulted EPA for

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<sup>17</sup> See EPA NGO Petition Response, *supra*, pp. 10-12.

<sup>18</sup> See 40 C.F.R. § 711.6(a)(3); see also Letter from Jeffrey T. Morris, Ph.D., Director, EPA Office of Pollution Prevention and Toxics to Rebecca J. Rentz, Esq., Senior Environmental Counsel, Occidental Petroleum Corp. (Jul. 28, 2017), confirming EPA’s interpretation of NOCS exemption as applying to the importation of asbestos, attached to the *Petition under TSCA Section 21 to Require Reporting on Asbestos Manufacture, Importation and Use under TSCA Section 8(a)* (Sept. 25, 2018) of the Asbestos Disease Awareness Organization, *et al.*, available at <http://www.asbestosdiseaseawareness.org/wp-content/uploads/2018/09/ADAO-Asbestos-CDR-petition-all.pdf>.

<sup>19</sup> See 40 C.F.R. §§ 711.10(c), 711.5, and 720.30(h)(1).

<sup>20</sup> See *id.* §§ 711.10(b) and 710.3.

<sup>21</sup> See *id.* § 711.3 (processing not included in definition of “manufacture”); *id.* § 711.8.

<sup>22</sup> Comments of the Attorneys General of Massachusetts, California, Hawaii, Maine, Maryland, New Jersey, New York, Oregon, Vermont, Washington, and the District of Columbia, submitted electronically to Charlotte Bertrand, Acting Principal Deputy Assistant Administrator, EPA Office of Chemical Safety and Pollution Prevention, in EPA-HQ-OPPT-2016-0736 (Asbestos), *Re: Notice of Availability on Problem Formulations for the Risk Evaluations to be Conducted Under the Toxic Substances Control Act for Asbestos, 1-Bromopropane, 1,4 Dioxane, Carbon Tetrachloride, Cyclic Aliphatic Bromide Cluster, also known as HBCD, Methylene Chloride, N-Methylpyrrolidone (NMP), Pigment Violet 29, Tetrachloroethylene, also known as Perchloroethylene, and Trichloroethylene (TCE) and General Guiding Principles to Apply Systematic Review in TSCA Risk Evaluations* (83 Fed. Reg. 26,998 (Jun. 11, 2018), Aug. 3, 2018, available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2016-0736-0146>. By electronic filing in the EPA docket HQ-OPPT-2016-0736 (Asbestos), the Attorney General of Rhode Island joined the comments (Aug. 15, 2018). Each of the 11 states and the district that joined the Problem Formulation Comments is among the petitioners herein.

<sup>23</sup> *Problem Formulation of the Risk Evaluation for Asbestos*, May 2018, available at:

[https://www.epa.gov/sites/production/files/2018-06/documents/asbestos\\_problem\\_formulation\\_05-31-18.pdf](https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf).

arbitrarily failing to pursue all reasonably available information about the chemicals for its risk evaluations—a point this petition echoes.

As with those conditions of use limitations that EPA has so far proposed for TSCA evaluation purposes, the CDR—without the new reporting requirements that the Attorneys General seek through this rulemaking—will make it impossible for EPA to comply with its statutory mandate to prevent unreasonable risks to health and the environment presented by asbestos.

Accordingly, the Attorneys General petition the Acting Administrator under TSCA Section 21(a)<sup>24</sup> to initiate rulemaking under Section 8(a)<sup>25</sup> to promulgate a rule to address the deficiencies in the CDR for asbestos reporting. Promulgation of such a rule would ensure that data as to the importation and use of asbestos and asbestos-containing products in the U.S. is adequately reported so EPA will have the information necessary for it to comply with its statutory mandate under TSCA to prevent unreasonable risks to health and the environment from asbestos, and so this crucial information is available to our states and the public.

This petition proceeds as follows. In Part I, we provide a summary of our states' interests with respect to EPA's evaluation and regulation of asbestos. In Part II, we describe EPA's obligations under TSCA for conducting risk evaluations and making regulatory determinations for asbestos in commerce, and for requiring reporting of information as reasonably required by EPA to fulfill its statutory mandate under TSCA to prevent the unreasonable risk of injury to health or the environment. In Part III, we set forth the current data reporting requirements under the CDR and describe the inadequacies of the CDR for the purpose of gathering the information EPA needs properly to evaluate and regulate asbestos. Finally, we suggest how EPA should promulgate a rule for asbestos reporting to enable EPA to fulfill its statutory mandate.

## **I. The Interests of the Petitioning States**

The petitioning states have a significant interest in ensuring that: (a) EPA has the data it needs to fulfill its mandate under TSCA to prevent the unreasonable risk of injury to health and the environment from exposures to asbestos; and (b) our state regulators and other stakeholders have the information regarding the presence of asbestos in commerce to enable them to take appropriate action at the state and local level to protect our residents from asbestos' dangers.

EPA's past conclusions about the unreasonable risks asbestos poses to human health and the environment are undeniable. In 1989, EPA found that asbestos is a potent carcinogen at all levels of exposure, regardless of the type of asbestos or the size of the fiber, i.e., that there is no level of exposure that is safe for a human,<sup>26</sup> and it is well-recognized that EPA possesses an abundance of information with respect to asbestos disease risks.<sup>27</sup> EPA's findings as to the disastrous human health effects caused by exposure to asbestos are set forth in EPA's *Asbestos*:

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<sup>24</sup> 15 U.S.C. § 2620(a).

<sup>25</sup> *Id.* § 2607(a).

<sup>26</sup> See 54 Fed. Reg. at 29,467; 40 C.F.R. Part 763; *Corrosion Proof Fittings*, 947 F.2d. at 1217 (“The EPA . . . believed that there was no asbestos exposure level for which the risk of injury or death was zero.”).

<sup>27</sup> See *Corrosion Proof Fittings*, 947 F.2d at 1211 n. 9 (noting that EPA did not need to convene a panel of experts for its asbestos rulemaking because it already had sufficient information regarding the risks).

*Manufacture, Importation, Processing and Distribution in Commerce Prohibitions; Final Rule (Asbestos Ban Rule).*<sup>28</sup>

Asbestos' potential for substantial harm to public health and the environment is the reason why it is among the first candidates for risk evaluation. The consequences of a federal failure to adequately identify and eliminate those unreasonable risks is correspondingly high to petitioner states and their residents, with the potential for even greater risk to susceptible subpopulations, where the failure to perform a full analysis may have the most severe adverse impact. In the absence of sufficient national regulation of asbestos, petitioner states face continued ongoing costs of state-subsidized medical care for diseases caused by asbestos exposure, including pulmonary fibrosis (asbestosis), lung cancer, and mesothelioma, as well as lost productivity resulting from those diseases. Asbestos exposure is the sole known cause of mesothelioma, a rare and highly fatal cancer of the chest or abdominal lining caused by exposure to asbestos fibers.<sup>29</sup> From 2011–2015, the CDC reports there were a total of 16,420 new cases of mesothelioma in the U.S., resulting in 12,837 deaths, of which 6,582 new cases of mesothelioma, resulting in 5,159 deaths, were in the petitioning states.<sup>30</sup>

A failure to properly regulate at the federal level would also harm the petitioning states and district by increasing their own regulatory and enforcement costs. Many of the petitioning states and district have regulations prohibiting various uses of asbestos/asbestos-containing products. For example, Massachusetts and Oregon comprehensively regulate the handling, transport, and disposal of asbestos in its borders through a set of overlapping state and delegated federal programs involving multiple state agencies.<sup>31</sup> California regulates exposure to asbestos in construction work,<sup>32</sup> general industry,<sup>33</sup> shipyards,<sup>34</sup> and has prohibited the sale of brake pads with asbestiform fibers above 0.1% weight.<sup>35</sup> New Jersey also regulates exposure to asbestos in construction work and general industry in the public sector and regulates the asbestos abatement

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<sup>28</sup> 54 Fed. Reg. 29,460 (Jul. 12, 1989); 40 C.F.R. Part 763. In *Corrosion Proof Fittings*, the Fifth Circuit remanded the rule to EPA for further proceedings based on the Court's having found that EPA failed to satisfy the "least burdensome" requirement imposed on the agency under the then-applicable language of TSCA for banning asbestos, without challenging EPA's findings regarding the unreasonable risks posed by asbestos absent regulation. See *Corrosion Proof Fittings*, *supra*, 947 F.2d at 1207-1208, 1211 fn. 9. See also EPA's 2014 IRIS Assessment of Libby Amphibole Asbestos (concluding that asbestos "is carcinogenic to humans"), available at [https://cfpub.epa.gov/ncea/iris/iris\\_documents/documents/toxreviews/1026tr.pdf](https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/1026tr.pdf).

<sup>29</sup> See C.R. Roelofs et al., *Mesothelioma and Employment in Massachusetts: Analysis of Cancer Registry Data 1988-2003*, 56(9), AM. J. OF INDUSTRIAL MED. 985 (2013).

<sup>30</sup> See <https://gis.cdc.gov/Cancer/USCS/DataViz.html> (last accessed Jan. 30, 2019).

<sup>31</sup> See e.g., Massachusetts Clean Air Act, MASS. GEN. LAWS ch. 111, §§ 142A-O, and the federal Clean Air Act, 42 U.S.C. § 7401, et seq., which authorize the Massachusetts Department of Environmental Protection ("MassDEP") to prevent air pollution by regulating asbestos handling, transport, and disposal; MASS. GEN. LAWS ch. 21E by which MassDEP requires notice and remediation of releases of asbestos to the environment as a hazardous material under the state's "superfund" law; MASS. GEN. LAWS ch. 111, § 150A under which MassDEP regulates disposal of asbestos under the Massachusetts Solid Waste Management Act; and M.G.L. c. 149 through which Massachusetts Department of Labor Standards ("DLS") ensures worker safety in Massachusetts by licensing asbestos-related work and requiring the use of proper work practices and safety equipment. See also Or. Admin. R. 340-248.

<sup>32</sup> California Code of Regulations ("Cal. Code Regs."), tit. 8, § 1529.

<sup>33</sup> *Id.* tit. 8, § 5208.

<sup>34</sup> *Id.* tit. 8, § 8358.

<sup>35</sup> CAL. HEALTH & SAFETY CODE § 25250.51.

industry through a series of comprehensive regulations administered by multiple state agencies.<sup>36</sup> And the District of Columbia regulates the removal and abatement of asbestos through its own licensing and permitting requirements to ensure the safe removal and disposal of asbestos-containing material and the safety of asbestos abatement workers and the surrounding community.<sup>37</sup> Absent adequate federal regulation, these states will continue to bear the increasing costs of their present reactive approach to protecting their citizens' health from asbestos-caused disease and may be required to promulgate and enforce additional regulations.

## II. EPA's Obligations Under TSCA to Evaluate Asbestos

TSCA directs EPA to determine whether certain chemicals pose an unreasonable risk of injury to health or the environment, and if a chemical does present such risk, mandates that EPA eliminate that risk.<sup>38</sup> To determine whether a chemical substance presents such unreasonable risks, TSCA requires EPA to evaluate the risks from the full range of exposures in the circumstances under which the chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of, without consideration of costs or other nonrisk factors.<sup>39</sup> If EPA determines that an unreasonable risk exists, TSCA directs EPA to issue a rule imposing one or more of a variety of regulatory requirements so that the chemical substance no longer presents such risk.<sup>40</sup>

And under TSCA, EPA is required to prioritize chemical substances for this two-stage agency review, so that EPA first evaluates and regulates the chemicals suspected of presenting the greatest risks.<sup>41</sup> Risk is a function of hazard and exposure, and to evaluate the risks posed by a chemical like asbestos, which has well-documented human health hazards, EPA must consider the full range of potential exposures to the chemical. Despite this, the CDR shields from reporting information regarding the manufacture (including importation) and use of asbestos that the agency must have to be able to identify significant sources of potential chronic exposures to this highly hazardous chemical and to perform TSCA-compliant risk evaluations.

### A. Risk Evaluation of Asbestos as One of the Initial Ten TSCA Chemicals

On December 19, 2016, through the prioritization process required by TSCA, EPA identified asbestos as one of the initial ten TSCA chemical substances<sup>42</sup> to undergo risk evaluation.<sup>43</sup> Thus, EPA now must conduct a risk evaluation to determine whether asbestos:

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<sup>36</sup> N.J.A.C. 8:60, Asbestos Licenses and Permits; N.J.A.C. 5:23-8, Asbestos Abatement Subcode; N.J.S.A. 34:6A-30, Adoption of Standards (provides for the State of NJ to adopt federal standards); N.J.A.C. 7:26, Solid and Hazardous Waste Regulations.

<sup>37</sup> See 20 DCMR §§ 800.1, *et seq.*

<sup>38</sup> 15 U.S.C. §§ 2605(a) and (b).

<sup>39</sup> See 15 U.S.C. §§ 2605(b)(4)(A) and 2602(4).

<sup>40</sup> See *id.* § 2605(a).

<sup>41</sup> *Id.* § 2605(b)(1).

<sup>42</sup> See 15 U.S.C. § 2605(b)(2)(A).

<sup>43</sup> See *Designation of Ten Chemical Substances for Initial Risk Evaluations Under the Toxic Substances Control Act*, 81 Fed. Reg. 91,927 (Dec. 19, 2016). With asbestos, EPA designated the following chemicals as the Initial Ten TSCA Chemicals for risk evaluation: 1-Bromopropane, 1,4-Dioxane, Carbon Tetrachloride, Cyclic Aliphatic

presents an unreasonable risk of injury to health or the environment, without consideration of costs or other nonrisk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use.<sup>44</sup>

## **B. Regulation of Asbestos under TSCA Section 6(a)**

Under TSCA Section 6(a), if in its risk evaluation EPA determines that asbestos presents an unreasonable risk, EPA is required to establish requirements for asbestos to ensure that asbestos does not present “an unreasonable risk of injury to health or the environment.”<sup>45</sup>

The suite of potential requirements that EPA has at its disposal under TSCA to address unreasonable risk of injury to health or the environment posed by asbestos include:

- prohibiting or otherwise restricting manufacturing, processing, or distribution in commerce of asbestos;<sup>46</sup>
- prohibiting or otherwise restricting the manufacturing, processing, or distribution in commerce of asbestos for a particular use;<sup>47</sup>
- imposing labelling requirements for asbestos or for articles containing asbestos;<sup>48</sup>
- imposing records retention, monitoring and testing obligations on manufacturers and processors to assure compliance;<sup>49</sup>
- prohibiting or otherwise regulating the commercial use of asbestos;<sup>50</sup>
- prohibiting or otherwise regulating disposal of asbestos or any article containing asbestos by its manufacturer or processor or by any other person who uses or disposes of asbestos for commercial purposes;<sup>51</sup> and
- directing manufacturers and processors of asbestos to notify distributors and others in possession of asbestos, and the public, of EPA’s regulatory requirements imposed to prevent unreasonable risk of injury to health or the environment, and to replace or repurchase the asbestos.<sup>52</sup>

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Bromide Cluster (also known as HBCD), Methylene Chloride, N-Methylpyrrolidone (NMP), Pigment Violet 29, Tetrachloroethylene (also known as Perchloroethylene), and Trichloroethylene (TCE). EPA announced its designation of the ten priority chemicals, featuring asbestos as one of the first chemicals to be evaluated, in a November 29, 2016 press release, available at <https://archive.epa.gov/epa/newsreleases/epa-names-first-chemicals-review-under-new-tsca-legislation.html>.

<sup>44</sup> *Id.* § 2605(b)(4)(A).

<sup>45</sup> *Id.* § 2605(a).

<sup>46</sup> *Id.* § 2605(a)(1).

<sup>47</sup> *Id.* § 2605(a)(2).

<sup>48</sup> *Id.* § 2605(a)(3).

<sup>49</sup> *Id.* § 2605(a)(4).

<sup>50</sup> *Id.* § 2605(5).

<sup>51</sup> *Id.* § 2605(a)(6).

<sup>52</sup> *Id.* § 2605(a)(7).



Thus, the scope of restrictions EPA is authorized to impose under TSCA to prevent unreasonable risk of injury from exposure to asbestos includes restricting those who manufacture asbestos, process asbestos, use asbestos, or dispose of asbestos, and those restrictions apply both to the chemical substance asbestos and to articles that contain asbestos.

**C. Information Requirements under TSCA for Conducting Risk Evaluations to Determine Whether a Chemical Substance Presents an Unreasonable Risk of Injury to Health or the Environment and for Regulating to Prevent Such Risk**

Under TSCA, Congress expressly required EPA to engage in science-based actions to prevent unreasonable risk of injury to health or the environment as a result of exposures to hazardous chemical substances like asbestos, and to consider the information reasonably available to the Administrator regarding, among other things, exposure, in regulating under the Act.<sup>53</sup>

Section 26 of TSCA provides:

**(h) Scientific standards**

In carrying out [section 2605] of this title . . . the Administrator shall use scientific information, technical procedures, measures, methods, protocols, methodologies, or models, employed in a manner *consistent with the best available science* . . . .<sup>54</sup>

**(i) Weight of scientific evidence**

The Administrator shall make decisions under [section 2605] of this title based on the weight of the scientific evidence.<sup>55</sup>

\* \* \*

**(k) Reasonably available information**

In carrying out [section 2605] of this title, the Administrator shall take into consideration information relating to a chemical substance or mixture, including hazard and exposure information, under the conditions of use, that is *reasonably available* to the Administrator.<sup>56</sup>

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<sup>53</sup> *Id.* §§ 2625(h), (i), and (k).

<sup>54</sup> *Id.* § 2625(h) (emphasis supplied).

<sup>55</sup> *Id.* § 2625(i) (emphasis supplied).

<sup>56</sup> *Id.* § 2625(k) (emphasis supplied).

Additionally, in conducting the risk evaluations under TSCA, EPA must consider “the likely duration, intensity, frequency, and number of exposures under the conditions of use of the chemical substance . . . .”<sup>57</sup>

#### **D. Reporting Requirements under Section 8(a) of TSCA**

For EPA to fulfill its mandate under TSCA to regulate substances based on accurate and complete risk evaluations, TSCA Section 8(a)<sup>58</sup> requires that EPA promulgate rules—that is, the CDR—requiring manufacturers (including importers) and processors of chemical substances to report to the agency the following information about the chemical substance:

- common or trade name, chemical identity, and molecular structure;<sup>59</sup>
- categories or proposed categories of use;<sup>60</sup>
- total amount manufactured or processed and reasonable estimates of amount to be manufactured or processed, with total amount manufactured or processed for each category of use and reasonable estimates of amount to be manufactured or processed for each category of use;<sup>61</sup>
- description of the byproducts resulting from the manufacture, processing, use, or disposal;<sup>62</sup>
- all existing information about the environmental and health effects of the chemical substance;<sup>63</sup>
- number of individuals exposed and estimate of number of those who will be exposed in their places of employment, including exposure duration;<sup>64</sup> and
- manner or method of disposal.<sup>65</sup>

The current CDR includes significant exemptions for asbestos from these Section 8(a) reporting requirements.<sup>66</sup> Without complete reporting under Section 8(a), EPA will not have data that accurately reflects the use and potential exposure to asbestos in the U.S. and as a result will be unable reasonably to comply with its obligations under TSCA to protect the public from asbestos’ risks.

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<sup>57</sup> *Id.* § 2605(b)(4)(F)(iv).

<sup>58</sup> *Id.* § 2607(a).

<sup>59</sup> *Id.* § 2607(a)(2)(A).

<sup>60</sup> *Id.* § 2607(a)(2)(B).

<sup>61</sup> *Id.* § 2607(a)(2)(C).

<sup>62</sup> *Id.* § 2607(a)(2)(D).

<sup>63</sup> *Id.* § 2607(a)(2)(E).

<sup>64</sup> *Id.* § 2607(a)(2)(F).

<sup>65</sup> *Id.* § 2607(a)(2)(G).

<sup>66</sup> *See* Part III, *infra*.

More specifically, the CDR’s “naturally occurring substance,”<sup>67</sup> “impurities,”<sup>68</sup> and “as part of an article”<sup>69</sup> exemptions for asbestos reporting, and its failure expressly to provide that processors of asbestos as well as manufacturers are subject to reporting under the CDR,<sup>70</sup> mean that EPA will be unable both to satisfy TSCA’s standards for the data that EPA must consider in preparing its risk evaluation for, and making determinations regarding the regulation of, asbestos,<sup>71</sup> and to meet TSCA’s “weight of scientific evidence” standard for decision making under Section 26.<sup>72</sup>

### **III. The Information Currently Reported Under the CDR is Inadequate for EPA to Conduct Meaningful, TSCA-Compliant Asbestos Risk Evaluation and Decision Making**

As the Problem Formulation Comments reflect, the petitioning Attorneys General believe that in its asbestos risk evaluation process to date EPA has “choos[en] to put on blinders and ignore some of the most meaningful data with respect to risks of exposure to the chemical substance.”<sup>73</sup> This troubling theme of willfully ignoring available information is also reflected in EPA’s approach to using its authority under TSCA Section 8(a) to obtain information necessary to support its regulatory actions.<sup>74</sup>

#### **A. The CDR, 40 C.F.R. Part 711**

On August 16, 2011, pursuant to its authority under Section 8(a) of TSCA,<sup>75</sup> EPA amended the then-existing Inventory Update Rule, re-naming it and enhancing its reporting requirements, resulting in the CDR currently in effect. EPA said it took this action, among other reasons, “[t]o increase its ability to effectively provide public access to the information” and “[t]o improve the usefulness of the information reported.”<sup>76</sup> Further, EPA acknowledged that the data collection regulations pursuant to its Section 8 authority are necessary for fulfilment of its duties to evaluate risk exposures of chemicals subject to TSCA:

The CDR enables EPA to collect and publish information on the

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<sup>67</sup> See 40 C.F.R. § 711.6(a)(3). See also Letter from Jeffrey T. Morris, Ph.D., Director, EPA Office of Pollution Prevention and Toxics to Rebecca J. Rentz, Esq., Senior Environmental Counsel, Occidental Petroleum Corp. (Jul. 28, 2017), confirming EPA’s interpretation of NOCS exemption as applying to the importation of asbestos, attached to the *Petition under TSCA Section 21 to Require Reporting on Asbestos Manufacture, Importation and Use under TSCA Section 8(a)* (Sept. 25, 2018) of the Asbestos Disease Awareness Organization, *et al.*, available at <http://www.asbestosdiseaseawareness.org/wp-content/uploads/2018/09/ADAO-Asbestos-CDR-petition-all.pdf>. The Attorneys General do not concede that asbestos as imported into the U.S. meets the CDR’s criteria for a “naturally occurring substance” and reserve all claims that asbestos as imported into the U.S. is not such a “naturally occurring substance.”

<sup>68</sup> See 40 C.F.R. §§ 711.10(c), 711.5, and 720.30(h)(1).

<sup>69</sup> See *id.* §§ 711.10(b) and 710.3.

<sup>70</sup> See *id.* § 711.3 (processing not included in definition of “manufacture”); *id.* § 710.8.

<sup>71</sup> See 15 U.S.C. §§ 2625(h) and (k).

<sup>72</sup> See *id.* § 2625(i).

<sup>73</sup> See the Problem Formulation Comments, *supra*, at 21-22.

<sup>74</sup> 15 U.S.C. § 2607(a); see Part II(C), *supra*.

<sup>75</sup> *Id.* § 2607(a).

<sup>76</sup> 76 Fed. Reg. 50,816, 50,818 (Aug. 16, 2011).

manufacturing, processing, and use of commercial chemical substances and mixtures . . . on the TSCA Chemical Substance Inventory (TSCA Inventory). This includes current information on chemical substance production volumes, manufacturing sites, and how the chemical substances are used. This information helps the Agency determine whether people or the environment are potentially exposed to reported chemical substances.<sup>77</sup>

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. . . exposure information is an essential part of developing risk evaluations and, based on its experience in using this information, the Agency believes that collecting this exposure information is critical to its mission of characterizing exposure, identifying potential risks, and noting uncertainties for these lower production volume chemical substances.<sup>78</sup>

EPA also highlighted the role the CDR would have in affording the public information about chemicals. In fact, this underscored EPA’s renaming of the regulations “to better reflect the distinction between this data collection (which includes exposure-related data) and the TSCA Inventory itself (which only involves chemical identification information).”<sup>79</sup> It continued:

Identifying this data collection as ‘CDR’ will make it easier for the public to understand what information is available to them through the data collection. The name change thereby contributes to the Agency’s current chemicals management program by increasing transparency and facilitating public access to information about chemical substances.<sup>80</sup>

And EPA recognized “the lower thresholds [of chemicals reported] will provide the public with information on a greater number of chemical substances.”<sup>81</sup>

Notwithstanding the undeniably crucial role that chemical information plays in enabling EPA to satisfy its mandate under TSCA, and the role it plays in facilitating state and public access to information about chemicals and EPA’s aim to increase transparency of that information, the CDR exempts raw asbestos, at least as to imports, from reporting as a “naturally

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<sup>77</sup> *Id.* at 50,816.

<sup>78</sup> *Id.* at 50,823

<sup>79</sup> *Id.* at 50,819.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 50,823.

occurring substance,”<sup>82</sup> potentially exempts asbestos as an “impurity”<sup>83</sup> and as a chemical substance imported as part of an article,<sup>84</sup> and may fail to include processors of asbestos within the net of required reporters under the statute.<sup>85</sup> Consequently, as to asbestos, the present CDR does not satisfy EPA’s stated goals of providing useful (*i.e.*, complete) exposure information “essential” to risk evaluations, or complete information about asbestos available to the public. The new reporting rule that the petitioning states seek via this petition, which would enable EPA to present and rely on a complete set of domestic data about the amount, and uses, of asbestos, is consistent with those goals and with the statute’s requirements.

**B. The Information That EPA Receives Under the CDR Is Insufficient for EPA to Perform Adequate Risk Evaluations and Make Reasonable Regulatory Determinations Necessary to Prevent Unreasonable Risk of Injury to Health and the Environment Pursuant to Section 6 of TSCA**

As EPA recognizes in the CDR, TSCA Section 8(a) authorizes the EPA Administrator to require reporting of information necessary for EPA to administer TSCA.<sup>86</sup> TSCA aims to ensure that “adequate information [is developed by EPA] with respect to the effect of chemical substances and mixtures on health and the environment and . . . the development of such information should be the responsibility of those who manufacture and those who process such chemical substances and mixtures.”<sup>87</sup>

Accordingly, TSCA provides that the “Administrator shall promulgate rules under which . . . each person . . . who manufactures or processes . . . a chemical substance . . . shall . . . submit to the Administrator such reports, as the Administrator may reasonably require [to fulfill its mandate under TSCA].”<sup>88</sup> The reports the Administrator may require under Section 8(a) include:

- The total amount of each such substance and mixture manufactured or processed, reasonable estimates of the total amount to be manufactured or processed, the amount manufactured or processed for each of its categories of use, and reasonable estimates of the amount to be manufactured or processed for each of its categories of use or proposed categories of use.<sup>89</sup>
- All existing information concerning the environmental and health effects of such substance or mixture.<sup>90</sup>

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<sup>82</sup> 40 C.F.R. § 711.6(a)(3) provides “**Chemical substances for which information is not required . . . Full exemptions . . . Naturally occurring chemical substances.** Any naturally occurring chemical substance, as described in 40 C.F.R. 710.4(b) . . . . And 40 C.F.R. § 710.4(b) provides that naturally occurring chemical substance means “[a]ny chemical substance which is naturally occurring and: (1) Which is (i) unprocessed or (ii) processed only by manual, mechanical, or gravitational means; by dissolution in water; by flotation; or by heating solely to remove water; or (2) Which is extracted from air by any means . . . .”

<sup>83</sup> See 40 C.F.R. § 711.10(c); 40 C.F.R. § 711.5; and 40 C.F.R. § 720.30(h)(1).

<sup>84</sup> See *id.* §§ 711.10(b) and 710.3.

<sup>85</sup> See *id.* § 711.3 (processing not included in definition of “manufacture”) and 40 C.F.R. § 711.8.

<sup>86</sup> *Id.* § 711.1(a).

<sup>87</sup> *Id.* § 2601(b)(1).

<sup>88</sup> *Id.* § 2607(a)(1).

<sup>89</sup> *Id.* § 2607(a)(2)(C).

<sup>90</sup> *Id.* § 2607(aa)(2)(E).

- The number of individuals exposed, and reasonable estimates of the number who will be exposed, to such substance or mixture in their places of employment and the duration of such exposure.<sup>91</sup>

However, by recognizing a reporting exemption for asbestos as a “naturally occurring substance,” by the “impurities” and “articles” exemptions, and by not making clear that processors of asbestos must report, the CDR falls far short of requiring the robust reporting to EPA that Congress built into TSCA to enable EPA to implement the health-protection measures found in TSCA and without which EPA cannot carry out its mandate under TSCA.

EPA’s stark admissions in the Asbestos Problem Formulation about the woeful lack of information the agency has about the presence of asbestos in commerce in the U.S. demonstrates the pressing need for an asbestos reporting rule that requires manufacturers and processors to inform EPA about the specific quantities and anticipated uses and pathways for human exposure for the asbestos they are bringing into the country and/or are distributing in commerce here. This is equally true whether the form of the asbestos is as the raw mineral, as incorporated into an article, such as car brakes and brake linings, or as an impurity in items such as children’s crayons:

EPA has identified the ongoing use of chrysotile asbestos in: industrial processes in the chlor-alkali industry, asbestos sheet gaskets for use in equipment used in the manufacture of titanium dioxide and asbestos brake blocks in oilfield equipment and aftermarket asbestos brake linings. **In addition, certain asbestos containing products can be imported into the U.S., but the amounts are not known. These products are mostly used in industrial processes (e.g. cement products) but could also be used by consumers, and include woven products and automotive brakes and linings.**<sup>92</sup>

### *I. NOCS Exemption*

In a July 2017 letter,<sup>93</sup> EPA confirmed the agency’s interpretation of the CDR’s “naturally occurring chemical substance” or NOCS exemption that imports of raw asbestos are not subject to reporting under the CDR because of the reporting exemption in 40 C.F.R.

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<sup>91</sup> *Id.* § 2607(a)(2)(F).

<sup>92</sup> EPA Asbestos Problem Formulation, p. 8 (emphasis supplied).

<sup>93</sup> Letter from Jeffrey T. Morris, Ph.D., Director, EPA Office of Pollution Prevention and Toxics to Rebecca J. Rentz, Esq., Senior Environmental Counsel, Occidental Petroleum Corp. (Jul. 28, 2017), confirming EPA’s interpretation of NOCS exemption as applying to the importation of raw asbestos, attached to the *Petition under TSCA Section 21 to Require Reporting on Asbestos Manufacture, Importation and Use under TSCA Section 8(a)* (Sept. 25, 2018) of the Asbestos Disease Awareness Organization, *et al.*, available at <http://www.asbestosdiseaseawareness.org/wp-content/uploads/2018/09/ADAO-Asbestos-CDR-petition-all.pdf>.

§ 711.6(a)(3).<sup>94,95,96</sup>

In the Asbestos Problem Formulation, EPA stated that “[r]eporting of asbestos in the 2016 Chemical Data Reporting (CDR) period was limited. Only two companies, both from the chlor-alkali industry, reported importing asbestos and the amounts cannot be publicly disclosed due to company claims of confidential business information (CBI).”<sup>97</sup> Importantly, those two entities were not required to report under the CDR and did so *voluntarily*: the new reporting rule the petitioning states seek would expand the reporting requirements to capture this important data.

And in the EPA NGO Petition Response, EPA asserts that the agency receives sufficient information about asbestos use and exposure pathways through channels other than CDR reporting, including information received by EPA through voluntary disclosures.<sup>98</sup> However, such information, which is neither comprehensive nor certified as required for reporting under the CDR,<sup>99</sup> cannot substitute for the type of comprehensive data regarding quantities of asbestos and exposure pathways that is needed to assess asbestos risks adequately and regulate the chemical to prevent unreasonable injury to health and the environment posed by asbestos.

Further, in denying the NGO Petition, EPA states it “does not believe that the [amendments requested by the NGOs] would result in the reporting of any information that is not already known to EPA” because it has “conducted extensive research and outreach to develop its understanding of import information on asbestos-containing products in support of the ongoing asbestos risk evaluation.”<sup>100</sup> These statements directly contradict those previously made by EPA in its Asbestos Problem Formulation where the EPA specifically identifies its lack of data on the import of asbestos-containing products—for example, “[i]t is important to note that the **import volumes of products containing asbestos is [sic] unknown.**”<sup>101</sup>

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<sup>94</sup> See 40 C.F.R. §§ 711.6(a)(3) and 710.4(b). In EPA’s letter to Occidental, the agency apparently relied solely on Occidental’s own representation that the imported asbestos had been processed only by mechanical and gravitational means in determining that the NOCS exemption applied, reliance we believe was misplaced and unreasonable under the circumstances.

<sup>95</sup> In the EPA NGO Petition Response, the agency does not dispute that those who import raw asbestos, whether by the chlor-alkali industry for making diaphragms for chlorine production or by any other industry, are exempt from reporting. Therefore, EPA has no reasonable basis to conclude, as it does, that “the chloralkali industry is the only importer of raw bulk asbestos” and there are no other firms that are importing raw asbestos into the U.S. See EPA NGO Petition Response, pp. 17-18.

<sup>96</sup> The petitioning states understand that prior to the point of import all raw asbestos exported from its country of origin has only been processed by mechanical and gravitational means. Thus, EPA’s application of the naturally occurring substance exemption is not unique to the raw asbestos imported by Occidental.

<sup>97</sup> *Id.* at p. 21.

<sup>98</sup> See *id.* at 7-9; see also Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: Asbestos, CASRN: 1332-21-4, Support document for Docket EPA-HQ-OPPT-2016-0736, Office of Chemical Safety and Pollution Prevention, U.S. EPA, February 2017, pp. 4-6, available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2016-0736-0005>.

<sup>99</sup> See 40 C.F.R. §§ 711.15(a)&(b), 711.35 (reporters must complete and submit Form U (EPA Form 7740-8) available at [https://www.epa.gov/sites/production/files/2014-02/documents/form\\_u\\_2012\\_sample\\_report\\_021412\\_no\\_draft\\_0.pdf](https://www.epa.gov/sites/production/files/2014-02/documents/form_u_2012_sample_report_021412_no_draft_0.pdf).

<sup>100</sup> EPA NGO Petition Response, *supra*, at p. 13.

<sup>101</sup> *Problem Formulation of the Risk Evaluation for Asbestos*, p. 22, May 2018 (emphasis supplied), available at: [https://www.epa.gov/sites/production/files/2018-06/documents/asbestos\\_problem\\_formulation\\_05-31-18.pdf](https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf)

The identified uses of imported raw asbestos represent pathways of exposure that present risks to health and the environment that EPA must consider in conducting its risk evaluation and regulating asbestos, and accordingly EPA should promulgate an asbestos reporting rule to require reporting of such information. Moreover, the required asbestos reporting must capture information with respect to the quantities imported, and these potential exposure pathways so this information can be made available to inform the states' and the public's knowledge regarding asbestos exposure risks.

Our concern here is heightened by the reported perspective of this administration regarding the risks posed by asbestos. There have been recent widespread reports that a Russian mining company has praised the administration for downplaying the health risks of the cancer-causing mineral. The reports describe the Russian company Uralsbest OJSC's announcing on June 25<sup>th</sup> in a Facebook post that "Donald is on our side!," with reports that the Facebook post went on to thank "US President Donald Trump for his words in defense of chrysotile-asbestos," and included posted photos of pallets of its chrysotile asbestos product wrapped in plastic emblazoned with President Trump's image.<sup>102</sup>

## 2. Failure to Require Reporting from Processors

TSCA expressly provides EPA with the authority to require reporting from and impose restrictions on firms that process asbestos, as well as on those that manufacture, including import, the hazardous chemical.<sup>103</sup>

For example, EPA has the authority to: (i) prohibit the processing of asbestos or limit the amounts of asbestos that may be processed;<sup>104</sup> (ii) prohibit the processing of asbestos or limit the amounts of asbestos that may be processed for a particular use or for a particular use in a concentration in excess of a specified level;<sup>105</sup> (iii) impose records retention requirements for processors of asbestos;<sup>106</sup> (iv) prohibit disposal of asbestos or any article containing asbestos by its processor;<sup>107</sup> and (v) direct processors of asbestos to notify distributors and others in possession of asbestos, and the public, of EPA's regulatory requirements imposed to prevent unreasonable risk of injury to health or the environment, and to replace or repurchase the asbestos.<sup>108</sup>

Notwithstanding EPA's clear authority to require processors to report and its mandate to regulate processing to the extent necessary to address unreasonable risks posed to human health and the environment by such processing, EPA concedes that it "does not have information

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<sup>102</sup> See, e.g., <http://www.newsweek.com/trumps-face-stamped-russian-asbestos-products-tied-putin-donald-our-side-1018327> (last accessed Nov. 19, 2018). This follows from President Trump's apparent longstanding belief that the dangers of asbestos are merely a manifestation of a "mob conspiracy." See, e.g., <https://www.nytimes.com/2018/06/07/us/politics/epa-toxic-chemicals.html>.

<sup>103</sup> See 15 U.S.C. §§ 2607(a)(1), § 2605(a).

<sup>104</sup> *Id.* § 2605(a)(1).

<sup>105</sup> *Id.* § 2605(a)(2).

<sup>106</sup> *Id.* § 2605(a)(4).

<sup>107</sup> *Id.* § 2605(a)(6).

<sup>108</sup> *Id.* § 2605(a)(7).



pertaining to asbestos processing, as defined under [TSCA].”<sup>109</sup> This is despite the fact that the U.S. Geological Survey (USGS) Minerals Yearbook for 2016 reported that U.S. firms exported and reexported \$35.4 million of manufactured asbestos products in 2016, including asbestos-based friction products like brake linings, clutch linings, and disk pads, and gaskets, packing, and seals, in the amount of 2,710 metric tons.<sup>110</sup> Yet even the USGS acknowledges that “insufficient data were available to reliably identify” all asbestos uses and that, in 2016, an “unknown quantity of asbestos was imported within manufactured products, possibly including brake linings and pads, building materials, gaskets, millboard, and yarn and thread, among others.”<sup>111</sup> Accordingly, to enable EPA to carry out its responsibility to impose requirements on processors to eliminate unreasonable risks of injury to health or the environment arising from exposures to asbestos, EPA must promulgate new regulations to apply the reporting requirements of the CDR to processors of asbestos notwithstanding that the current CDR does not expressly require such reporting. Should EPA fail to do so, EPA would be violating TSCA, acting arbitrarily and capriciously, and abusing its discretion in implementing TSCA.

### 3. Exemptions for “Impurities” and “Articles”

Similarly, while the CDR exempts reporting with respect to “impurities”<sup>112</sup> and for chemical substances imported as “part of an article,”<sup>113</sup> neither of these exceptions should be applied to reporting with respect to the presence of asbestos if EPA is to satisfy TSCA’s mandate to prevent unreasonable risks associated with exposures to this highly toxic chemical.

The application of these exemptions is particularly troubling because as to the products EPA identifies in its *Scope of the Risk Evaluation for Asbestos*<sup>114</sup> and Asbestos Problem Formulation,<sup>115</sup> that is, asbestos diaphragms, sheet gaskets, oilfield brake blocks, aftermarket automotive brakes/linings, other vehicle friction products, asbestos cement products, other gaskets and packaging, and woven products,<sup>116</sup> EPA candidly offers that “[i]t is important to note that the import volumes of products containing asbestos is [sic] unknown.”<sup>117</sup>

In fact, the Asbestos Problem Formulation provides virtually no information about the amount of asbestos in any of these products, the quantities in which they may be imported, and where they may be used, let alone any information about the extent to which the public may be exposed to these asbestos-containing products.<sup>118</sup> And in EPA’s Asbestos Life Cycle Diagram in

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<sup>109</sup> EPA Office of Chemical Safety and Pollution Prevention, Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: Asbestos, February 2017, Support document for Docket EPA-HQ-OPPT-2016-0736, available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2016-0736-0005>.

<sup>110</sup> See USGS 2016 Minerals Yearbook: Asbestos [Advance Release], pp. 8.2 and 8.6 (Table 4), available at <https://minerals.usgs.gov/minerals/pubs/commodity/asbestos/myb1-2016-asbes.pdf>.

<sup>111</sup> <https://minerals.usgs.gov/minerals/pubs/commodity/asbestos/mcs-2017-asbes.pdf>.

<sup>112</sup> See 40 C.F.R. §§ 711.10(c), 711.5, 720.30(h)(1).

<sup>113</sup> See *id.* §§ 711.10(b), 710.3.

<sup>114</sup> *Scope of the Risk Evaluation for Asbestos*, Jun. 2017, available at:

[https://www.epa.gov/sites/production/files/2017-06/documents/asbestos\\_scope\\_06-22-17.pdf](https://www.epa.gov/sites/production/files/2017-06/documents/asbestos_scope_06-22-17.pdf).

<sup>115</sup> *Problem Formulation of the Risk Evaluation for Asbestos*, May 2018, available at:

[https://www.epa.gov/sites/production/files/2018-06/documents/asbestos\\_problem\\_formulation\\_05-31-18.pdf](https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf).

<sup>116</sup> *Id.* at 22.

<sup>117</sup> *Id.* (emphasis supplied).

<sup>118</sup> *Id.* at 21-26. In particular, EPA admitted that there is no accurate information about the amount of imported

the Asbestos Problem Formulation for asbestos, EPA characterizes as “unknown” the quantity of asbestos contained within import products, such as oilfield brake blocks, aftermarket auto brakes/linings, other vehicle friction products, woven products, cement products, other gaskets and packaging, and asbestos-containing sheet gaskets.<sup>119</sup> EPA lacks this information despite its reported discussions with Chemours, a company that currently uses asbestos-containing gaskets imported from China to create chemical containment seals during the production of titanium dioxide, and Branham Corporation, Chemours’ gasket supplier, and with a domestic brake blocks manufacturer that confirmed that it continues to import asbestos-containing brake blocks on behalf its clients for use in oilfield equipment.<sup>120</sup>

EPA acknowledged that consumer exposure *could occur* from “changing asbestos-containing brakes or brake linings” or “using asbestos-containing woven products, and handling of asbestos waste that may result from these activities.”<sup>121</sup> However, EPA simply throws up its hands, stating that “[c]onsumer exposures will be difficult to evaluate since the quantities of these products that still might be imported into the United States *is not known*.”<sup>122</sup>

Moreover, the petitioning states are aware of no federal law that regulates asbestos in talc. Yet the contamination of talc with asbestos is well-known, having been discovered as impurities in cosmetics,<sup>123</sup> baby powder,<sup>124</sup> and crayons.<sup>125</sup> Thus, the petitioning states believe that it is reasonable to expect that importers of talc do, and will continue to, test it for asbestos and that the results of such testing constitute “reasonably ascertainable” information for reporting purposes (*i.e.*, “information that a reasonable person similarly situated might be expected to possess, control, or know”).<sup>126</sup>

The presence of asbestos in such consumer products, whether unintentional “impurities” or as an unintended ingredient in the article, dictates that these exemptions cannot apply with respect to the reporting requirements for asbestos in commerce.<sup>127</sup>

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asbestos-containing goods, stating “it is important to note that the import volume of products containing asbestos is not known.” *Id.* at 22.

<sup>119</sup> See *Problem Formulation of the Risk Evaluation for Asbestos*, May 2018, p. 24, available at:

[https://www.epa.gov/sites/production/files/2018-06/documents/asbestos\\_problem\\_formulation\\_05-31-18.pdf](https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf).

<sup>120</sup> *Id.* at p. 25.

<sup>121</sup> *Id.* at p. 39.

<sup>122</sup> *Id.* (emphasis added).

<sup>123</sup> <https://www.cbsnews.com/news/study-asbestos-claires-makeup-products-marketed-to-teens/> (last accessed Jan. 22, 2019).

<sup>124</sup> <https://www.nytimes.com/2018/12/14/business/baby-powder-asbestos-johnson-johnson.html> (last accessed Jan. 22, 2019).

<sup>125</sup> <https://www.cbsnews.com/news/asbestos-crayons-playskool-consumer-group-finds/> (last accessed Jan. 22, 2019).

<sup>126</sup> 40 C.F.R. § 720.3(p).

<sup>127</sup> See, e.g., U.S. PIRG EDUCATION FUND, SAFER SCHOOL SUPPLIES: SHOPPING GUIDE 1,7 (Fall 2018), available at: [https://uspirg.org/sites/pirg/files/reports/Copy%20of%20USP\\_Toxics-report\\_Fall2018\\_PRINTv1b.pdf](https://uspirg.org/sites/pirg/files/reports/Copy%20of%20USP_Toxics-report_Fall2018_PRINTv1b.pdf) (crayons); ENVIRONMENTAL DEFENSE FUND, SCIENCE REVIEW: ASBESTOS FOUND IN KIDS’ COSMETICS AGAIN (Jan. 2, 2018), available at <https://www.ewg.org/news-and-analysis/2018/01/asbestos-found-kids-cosmetics-again> (cosmetics, noting “experts say talc used to make the cosmetics can be contaminated with asbestos”).

**4. Reporting for Asbestos Must Enable EPA to Satisfy the “Best Available Science,” “Weight of the Scientific Evidence,” and “Reasonably Available Information” Requirements for Making Determinations under TSCA**

The Problem Formulation for Asbestos is rife with examples of instances where it appears that EPA stopped short of complete data collection, failing to satisfy its statutory obligation under Section 26 to consider the information “reasonably available” to it.<sup>128</sup> The recent overhaul of TSCA was designed to address the recognized failures of traditional risk assessment to consider the big picture of toxic chemicals exposures and address the landscape of the many uses and exposure pathways affecting different people in different ways.<sup>129</sup> TSCA, as amended by the Lautenberg Amendments, addresses this by mandating comprehensive risk evaluations in which EPA reviews chemical substances broadly in the context of the chemical substances’ known, intended, and reasonably foreseen uses across the full spectrum of potentially exposed populations. As the Problem Formulation Comments point out, the Problem Formulation for Asbestos, which would restrict EPA’s reviews to certain uses and exposures that do not reflect the pathways through which people and the environment are affected by asbestos, will not meet the express purpose of TSCA as amended and should be abandoned in this regard.<sup>130</sup>

Accordingly, EPA must account for the many tons of asbestos that are imported into the U.S., whether as a raw material or processed, to evaluate adequately the current and likely future risks of exposure to asbestos, and must also account for asbestos in consumer products, whether or not the asbestos is intentionally included in those products. These data, which the agency can collect by appropriately requiring reporting from the firms that possess the information, for example, by promulgating the rule sought by this petition, and are therefore reasonably available to the agency, are needed for EPA to be able to make informed technically complex decisions regarding the regulation of asbestos. Without these data to rely on, the agency will be unable to meet its obligations under TSCA to make its decisions based on the weight of the scientific evidence and using the best available science and will fail in protecting the American public from the deadly risks to human health associated with asbestos. Accordingly, EPA must issue an asbestos reporting rule to ensure that the NOCS, the impurities, and the articles exemptions do not apply to asbestos, and that processors of asbestos are required to report.

**CONCLUSION**

For the foregoing reasons, the undersigned Attorneys General, on behalf of their respective states or district, respectfully request the Acting Administrator to grant this petition and initiate rulemaking under TSCA Section 8(a) to issue a new asbestos reporting rule to ensure that data as to the importation and use of asbestos and asbestos-containing products in the United States is adequately reported to EPA by: (i) eliminating the applicability of the “naturally occurring substance” exemption for asbestos reporting; (ii) applying reporting requirements to

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<sup>128</sup> See 15 U.S.C. § 2625(k); see also, e.g., *Problem Formulation of the Risk Evaluation for Asbestos*, May 2018, at 21-26, available at [https://www.epa.gov/sites/production/files/2018-06/documents/asbestos\\_problem\\_formulation\\_05-31-18.pdf](https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf).

<sup>129</sup> See Problem Formulation Comments, *supra*, at 22.

<sup>130</sup> *Id.*

processors as well as to manufacturers of asbestos; (iii) eliminating the impurities exemption applicable to other chemical substances under the CDR; and (iv) requiring reporting with respect to articles that contain asbestos.

We would be pleased to provide further input as the agency works to respond to this petition. Please do not hesitate to contact us if you wish to engage us further in this important effort.

Sincerely,

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