AmericanCoatings
ASSOCIATION℠

July 5, 2022

Dr. Michal Freedhof
Assistant Administrator
Office of Chemical Safety and Pollution Prevention
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: Docket No. EPA-HQ-OPPT-2021-0357
Asbestos; Reporting and Recordkeeping Requirements Under TSCA
Submitted online via www.regulations.gov

Dear Dr. Freedhof:

The American Coatings Association ("ACA")[1] appreciates the opportunity to comment on the proposed TSCA Section 8(a) Reporting and Recordkeeping Requirements for Asbestos. We are committed to working with EPA to help ensure an accurate understanding of chemical risk, including risk from asbestos in products.

The Association's membership represents 90% of the paint and coatings industry, including downstream users (or processors) of chemicals, as well as chemical manufacturers. Our membership includes companies that manufacture paints, coatings, sealants and adhesives and their raw materials that may be affected by EPA reporting requirements.

ACA appreciates EPA's willingness to interact with stakeholders during this process. We are optimistic that through continued involvement with the public and stakeholder community, EPA will successfully implement a strong, risk-based approach to managing risk posed by asbestos. Several industry sectors have similar concerns as ACA and its members. As such, ACA

[1] ACA is a voluntary, non-profit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services. ACA's membership represents over 90 percent of the total domestic production of paints and coatings in the country.

supports comments submitted by the Ad Hoc Downstream Users Coalition whose concerns are similar to those of ACA members.

ACA and its members respectfully submit the following comment:

I. Introduction

EPA is proposing a reporting and record-keeping requirement for manufacturers, importers and processors of asbestos, including asbestos in bulk form, mixtures with asbestos or trace contaminants of asbestos and asbestos in articles, where activities occurred in the four years prior to the effective date of the rule. EPA proposes data submission within nine months following the effective date of the rule, to be determined by the agency. Small manufacturers would be exempt from requirements related to Libby Amphibole Asbestos only, but not other identified asbestos types, based on EPA's interpretation of the small business exemption under Section 8(a)(1) and (a)(3) of TSCA. EPA also proposes exemptions for manufactures of a non-isolated intermediates and activities related to research and development.

Reportable information includes company / site size, quantities of asbestos mined, handled or in products, products produced, numbers of employees affected, relevant PPE and exposure information. EPA proposes varying reportable data elements by type of company activity for:

- Mining, milling and importing of bulk materials with asbestos.
- Primary processors, defined as companies processing bulk asbestos into a mixture.
- Secondary processors, defined as companies further processing asbestos, after primary processing is complete, into a mixture or article.
- Import, including import as a component in a mixture or an article.

EPA proposes companies maintain supporting documentation for a period of five years after reporting to EPA.

Although ACA members typically do not handle asbestiform materials and mixtures, in some rare instances ACA members might be affected as importers or secondary processors, and possibly as primary processors for activities related to asbestos in mixtures at trace amounts. EPA currently does not propose a *de minimis* level for reporting or an exemption for by products. Although ACA members typically do not handle raw materials with asbestiform contaminants, asbestos in trace quantities or other covered asbestiform material, ACA members will be subject to extensive document review requirements under this rule based on suspicion of handling such materials.

II. A *de minimis* threshold of 1% in mixture would provide EPA with necessary data without imposing an unrealistic reporting requirement on processors and importers.

Secondary processors, importers and other reporting entities rely on disclosures from upstream actors to identify contaminants and trace amounts of asbestos, in lieu of conducting tests. Amounts below disclosure thresholds typically are not disclosed on Safety Data Sheets. Under the proposed rule, downstream actors are required to undertake extensive internal review of documentation to identify all information "known to or reasonably ascertainable by" them. The scope of due diligence is significant and further detailed in the following section below. Internal document review by downstream users (secondary processors, importers and some primary processors) is unlikely to yield useful information since most detailed information is held by upstream actors.

Downstream formulators also face a significant barrier in identifying reportable amounts in mixtures when not disclosed. Such information is not readily supplied to downstream users upon request. Because of complexities in the supply chain, suppliers often do not know this information or simply do not want to disclose information about small amounts, even when known. Downstream users often struggle to identify a point of inquiry from a supplier for reportable information. Even if inquiries are submitted, obtaining a response, where information is not compelled or required, is rare.

Noting that most manufacturers of formulated products do not handle asbestiform materials in trace amounts or otherwise, they would still be required to implement a detailed internal document review process, absent further tailoring of this rule. The current proposal has no exemptions for *de minimis* amounts. *De minimis* thresholds are common for TSCA reporting rules. The Chemical Data Reporting Rule (CDR), another Section 8 data collection rule, for example includes a *de minimis* threshold of 25,000 pounds per year or 2,500 pounds per year for regulated chemicals.

ACA suggests that EPA establish a *de minimis* threshold of 1% in mixture, based on EPA's prior practices related to identifying mixtures causing site contamination with asbestos from the Libby mine.[2] EPA selected this value as the limit of detection in mixtures and to maintain focus on materials with higher concentrations. A 1% threshold also ensures compatibility with OSHA disclosure requirements for Safety Data Sheets, typically at 1% for most hazards and 0.1% for carcinogens, chemicals associated with reproductive toxicity and certain other health hazards.

ACA suggests that a percentage threshold based on the OSHA SDS (Safety Data Sheet) disclosure threshold would allow for expeditious gathering of relevant information, over a volume-based threshold. A volume based threshold, though helpful, leaves a potential compliance gap where a downstream user may purchase amounts of asbestos above the

[2] GAO-08-71 1 (2007-10-12) Hazardous Materials: EPA May Need to Reassess Sites Receiving Asbestos Contaminated Ore from Libby, Montana, and Should Improve Its Public Notification Process.

volume-based threshold in a mixture with an amount below 1%, so it is not disclosed on an SDS. In effect, a volume-based threshold places a downstream user in an uncertain position, where it must gather additional information and/or conduct testing to avoid this compliance gap.

Exemptions based on concentration thresholds are common under international systems. For example, under REACH, companies manufacturing or importing an amount below 0.1% are exempt from reporting requirements. The International Material Data System[3] used by the automotive industry also has a minimum 0.1% concentration tracking requirement.

Considering the large amount of information required by EPA, a *de minimis* threshold would enhance quality of information provided to EPA. Upstream manufacturers (primary processors and bulk material providers) are better positioned to provide accurate information about mixtures with small amounts of asbestos in their products. These upstream actors manufacture chemical raw materials used by secondary processors and in some cases other primary processors. Upstream actors can also provide information about downstream uses through normal communications and inquiries as necessary to identify downstream uses, in addition to information already within the upstream actor's possession. Upstream actors commonly recommend workplace safety practices to downstream users and are better positioned to make targeted inquiries as necessary into downstream workplace safety practices, since the chemical identity and trace amounts are more likely known.

III. Under TSCA Section 8, EPA must narrowly tailor the scope of reporting companies.

In addition to a *de minimis* level, ACA suggests further tailoring the rule to require reporting from entities whose products contain identified asbestiform materials. EPA's proposal currently requires any company handling mixtures or raw materials undertake extensive internal document review based on suspicion of handling asbestiform materials in any amount, even where no literature indicates presence of asbestos in a product or raw material at issue. TSCA Section 8 reporting requirements apply to companies that *actually* manufacture or process a chemical at issue. As noted ins Section 8(a)(1), a reporting requirement applies to, "each person (other than a small manufacturer or processor) who manufactures or processes or proposes to manufacture or process a chemical substance."

To narrowly tailor this rule, ACA suggests that EPA adopt a tiered data submission system, where companies that mine, mill and provide bulk asbestos and primary processors would be required to report in the first tier. EPA would then be in a better position to scope companies required to report in the second tier as secondary processors, restricted by product type. ACA

[3] The International Material Data System (IMDS) has been adopted as the global standard for reporting material content throughout the automotive supply chain and for identifying which chemicals of concern are present in finished materials and components. Additional information is available online at: https://public.mdsystem.com/web/imds-public-pages.

further suggests that EPA exempt products where literature does not indicate presence of asbestos as a contaminant, such as liquid formulated paints, coatings, sealants and adhesives.

By focusing the rule to require reporting of companies placing asbestiform materials on the market, EPA would more efficiently obtain information, including information about secondary processing and asbestos as an impurity, known to primary processors. EPA can then supplement this information with a more targeted rule for secondary processors.

IV. Additional guidance related to due diligence and modification of the applicable standard would enhance clarity of the rule, decrease administrative burden and provide a more streamlined approach to information gathering.

With EPA now in a new era of Section 8 reporting and data submission requirements, clarification regarding application of the "known to or reasonably ascertainable by" standard of due diligence would be helpful. The existing guidance, developed for CDR reporting at 76 FR 50816 (Aug. 16, 2011) does not provide clear parameters for collecting asbestos-related information, especially for downstream actors.

EPA limits its asbestos reporting activity to information "known to or reasonably ascertainable" by the submitter, requiring significant resources to assure compliance. The term *known to or reasonably ascertainable by* is defined at 40 CFR 704.3. It means:

> [A]ll 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.

The standard requires a detailed review of internal records at all levels of the company, not just management, followed by focused external inquiries when justified. Interpretation of the standard is case specific. Companies may need to inquire with a buyer, supplier or other company where an internal document indicates that such entity has additional information. Inquiries can also extend to sub-contractors hired for research and development that may have relevant information. These requirements are explained at 76 FR 50816 (Aug. 16, 2011).

Under the *known to or reasonably ascertainable by* standard of due diligence, companies must not only submit requested information in its possession, but also any information that it could reasonably be expected to know. In effect, companies must obtain information not in its possession, if it falls within scope of what other companies normally maintain. To assure compliance, most companies will want to expend ample time and resources to thoroughly evaluate internal records and make any necessary inquiries.

ACA suggests developing a guidance document explaining application of the due diligence standard for the purpose of asbestos reporting. ACA requests further clarification about the following:

- ACA requests information about the extent of review of internal documentation. Here, as noted in the section above, ACA suggests clarification that a downstream actor can rely on inventories, accompanying disclosures and SDS provided by a distributor or other upstream provider. Further, the reporting entity need not undertake extensive internal review of documentation, but briefly identify any invoices and disclosures accompanying a shipment. Please note that even after limiting the scope of reviewable documentation, companies still face a significant compliance burden to review documentation over the four-year look back period and multiple products and raw materials.
- ACA requests clarification on the documentation reasonably expected for review. Currently, due diligence requirements include identifying information "that a reasonable person similarly situated might be expected to possess, control, or know," ACA suggests limiting document review to documentation provided by an upstream actor at the time of delivery, such as invoices, inventories and SDS, to meet this "reasonable person" part of the due diligence standard.
- ACA requests clarification about when external inquiries are appropriate. The current due diligence guidance (at 76 FR 50816, Aug. 16, 2011) encourages "targeted external inquiries" based on any information obtained during internal document review. EPA, in webinars interpreting the standard, has stated that external inquiries are never required. Please provide more information. Noting that upstream providers hold the bulk of reportable information and are required to report, ACA suggests that processors and downstream actors do not need to make external inquiries to obtain the same information.

In addition to clarification noted above, ACA suggests EPA adopt the "readily obtainable" standard of due diligence used by EPA for CDR reporting prior to 2011. Considering the availability of information and the burden on processors, this standard may be appropriate for processor reporting of asbestos. ''Readily obtainable information," as explained in the 2006 IUR is limited to what was known by certain ''management and supervisory employees of the submitter.'' It does not require review of all information in possession and control of a reporting entity.

V. EPA's proposal to require "reasonable estimates" does not provide usable information and is beyond EPA's authority specified in TSCA Section 8.

ACA suggests that EPA eliminate the proposed requirement to provide "reasonable estimates." EPA explains:

> In the event that a manufacturer (including importer) or processor does not have actual data (e.g., measurements or monitoring data) to report to EPA, the manufacturer (including importer) or processor would be required to make "reasonable estimates".[4]

Reasonable estimates would not provide EPA with information that meets the "best available science" criteria when further evaluating risks of asbestos contaminants in products. The "best available science" refers to "science that is reliable and unbiased," and its use involves "supporting studies conducted in accordance with sound and objective science practices, including, when available, peer reviewed science and supporting studies and data collected by accepted methods or best available methods."[5] Reasonable estimates are likely to lead under or over reporting of information. This results in an inaccurate and non-verifiable baseline for further analysis of asbestos in products.

Requiring reasonable estimates is also beyond the scope of authorized reporting and record keeping requirements described in TSCA Section 8. Although TSCA Section 8(a)(2)(C) authorizes collection of, "reasonable estimates of the total amount to be manufactured or processed," the reasonability of an estimate requires that it is predicated on accurate underlying information, such as an import or manufacture volume of a raw material that is further processed or manufactured. Here, EPA is requiring an estimate, even where no underlying information is known to or reasonably ascertainable by the company. As noted above, such non-verifiable estimates do not meet the "best available science" standard for use in further EPA analysis. ACA recommends deleting the requirement for submission of "reasonable estimates."

VI. Further economic analysis would provide a better understanding of the rule's far-reaching impact and need for exemptions.

EPA must revise its economic assessment to fully appreciate the far-reaching impact that this rule has on industry and the difficulty in conducting due diligence at all levels of the value chain. EPA estimates that only 18 firms may submit reports on 27 sites, including manufacturers and processors. EPA estimates the burden of reporting for intentional manufacturers or processors at a range of 12 hours at $1,146 to 26 hours at $2,265, per reporting facility or site. Where a company processes asbestos as an impurity, EPA estimates the burden at 17 hours at $1,573 to 40 hours at $3,334, per site.

EPA's estimate does not even cover the number of manufacturers of paints, coatings, sealants and adhesives that must implement a due diligence program, estimated at around 200 firms. Although handling of asbestiform materials would be extremely rare, these companies must

[4] Asbestos; Reporting and Recordkeeping Requirements Under the Toxic Substances Control Act (TSCA), 87 Fed. Reg. 27,067 (May 6, 2022).

[5] 40 C.F.R. § 702.33.

implement a due diligence strategy to confirm that no reportable information is available, at considerable costs considering the broad reach of the due diligence standard, the scope of data required and the four-year look back period.

VI. Additional time is required to provide information.

Due to the broad scope of the data collection requirements, challenges in identifying reportable chemicals and the uncertainty of the level of due diligence required of each reporter, ACA suggests providing an additional six months for reporting. Due to significant challenges in identifying trace amounts in mixtures, ACA estimates that secondary processors may spend about nine months attempting to identify reportable chemicals, while requiring at least an additional six months to identify responsive information. Under current due diligence requirements, companies will need to establish systems of extensive review of internal documentation while making any external inquiries as necessary.

VII. Conclusion

ACA appreciates the opportunity to submit comment on EPA's proposed asbestos reporting rule. ACA suggests the following:

- Allow a *de minimis* exemption to the reporting requirement for amounts below 1%, thereby allowing processors to rely on disclosures on Safety Data Sheets.
- Implement a tiered data reporting requirement so mines, mills, bulk producers and primary processors would report first, allowing for a targeted reporting requirement for secondary processors, with exemptions for product categories where literature does not indicate presence of asbestiform minerals.
- Provide additional guidance regarding application of the due diligence standard allowing reliance on disclosures made by upstream providers in SDS, invoices and inventories provided at the time of sale.
- Provide guidance about the due diligence standard to clarify that records maintained by a reasonable person are limited to documentation identified above, as provided at the time of sale or delivery.
- Adopt the "readily obtainable" standard of due diligence for reporting by processors and importers of mixtures.
- Delete the requirement to provide "reasonable estimates" of reportable information.
- Allow at least an additional six months for reporting.
- Revise EPA's economic analysis to realistically assess the far-reaching impact of this rule and the need for a *de minimis* exemption and limits on the scope of due diligence.

Please feel free to contact me if I provide any additional information.

Respectfully submitted,

Riaz Zaman
Sr. Counsel, Government Affairs
American Coatings Association
901 New York Ave., Ste. 300
Washington, D.C. 20001
rzaman@paint.org
202-719-3715