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Kirkland Alert

New Asbestos Reporting Rule Likely to Generate Challenges and Litigation

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Overview

On July 25, 2023, the U.S. Environmental Protection Agency (“EPA”) finalized new reporting and recordkeeping requirements for asbestos under the Toxic Substances Control Act (“TSCA”), effective August 24, 2023 (“Reporting Rule”). The Reporting Rule requires businesses that manufactured, processed or imported asbestos and asbestos-containing articles between 2019 and 2022 to report certain information to EPA as a one-time requirement. This Reporting Rule adds new reporting requirements for asbestos, including reporting for asbestos that are impurities or components of a mixture, specifying information including presence, types, quantities, types of use and employee data. This *Alert* provides background on the Reporting Rule, summarizes the Reporting Rule’s notable requirements and describes potential implications and legal challenges.

Background

The Reporting Rule is the result of a settlement agreement stemming from a litigation challenge under TSCA Section 21, which allows any person to petition EPA to initiate a proceeding for a rule or order; in this case, Attorneys General of 14 states and the District of Columbia petitioned EPA to initiate a rulemaking to increase asbestos reporting. After consolidating *Asbestos Disease Awareness Organization v. EPA* and *State of California et al. v. EPA*, the U.S. District Court for the Northern District of California issued a ruling in favor of plaintiffs and denying summary judgment to EPA. Following the ruling, the parties agreed that EPA would promulgate a TSCA rule to address information-gathering deficiencies raised by the court. The proposed rule was

published in the Federal Register on May 6, 2022, with only approximately 16 public comments submitted, including from industry groups.

Rule Requirements

The Reporting Rule requires manufacturers, including importers, and processors of asbestos and asbestos-containing articles to report exposure-related information; the quantities of asbestos manufactured, imported or processed; the types of use; and other employee data, including the number of employees involved with the activity. This Reporting Rule applies to manufacturers, importers and processors even where an asbestos-containing article is merely an impurity and where asbestos is a component of a mixture. The Reporting Rule requires one-time reporting for persons who manufactured, processed or imported asbestos between 2019 to 2022. Under this Reporting Rule, the definition of asbestos consists of the following fiber types listed under the statute: chrysotile, crocidolite, amosite, anthophyllite, tremolite, actinolite, libby amphibole asbestos, winchite and richterite. If a specific asbestos type is unknown, the submitter must provide information under the general asbestos form number.

The Reporting Rule does not apply to all businesses. Only manufacturers, including importers, and processors of asbestos and asbestos-containing articles whose annual sales, when combined with their ultimate parent company, were greater than or equal to \$500,000 in any calendar year from 2019 to 2022, are required to report under the Reporting Rule.

The Reporting Rule requires electronic reporting through EPA's Central Data Exchange (CDX). The reporting window will begin six months after the final rule is effective. At that time, manufacturers, importers and processors will have three months after the window opens to submit their information to EPA. The final rule becomes effective on August 24, 2023. After the effective date, manufacturers, importers and processors have nine months to gather and then report the required information by May 24, 2024.

Under the Reporting Rule and corresponding regulations, EPA requires reporting when the presence of asbestos is "known to or reasonably ascertainable by" the information submitter. This standard includes all information in a person's possession or control and all the information that a reasonable person in a similar situation might be expected to possess, control or know. Where businesses are unable to provide the quantity of asbestos in their products because the concentrations are unknown and not reasonably ascertainable, but the business is aware of asbestos in the products,

the Reporting Rule allows the business to submit a short reporting form for attestation purposes. Other businesses subject to the Reporting Rule should expect to submit the full form, which requires specific quality information per asbestos type, more detailed processing information and employee information, including exposure information.

Potential Implications

EPA's stated purpose in promulgating the asbestos Reporting Rule is to collect data to better understand exposures and uses of asbestos and to inform future TSCA risk evaluation and risk management actions. EPA also expects the new reporting requirements to increase the public's access to asbestos information, an outcome that EPA hopes will improve accountability and drive industry innovation.

Aside from these impacts, the Reporting Rule has the potential to provide the plaintiffs' bar with a new set of targets in toxic tort litigation. Because the Reporting Rule could theoretically apply to impurities as small as a single asbestos fiber, businesses that may have previously understood their asbestos exposure to be negligible could become targets in litigation triggered by the one-time reporting requirements. Moreover, the ability of businesses to claim information reported to EPA as confidential is limited. The finalized Reporting Rule prohibits businesses from claiming as confidential (1) the site North American Industry Classification System (NAICS) code, (2) chemical and bulk material identities, (3) responses that are blank or "not known or reasonably ascertainable," and (4) health and safety data.

Potential Legal Challenges to the Reporting Rule

The Administrative Procedure Act instructs a reviewing court to hold unlawful and set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." After EPA proposed the asbestos Reporting Rule in May 2022, certain industry groups submitted comments critiquing the proposed rule and setting the stage for potential legal battles. Many of the comments urged EPA to implement a 1% *de minimis* reporting threshold for asbestos impurities, a position the agency ultimately rejected in the final Reporting Rule. The American Chemistry Council (ACC) pointed out that TSCA Title II defines "asbestos-containing materials" as materials that contain at least 1% asbestos and that the OSHA hazard communication standard is triggered only when asbestos is present at concentrations of at least 1%. This could signal a potential challenge to EPA's rejection of a *de minimis*

threshold for asbestos impurities as arbitrary and inconsistent with other regulatory regimes.

In addition, ACC raised the argument that requiring businesses to report asbestos impurities below a 1% threshold would violate TSCA's own provisions. Under TSCA's reporting laws, the administrator must, to the extent feasible, "apply any reporting obligations to those persons likely to have information relevant to the effective implementation" of the reporting requirements. ACC argues that businesses would be saddled with significant costs in attempting to obtain "reasonably ascertainable" information from suppliers on the presence or absence of asbestos impurities in their products. ACC further contends that suppliers are unlikely to provide any information on asbestos impurities in products and that most companies would end up with nothing to report. Thus, under this reasoning, ACC asserts that the Reporting Rule improperly applies to businesses that are unlikely to have relevant information to report to EPA.

Business groups may also challenge the Reporting Rule as requiring reporting that is unnecessary. According to TSCA's reporting provisions, the EPA Administrator must, to the extent feasible, "not require reporting which is unnecessary or duplicative." In its comments to the proposed rule, ACC claims that the Reporting Rule is not necessary for the risk evaluation and risk management of asbestos. In particular, ACC asserts that (1) information obtained through the final rule would come too late to inform EPA's risk evaluation and risk management for chrysotile asbestos; (2) information on ongoing uses of chrysotile asbestos would be irrelevant to the EPA's Asbestos Part 2 risk evaluation, which includes legacy uses of asbestos; and (3) incorporating asbestos as an impurity in talc within the scope of the Reporting Rule would not "meaningfully inform" the Asbestos Part 2 risk evaluation and is thus unnecessary.

While potential legal challenges have not yet been filed, industry groups have already begun expressing their dissatisfaction with the new asbestos Reporting Rule, in part citing the need for a *de minimis* threshold. Notably, similar opposition is expected in response to EPA's upcoming finalization of a reporting rule for PFAS under a separate statutory regime, for which EPA also proposed removal of the applicability of a *de minimis* exemption; that final rule is anticipated to be promulgated by November 30, 2023. EPA is also in the process of finalizing a TSCA reporting rule which will require each person who manufactured or imported PFAS after January 1, 2011, to report key data on use of the chemicals and possible exposure to workers, the general public and the environment. Trade groups have argued that the TSCA PFAS reporting rule imposes unreasonable costs and should adopt a *de minimis* threshold for the chemicals. On July 7, 2023, the day after EPA released the final asbestos Reporting

Rule, ACC issued the following statement: “ACC urges EPA to reconsider its approach in the asbestos Reporting Rule. It is essential that EPA adopt a *de minimis* threshold of 1% for reporting on asbestos impurities for this rule to be workable without placing an unreasonable burden on industry.” Kirkland will continue to monitor any developments related to the Reporting Rule.

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