



RETAIL INDUSTRY LEADERS ASSOCIATION

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July 5, 2022

Via regulations.gov (EPA-HQ-OPPT-2021-0357)

ATTN: Daniel R. Ruedy, Data Gathering and Analysis Division
Office of Pollution Prevention and Toxics
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460-0001

Re: Asbestos; Reporting and Recordkeeping Requirements Under the Toxic Substances Control Act (TSCA) Section 8(a); 87 Fed. Register 27060 (July 5, 2022); Docket ID: EPA-HQ-OPPT-2021-0357

Dear Mr. Ruedy:

The Retail Industry Leaders Association (RILA) appreciates the opportunity to submit comments on the U.S. Environmental Protection Agency's (EPA's or Agency's) proposed Toxic Substances Control Act (TSCA) Section 8(a) Reporting and Recordkeeping Requirements for Asbestos (hereinafter "Proposed Rule").

By way of background, RILA's members include the largest and most innovative retailers. The retail industry employs over 42 million Americans and accounts for \$1.5 trillion in annual sales. RILA and its member companies strongly support the mission and goals of the EPA to protect human health and the environment, including preventing exposure risk from substances that may be present in consumer goods and products. RILA members have robust compliance programs in place and work closely with trusted suppliers to ensure that all products that they sell meet or exceed all applicable U.S. safety standards and legal requirements.

Background

EPA is promulgating the Proposed Rule in the wake of petitions filed that were aimed at closing data gaps in Chemical Data Reporting (CDR) rule to increase the accuracy and completeness of data gathered on asbestos.¹ EPA's Proposed Rule is the latest in a suite of rulemakings that imposes new reporting and recordkeeping obligations on many retailers vis-à-vis their role as current or past importers of finished articles, or consumer products. It bears mentioning upfront that the full framework of TSCA reporting in general is relatively new territory for retailers. Prior

¹ 87 Fed. Reg. 27060 at 25064.

to the 2016 Lautenberg Chemical Safety for the 21st Century Act reporting on chemical substances contained within imported articles, including substances within components of those articles, was not within the scope of TSCA reporting and recordkeeping obligations for importers of articles.

Furthermore, EPA's proposal includes all imported articles containing asbestos even in cases where asbestos is not intentionally added and is present as an impurity. EPA's Proposed Rule requires a one-time reporting requirement and applies retroactively on all imported products containing asbestos, including as an impurity, dating back to 2019.

RILA submits the following comments to EPA to provide input and details on the unique challenges and undue burden the broad scope and retroactive nature of the Proposed Rule presents for retailers, and recommendations for mitigating these impacts.

Similar to fundamental issues previously raised in recent RILA comments² on TSCA Section 8 reporting rulemaking, retailers are uniquely challenged in both: 1) conducting due diligence to determine whether they would even be required to report; and 2) in proceeding to gather and report on data required under the Proposed Rule for the following reasons:

- Retailers have limited visibility into manufacturing processes;
- Retailers were not previously required to collect data on the presence of asbestos (including as impurities) in products regulated under TSCA as articles that they have imported dating back to 2019;
- Assumption based on the product category, or presence of other substances (e.g., talc) where asbestos may be present as impurity, could result in grossly inaccurate estimates of asbestos-containing imported articles; and
- Performing retrospective supply chain verification would be extremely time and resource-intensive, if not impossible to execute, and grossly exceeds the cost estimates outlined in the Proposed Rule.

Given these significant reporting challenges, RILA makes the following recommendations to mitigate these unreasonable burdens:

- Exclude asbestos impurities in finished articles from reporting requirements;
- Apply the reporting period prospectively;
- Allow article importers to delegate reporting authority back to manufacturers;

² Comment letter, Retail Industry Leaders Assoc., U.S. Environmental Protection Agency's proposed Toxic Substances Control Act (TSCA) Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS) (Sept. 27, 2021), [EPA-HQ-OPPT-2020-0549-0106](#).

- Add clarity to the "known to or reasonably ascertainable" reporting standard for article importers; and
- Account for supply chain complexities when setting compliance timeframes.

Each of these issues is discussed in more detail below.

I. Determining Whether Imported Articles Contain Asbestos and Gathering Any Requisite Reporting Data Would be Difficult If Not Impossible

In its Proposed Rule, EPA applies the "known to or reasonably ascertainable by" reporting standard under TSCA Section 8(b)(2). In describing this standard, EPA states:³

"[the reporting standard] would be defined to include '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.' This reporting standard would require reporting entities to evaluate their current level of knowledge of their manufactured products (including imports), as well as evaluate whether there is additional information that a reasonable person, similarly situated, would be expected to know, possess, or control. This standard carries with it an exercise of due diligence, and the information-gathering activities that may be necessary for manufacturers to achieve this reporting standard may vary from case-to-case."

EPA goes on to state:⁴

"This standard would require that submitters conduct a reasonable inquiry within the full scope of their organization (not just the information known to managerial or supervisory employees). This standard may also entail inquiries outside the organization to fill gaps in the submitter's knowledge. Such activities may, though not necessarily, include phone calls or email inquiries to upstream suppliers or downstream users or employees or other agents of the manufacturer (including importer) or processor, including persons involved in the research and development, import or production, or marketing of asbestos."

With respect to imported articles, EPA then states that it:⁵

"acknowledges that it is possible that an importer, particularly an importer of articles containing asbestos (including as an impurity), may not have knowledge that they have imported asbestos and thus not report under this rule, even after they have conducted their due diligence under this reporting standard as previously described. Such an importer should document its activities to support any claims it might need to make related to due diligence."

³ 87 Fed. Reg. 27060 at 27067

⁴ *Id.*

⁵ *Id.*

The Agency states that in cases where a manufacturer (including importer) does not have actual data to report, such as measurements or monitoring data, it would be required to make and report "reasonable estimates" of this information which "may rely, for example, on approaches such as mass balance calculations, emissions factors, or best engineering judgment."⁶

For the following reasons, for a retailer-importer to even conduct the due diligence required by EPA to even answer the threshold question of whether they have any actual or "reasonable estimates" of asbestos data to report, would be extremely resource and time-intensive, and could result in grossly inaccurate estimates of asbestos concentrations. A retailer-importer may overestimate and overreport out of an abundance of caution as they would be making a "best guess" based on a product type and/or whether the product may contain substance where asbestos impurities may be present (e.g., talc, vermiculite) without having actual knowledge of the substances used in formulation of the products and/or components within that product.

A. Retailers Have Limited Visibility into Manufacturing Processes

Retailers typically do not manufacture the finished consumer products they sell and have limited visibility into the manufacturing process and sourcing of raw materials and components. Manufacturers and formulators that have better access to data and information on the production and distribution of these substances are several tiers upstream in the supply chain from manufacturers of finished articles and their customers, the retailer-importers that purchase their products. Due to business and product design confidentiality, retailers, as purchasers and importers of finished consumer products, typically are not supplied with product composition information at a detailed level that would allow them to readily discern whether a product may contain asbestos – intentionally or as an impurity.

Retailers' limited visibility is further attenuated where a chemical substance may only be present as an impurity. To conduct the type of due diligence that EPA has described under a "known to or reasonably ascertainable by" reporting standard each retailer-importer would be required to undertake a time and resource intensive process to review hundreds of thousands of products imported annually. Multiply this effort over the 4-year lookback period for reporting and the number of products to be reviewed quickly jumps up to a million or more.

B. Retailer-Importers Have Not Been Collecting Documentation Relating to Asbestos or Asbestos Impurities

The EPA's proposal asks retailers to provide information that they simply do not have. It is difficult to mine data for substances when reporting or recordkeeping obligations did not previously exist. The lack of any related article reporting schema with this retrospective scope and scale should also give EPA pause.⁷

⁶ Id.

⁷ The due diligence exercise required by the Proposed Rule does *not* mirror various chemical data reporting (CDR) required by the U.S. EPA and some state authorities for certain chemicals of concern (e.g.,

The Proposed Rule requires a look back of four years. Such an undertaking across the millions of previously imported products would be incredibly resource and time-intensive, if not impossible to execute. Hypothetically, if a retailer-importer were to undertake gathering and reviewing any available documentation on imported articles dating back 4 years, the examples of documentation referenced in the Proposed Rule (e.g., marketing studies, sales reports, customer surveys, safety data sheets) are not likely to have the information EPA is seeking with respect to articles containing asbestos (including as an impurity). These documents would likely have minimal value in substantiating whether an article does or does not contain asbestos. Ultimately, given companies' document retention policies, retailers often will no longer have any of the listed product-related document examples to review to attempt to glean required reporting information.

C. Assumptions Tied to Product Categories or the Presence of Other Substances Where Asbestos May be Present as an Impurity Could Result in Grossly Inaccurate Estimates

Where actual knowledge and data is not available, EPA requires that reporting entities make "reasonable estimates," which may rely on "best engineering judgments." Simply put, retailers are not product engineers or manufacturers. Assumptions based on a product category alone (e.g., products that may contain sheet gasket or diaphragm components) or screening for product ingredients where asbestos may be present as an impurity (e.g., talc, vermiculite) is guesswork that is likely to result in grossly inaccurate estimates of the imported articles that included some amount of asbestos. Retailers do not have the product knowledge to make such an estimate with any reasonable accuracy as to the presence and quantity of asbestos.

With respect to impurities, EPA states, "[a]sbestos can occur naturally as impurities in other products that may be handled in very large volumes, such as talc, vermiculite, and potentially other substances."⁸ Talc and asbestos are both naturally occurring silicate minerals that may be found in close proximity in the earth, which may cause asbestos to be present as an impurity in talc. Talc, unlike asbestos, is not a known carcinogen. Talc has ongoing uses in many cosmetics and personal care products (e.g., face powder, lipstick, eye shadow, and foundation). It may be used to absorb moisture, to prevent caking, to make facial makeup opaque, or to improve the feel of a product. While retailer-importers may be able to determine which products it imported had talc as a listed ingredient, they would not readily have information on whether asbestos was present as an impurity. Nor would they know what concentrations asbestos may be present.⁹

Washington State's Chemicals of high concern to children reporting). In those reporting scenarios, the reporting entities understand the scope (*i.e.*, raw chemicals, formulations, releasable chemicals) and have been collecting information over the course of the reporting period in preparation for submitting those reports. See *generally*, "Chemicals of High Concern to Children Reporting List (webpage)," WASH. DEPT OF ECOLOGY, available at <https://ecology.wa.gov/Regulations-Permits/Reporting-requirements/Reporting-for-Childrens-Safe-Products-Act/Chemicals-of-high-concern-to-children> (last accessed: June 27, 2022). In contrast, retailer-importers have not been collecting documentation related to the presence of asbestos, including as an impurity, in the articles they import.

⁸ 87 Fed. Reg. 27060 at 27068.

⁹ See *generally*, "Talc" (webpage), U.S. Food & Drug Admin, available at <https://www.fda.gov/cosmetics/cosmetic-ingredients/talc> (last accessed: June 27, 2022).

For example, many U.S. retailers sell thousands of unique styles in the cosmetic category. Each unique product style may represent multiple stock keeping units (SKUs). For example, in the case of eye shadow, each unique style is available in a range of colors, so there may be multiple SKUs for each brand of eye shadow. For just this one product category alone, the retailer is left with the best available estimate that there are tens of thousands of SKUs that may be within the scope of the Proposed Rule. The retailer could not better verify whether the talc-containing cosmetic was tested for asbestos impurities without engaging each and every manufacturer-supplier to have them review their records down to the level of a particular product style. Additionally, U.S. retailers that import the very same products may end up with a very different "best available estimate." It is unclear how EPA would reconcile these differences in estimates.

D. Supply Chain Verification Would be Extremely Time and Resource Intensive and Grossly Exceeds the Costs Estimated

To avoid guesswork that could lead to grossly inaccurate estimates and reporting, a retailer will have to request each of its suppliers to examine their records to determine if they have information on the presence of asbestos. In the previous cosmetic example alone, that may be hundreds of suppliers for any one year. Performing that verification for all the potential imported articles containing asbestos (including as an impurity) could easily require engaging hundreds of individual suppliers.

One retailer's experience complying with Washington State's chemicals of high concern reporting regarding current products sold provides a point of reference for the time required to perform a similar type of supply chain verification. In this effort, the retailer-importer spent over 100 hours to engage with approximately 1,000 vendors. Of those, only around 20 vendors confirmed a need to report. Multiplying that level of effort by tens of thousands of suppliers, a retailer would easily expend thousands of hours determining which imported articles would require reporting under the Proposed Rule.

A 4-year lookback will cause the time and resources required to grow exponentially. In addition, in reaching back to suppliers used since 2019, a retailer is also likely to encounter other challenges. A retailer may no longer have a relationship with the supplier and therefore have no leverage to obtain information regarding product composition. Some suppliers may no longer be in operation. Suppliers' own record retention policies may mean that product documentation is no longer available. These circumstances make verifying whether a particular past imported article contained asbestos challenging to nearly impossible.

In theory, even if a retailer were to undertake the herculean task of tracking down every manufacturer of millions of past imported products, they are likely to receive at best a yes/no answer from a finished product manufacturer in response to inquiries about the presence of a particular substance in a finished product.

Additionally, EPA's estimate of associated hours and costs related to an entity's reporting effort under the Proposed Rule does not account for the time and complexity associated with supply

chain verification across potentially thousands of products.¹⁰ EPA has estimated at a high end one week of effort (*i.e.*, 40 hours) would be needed to accomplish the information gathering and compilation of information for reporting. In fact it would likely take several weeks for a retailer-importer to accomplish the due diligence tasks contemplated in the Proposed Rule when applied across thousands of products and hundreds of suppliers.

II. Recommendations for Mitigating the Reporting and Recordkeeping Burdens

Given the significant challenges facing retailer-importers to comply with the Proposed Rule, RILA recommends EPA tailor the scope of the reporting universe in the following reasonable and appropriate ways:

A. Exclude Asbestos that May be Present as An Impurity in Finished Articles

The Proposed Rule's inclusion of asbestos impurities contained in finished articles in the scope of reporting greatly expands the product universe and regulatory burden borne by retailer-importers and is unlikely to provide meaningful data. As previously discussed in the talc example, it could lead to the assumption that tens of thousands of products contain may contain asbestos in some amount and grossly overestimate the total volume of asbestos imported as an impurity in finished articles.

The inclusion of impurities contained in finished articles also will increase the amount of time and resources expended in reporting. It also creates disproportionate burdens for those entities that may be importing articles with asbestos impurities relative to importers of known quantities of asbestos, or where that information is more readily available due to being further upstream in the supply chain. In fact, although likely a gross underestimate, EPA seems to recognize that reporting entities that manufacture (or import) products where asbestos is present as an impurity will expend more resources in their data gathering efforts than entities that manufacture (or import) or process products where asbestos is *intentionally added* (emphasis added). EPA estimates that reporting on impurities will require 30 to 35 percent more hours and 28 to 33 percent greater expenditures per site than those entities where asbestos is intentionally added.¹¹

It is also unclear what value data derived from screening finished articles for substances like talc that may have asbestos impurities will have in supporting EPA's important risk evaluation work. EPA should exclude reporting on asbestos impurities in finished articles from the final rule and instead leverage other data sources to better understand the prevalence of asbestos impurities in consumer products and the likely concentrations at which they may be present. For example,

¹⁰ See *Id.* at 27062. "Where asbestos is intentionally manufactured (including imported) or processed, the estimated average burden and cost per site ranges from approximately 12 hours and \$1,146 to 26 hours and \$2,265, depending on the type of activities the respondent is engaged in and the information known to or reasonably ascertainable by them. For products where asbestos occurs as an impurity, the estimated average burden and cost per site ranges from approximately 17 hours and \$1,573 to 40 hours and \$3,334, again depending on the type of activities and the information that is known to or reasonably ascertainable."

¹¹ See *Id.*

the U.S. Food and Drug Administration (FDA) is conducting ongoing research and testing of talc-containing cosmetic products to better understand the prevalence of asbestos impurities in these products.¹² In 2021, the FDA tested 50 cosmetic product samples and did not detect asbestos fibers in any of the sample. FDA plans to conduct similar testing in 2022.¹³ The FDA's findings could be used by EPA to assist with estimating the prevalence of asbestos impurities in consumer products.

Additionally, EPA could still gather data on impurities from entities further upstream in the supply chain that are more directly involved with the sourcing and handling of raw materials and components. These entities have greater knowledge of a product's composition and the ability to test their feedstock and materials for the presence of asbestos impurities.

B. Apply the Reporting Period Prospectively

As discussed in more detail above, the challenges for articles reporting are compounded by the fact that retailer-importers were not previously required to collect information from their suppliers on the presence or absence of asbestos (or asbestos impurities) in a finished article's design and composition. The EPA should instead call for a one-time prospective reporting period for articles imported over a one-year period that begins no earlier than six months following issuance of the Final Rule. This will allow time for supplier education to provide the documentation required to attest to the known presence of asbestos in a particular product. A one-year period should provide EPA with sufficient data, in combination with other reporting and monitoring data, to draw inferences on any ongoing prevalence of asbestos in imported articles.

C. Allow Article Importers to Delegate Reporting Authority Back to Manufacturers

As previously discussed, product manufacturers, and not retailers, have greater visibility into the material feedstock and processes involved in manufacturing products. For this reason, EPA should follow a delegated authority approach for importers of articles like the one used by the U.S. Department of Energy for its Compliance Certification Management System (CCMS). The CCMS provides a mechanism for importers to delegate authority back to manufacturers of products to report on the internal components/chemicals of a product.¹⁴ This delegated authority approach offers multiple benefits, including that EPA will gather insights and data on global uses of

¹² See generally, "Talc" (webpage), U.S. Food & Drug Admin., available at <https://www.fda.gov/cosmetics/cosmetic-ingredients/talc> (last accessed: June 27, 2022).

¹³ See, "FDA Releases Data from the Agency's 2021 Testing of Talc-Containing Cosmetic Products for Asbestos," (webpage), U.S. Food & Drug Admin., available at <https://www.fda.gov/food/cfsan-constituent-updates/fda-releases-data-agencys-2021-testing-talc-containing-cosmetic-products-asbestos>.

¹⁴ See generally, "Compliance Certification Management System" (webpage), U.S. DEPT. OF ENERGY, available at <https://www.regulations.doe.gov/ccms>. Another example of this delegated authority model, is Washington State's chemical reporting under its Children's Safe Products Report Rule. See generally, "Chemicals of High Concern to Children Reporting List" (webpage) WASH. DEPT OF ECOLOGY, available at <https://ecology.wa.gov/Regulations-Permits/Reporting-requirements/Reporting-for-Childrens-Safe-Products-Act/Chemicals-of-high-concern-to-children> (last accessed: June 27, 2022).

chemicals and substances in manufacturing articles and can place the reporting obligations with those more closely involved in product engineering and manufacturing. At a minimum, retailer-importers should have the option of having a foreign supplier submit data directly to EPA on asbestos content in articles on the retailer's behalf.

D. Add Clarity to the "Known to or Reasonably Ascertainable" Standard for Article Importers

The term "known to or reasonably ascertainable" defined at 40 CFR § 704.3 is familiar to chemical manufacturers and importers, but not to retailers. EPA allows companies subject to its Chemical Data Reporting rule under TSCA to use this reporting standard for processing and use information (*i.e.*, information on how a chemical substance is used by the customer). For the Proposed Rule, EPA should specifically address this definition in its final rule so that retailers understand the Agency's reporting expectations. In particular, the Agency should make it clear that retailers are not expected to go outside of their organization to satisfy the "known to" component, and may rely on existing data, such as customer surveys or supplier data, that satisfy the "ascertainable" component.¹⁵

E. Compliance Timeframes Should Account for Supply Chain Complexities

Even if the scope is narrowed to eliminate retrospective review and reporting requirements, if retailer-importers are required to report on imported articles, data gathering for all imported articles that may contain asbestos will still require significant time to conduct supply chain verifications, compile documentation, and submit reports on potentially tens of thousands of imported articles. EPA needs to account for this complexity when setting submission deadlines for reporting under the final rule.

Closing

RILA appreciates the opportunity to provide these comments on EPA's Proposed Rule. The Association urges the Agency to consider the significant challenges retailers-importers of finished products will face when attempting to respond to the rule as proposed, and to appropriately narrow the scope of the reporting universe in its final rule. We would welcome an opportunity to discuss our feedback with the Agency on this and other TSCA reporting requirements that impact retailers.

If you have any questions or need any additional information, please contact me at susan.kirsch@rila.org / (202) 866-7477.

¹⁵ Some examples of documentation and steps that retailers could take to satisfy the "reasonably ascertainable" component would be: obtaining a certification or attestation from a supplier as to the asbestos content in articles, or documentation demonstrating that the information was requested from a supplier.

Sincerely,

A handwritten signature in blue ink that reads "Susan Kirsch". The signature is written in a cursive style with a small mark above the 'i' in "Kirsch".

Susan Kirsch
Vice President, Regulatory Affairs