

**THE ATTORNEYS GENERAL OF MASSACHUSETTS, CALIFORNIA,  
HAWAI'I, ILLINOIS, MAINE, MARYLAND, MINNESOTA, NEW JERSEY,  
NEW YORK, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, AND  
THE DISTRICT OF COLUMBIA**

June 2, 2020

**Via Electronic Filing**

**EPA-HQ-OPPT-2019-0501**

Andrew Wheeler, Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460-0001

**Re: Notice: Asbestos; Draft Toxic Substances Control Act (TSCA) Risk Evaluation and TSCA Science Advisory Committee on Chemicals (SACC) Meetings; Notice of Availability, Public Meetings, and Request for Comment (85 Fed. Reg. 18,954 (Apr. 3, 2020))**

Dear Administrator Wheeler:

The Attorneys General of Massachusetts, California, Hawai'i, Illinois, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia appreciate this opportunity to comment on the U.S. Environmental Protection Agency's ("EPA") Draft Risk Evaluation for Asbestos (the "Asbestos DRE"),<sup>1</sup> one of the ten chemical substances (the "Initial Ten TSCA Chemicals")<sup>2</sup> that are the subject of EPA's initial chemical risk evaluations required under the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (the "Lautenberg Act"),<sup>3</sup> amending the Toxic Substances Control Act

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<sup>1</sup> While these comments address only the Asbestos DRE, we note that the TSCA Science Advisory Committee on Chemicals meeting, originally planned as set forth in the subject notice for April 27, 2020, through April 30, 2020, is postponed and not scheduled to convene until after the comment deadline.

<sup>2</sup> See 15 U.S.C. § 2605(b)(2)(A), requiring EPA promptly to initiate risk evaluations on ten chemical substances drawn from the agency's *TSCA Work Plan for Chemical Assessments: 2014 Update*, [https://www.epa.gov/sites/production/files/2015-01/documents/tsca\\_work\\_plan\\_chemicals\\_2014\\_update-final.pdf](https://www.epa.gov/sites/production/files/2015-01/documents/tsca_work_plan_chemicals_2014_update-final.pdf), and publish the list within 180 days after June 22, 2016. The Initial Ten TSCA Chemicals are: 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). 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>3</sup> Pub. L. No. 114—182, 130 Stat. 448 (Jun. 22, 2016).

(“TSCA”).<sup>4</sup>

In its notice dated April 3, 2020,<sup>5</sup> EPA requested comments on the agency’s preliminary conclusions, findings, and determinations in the Asbestos DRE, and submissions of any additional useful information, for EPA to consider in finalizing its Section 6 risk evaluation. As part of that risk evaluation, EPA is charged with determining whether asbestos presents unreasonable risks<sup>6</sup> necessitating further action by the agency and, if so, to propose regulations to prevent such risks, including potentially prohibiting asbestos from being manufactured, processed, or distributed in the U.S.<sup>7</sup>

Our states and the District are committed to safeguarding our residents from the risks posed by asbestos, a chemical for which there is no known safe level of exposure. Asbestos is a well-documented carcinogen, and it is ubiquitous in our built environment.<sup>8</sup> The potential for harm to human health posed by asbestos is universally recognized, and addressing its risks was among Congress’ priorities in reforming TSCA.<sup>9</sup> Accordingly, many of our states have urged that Congress ban asbestos<sup>10</sup> and have taken legal action against EPA to ensure reporting by manufacturers, importers, and others sufficient to support EPA’s regulatory decision-making.<sup>11</sup>

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<sup>4</sup> 15 U.S.C. § 2601, et seq.

<sup>5</sup> See 85 Fed. Reg. 18,954 (Apr. 3, 2020).

<sup>6</sup> See 15 U.S.C. § 2605(b)(4)(A), requiring EPA to conduct risk evaluations to “determine whether a chemical substance 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>7</sup> See *id.* § 2605(a)(1)(A).

<sup>8</sup> See *Occupational Safety and Health Administration Safety and Health Topics: Asbestos*, available at <https://www.osha.gov/SLTC/asbestos/>.

<sup>9</sup> See, e.g., 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): “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 . . . . [W]e have made asbestos a priority in this bill.”

<sup>10</sup> On July 12, 2019, and March 3, 2020, the undersigned Attorneys General wrote Congress (letters attached hereto and incorporated herein by reference), supporting the “Alan Reinstein Ban Asbestos Now Act of 2019,” H.R. 1603, prohibiting the manufacture, processing, and distribution of asbestos in the U.S., effectively reinstating the ban EPA adopted thirty years ago in its *Final Rule: Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions*, 54 Fed. Reg. 29,460, 29,467, Jul. 12, 1989, available at: <https://www.epa.gov/sites/production/files/documents/nps57f.pdf> (that ban was vacated by the Fifth Circuit Court of Appeals in *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991)—a decision widely recognized as a primary driver of Congress’s toxics reform efforts culminating in the Lautenberg Act in 2016).

<sup>11</sup> See *State of California v. EPA*, 19-cv-3807-EMC, consolidated with *Asbestos Disease Awareness Organization v. EPA*, 19-cv-0871-EMC, U.S. District Court for the Northern District of California, challenging EPA’s denial of the *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 (the “Multistate Asbestos Reporting Petition”); Jan. 31, 2019), available at:

On August 3, 2018, the undersigned Attorneys General submitted comments for their respective states (the “Problem Formulation Comments”; incorporated herein by reference)<sup>12</sup> identifying deficiencies in EPA’s *Problem Formulation of the Risk Evaluation for Asbestos* (“Asbestos Problem Formulation”).<sup>13</sup> In the Problem Formulation Comments, and as relevant to the Asbestos DRE, the Attorneys General identified, among other infirmities, that the Asbestos Problem Formulation presented an incomplete and inadequate characterization of the conditions of use for EPA’s ongoing asbestos risk evaluation. That approach contradicted TSCA’s plain language and Congress’ clear 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. Thus, we urged EPA to issue revised Scopes of the Risk Evaluations To Be Conducted for the First Ten Chemical Substances Under the Toxic Substances Control Act,<sup>14</sup> which the Problem Formulations were meant to refine,<sup>15</sup> for asbestos and the rest of the Initial Ten TSCA Chemicals. As our comments made clear, a revised approach was needed to ensure that the data EPA considers in its risk evaluation process satisfies TSCA’s “best available science” standards. EPA must respond to the Problem Formulation Comments.<sup>16</sup>

Unfortunately, in the Asbestos DRE, EPA failed to correct the deficiencies identified in the Asbestos Problem Formulation and instead has produced a flawed draft risk evaluation that fails to properly characterize the conditions of use for asbestos. This approach squarely violates TSCA, as the Ninth Circuit ruled mere months ago, and suffers from a number of other deficiencies.<sup>17</sup>

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[https://www.epa.gov/sites/production/files/2019-02/documents/tsc\\_a\\_section\\_21\\_rulemaking\\_petition\\_for\\_asbestos\\_reporting\\_1\\_31\\_2019\\_2.pdf](https://www.epa.gov/sites/production/files/2019-02/documents/tsc_a_section_21_rulemaking_petition_for_asbestos_reporting_1_31_2019_2.pdf) (last accessed Jun. 1, 2020), and incorporated by reference herein, to augment the information importers and manufacturers must report to EPA about asbestos pursuant to the TSCA Chemical Data Reporting rule (the “CDR Rule”).

<sup>12</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).

<sup>13</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>14</sup> See *Notice of Availability for the Scopes of the Risk Evaluations To Be Conducted for the First Ten Chemical Substances Under the Toxic Substances Control Act*, 82 Fed. Reg. 31,592 (Jul. 7, 2017).

<sup>15</sup> See 83 Fed. Reg. 26,998 at 26,999.

<sup>16</sup> See 85 Fed. Reg. at 18,955.

<sup>17</sup> See, e.g., *Safer Chemicals v. EPA*, 943 F.3d 397, 425 (9th Cir. 2019) (EPA must include “legacy” uses in its TSCA risk evaluations).

EPA concedes that even the admittedly limited universe of commercial and consumer asbestos uses the agency identified in the Asbestos DRE presents an unreasonable cancer risk. Despite this, EPA does not evaluate comprehensively exposure pathways for the substance, or make determinations about asbestos' risks to human health and the environment using the "best available science" and "reasonably available information," as TSCA requires.<sup>18</sup> For example, the Asbestos DRE is rife with admissions that EPA lacks sufficient information to be able to evaluate risks to people from imported articles containing asbestos—information that EPA can and must obtain to make adequate determinations of the risks presented by articles containing asbestos. Yet, while admitting that it has incomplete information, EPA nevertheless determined that the "[i]mport of asbestos and asbestos-containing products" does not pose an unreasonable risk to human health.<sup>19</sup> This approach by the agency, of recognizing that it lacks basic information necessary to support its findings, yet making the finding of no unreasonable risk regardless, is arbitrary and capricious, and inconsistent with EPA's charge under TSCA.<sup>20</sup>

Accordingly, in the comments that follow, we call on EPA to revise its approach to evaluating the risks posed by asbestos to comply with its obligations under TSCA and obtain the information it has admitted it needs to conduct the necessary, thorough evaluations of the risks presented by asbestos before issuing any final asbestos risk evaluation.

## SUMMARY OF COMMENTS

In the Problem Formulation Comments, the Attorneys General identified flaws in EPA's approach under TSCA for evaluating asbestos risks and taking needed regulatory action to address the unreasonable risks to human health presented by asbestos in products and our built environment. Yet EPA has not corrected those flaws and instead continues to act in a manner antithetical to Congress' goal in reforming TSCA to provide EPA with the authority and mandate to ensure that chemical substances do not present an unreasonable risk to human health or the environment.<sup>21</sup>

In the Asbestos DRE, EPA continues to exclude exposures to legacy asbestos from its risk evaluation even though the vast majority of asbestos in the U.S. exists as legacy material—in place in buildings, pipes, equipment, and vehicles. EPA's failure to consider legacy uses of asbestos in its risk evaluation process means EPA will not consider the risks from, among other routes of exposures, aging asbestos-containing tiles, adhesives, and piping in millions of homes, commercial buildings, and in underground infrastructure nationwide. These glaring omissions fundamentally undermine the Asbestos DRE's conclusions.<sup>22</sup>

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<sup>18</sup> *Id.* § 2625(h), (k).

<sup>19</sup> Asbestos DRE, pp. 27, 218.

<sup>20</sup> *See, e.g., Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1305 (9th Cir. 1993) (agency arbitrarily and capriciously relied on data it knew was incomplete for endangerment finding).

<sup>21</sup> 15 U.S.C. § 2601(b).

<sup>22</sup> Legacy uses of asbestos excluded from the Scope of the Risk Evaluation include: asbestos arc chutes; asbestos packings; asbestos pipeline wrap; asbestos protective clothing; asbestos separators in fuel cells and batteries; asbestos-cement flat sheet; asbestos-cement pipe and fittings; asbestos-cement shingles; asbestos-reinforced plastics; automatic transmission friction components; beater-add gaskets; clutch facings; corrugated asbestos-cement sheet;

EPA also has decided to rely on incomplete information for its Asbestos DRE, failing to consider information that is “reasonably available” even though robust reporting on the importation and use of asbestos in the U.S. is necessary for the agency to satisfy its obligations to ensure that asbestos does not present an unreasonable risk of injury to health or the environment.<sup>23</sup> Likewise, and as we previously commented, EPA’s Asbestos Problem Formulation was deficient because it did not satisfy TSCA’s “best available science” standard.<sup>24</sup> The Asbestos DRE does not correct this defect.

Moreover, EPA has concluded with insufficient basis that it need not evaluate “general population exposures” and other conditions of use because such exposures might fall under the coverage of other environmental statutes administered by EPA such as the Safe Drinking Water Act, Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act.<sup>25</sup> This approach ignores that one of the primary drivers of toxics legislation in the U.S. beginning with the passage of TSCA in 1976 has been to ensure that the identification of the risks posed by chemical substances and their subsequent potential regulation not be compartmentalized within various EPA programs; and, instead, that EPA ensure that all risks are comprehensively evaluated.<sup>26</sup>

Rather than proceed with a fatally flawed final asbestos risk evaluation, we urge EPA to withdraw the current Asbestos DRE and address its manifold infirmities in a revised DRE in which EPA complies with its obligations under TSCA and the Administrative Procedure Act<sup>27</sup> to obtain the information it has admitted it needs to conduct the necessary, thorough evaluations of the risks presented by asbestos, and publish that revised Asbestos DRE for further public comment.

These comments proceed as follows. In Part I, we describe TSCA’s requirements for the risk evaluations. In Part II, we provide a summary of our states’ interests with regard to the risk evaluations. In Part III, we offer analysis supporting our view that the Asbestos DRE reflects EPA’s failures to comply with its obligations under TSCA to consider legacy uses and future disposals in its analysis and obtain the information it has admitted it needs to conduct the necessary, thorough evaluations of the risks presented by asbestos before issuing any final asbestos risk evaluation, including exposures that are or may be covered under other statutes administered by EPA. Finally, we suggest an appropriate path forward that includes EPA’s consideration of exposures to legacy asbestos, and requiring more robust reporting for asbestos to fill existing information gaps. Only then will EPA be able to evaluate the comprehensive universe of uses of asbestos in satisfaction of Congress’s mandates under TSCA, and as necessary to protect public health.

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extruded sealant tape; filler for acetylene cylinders; high-grade electrical paper; millboard; missile liner; roofing felt; and vinyl-asbestos floor tile. *See* Scope of the Risk Evaluation for Asbestos, Jun. 2017, pp. 24-25, *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>23</sup> *Id.* § 2625(k).

<sup>24</sup> *Id.* § 2625(h).

<sup>25</sup> Asbestos DRE, p. 25.

<sup>26</sup> *See Report to Senate from the Committee on Commerce*, S. Rep. No. 94-698 (Mar. 16, 1976).

<sup>27</sup> Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706.

## I. Risk Evaluation for Asbestos

Under TSCA, as amended, EPA is required to prioritize chemical substances for regulatory review and then assess the risks posed by the chemicals identified as priorities. Risk is a function of hazard and exposure; thus, to evaluate the risks posed by a chemical as TSCA requires, it is necessary to consider the full range of exposures. However, in the Asbestos Problem Formulation and, now in the Asbestos DRE, EPA has, without basis in law or fact, eliminated from its risk evaluation many significant sources of chronic exposure to asbestos.

TSCA Section 6 requires EPA to systematically to prioritize its risk evaluations, and to evaluate the potential risks presented by, the manufacture, processing, distribution in commerce, use, or disposal of chemical substances or mixtures.<sup>28</sup> Within 180 days of enactment of the 2016 TSCA amendments, that is by December 19, 2016, EPA was required to begin risk evaluations on ten chemical substances drawn from the agency's *TSCA Work Plan for Chemical Assessments: 2014 Update* (the "2014 TSCA Work Plan Update")<sup>29</sup> and to publish the list of such chemical substances during the 180-day period.<sup>30</sup> On December 19, 2016, EPA designated asbestos as one of the Initial Ten TSCA Chemicals for such risk evaluation.<sup>31</sup>

Under Section 6(b)(4)(A), EPA is required to conduct a risk evaluation for each of the Initial Ten TSCA Chemicals, including asbestos, and for chemicals later designated as "high-priority," to determine whether the:

chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of cost 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>32</sup>

And under Section 6(b)(4)(D), within six months after the initiation of the risk evaluation for

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<sup>28</sup> 15 U.S.C. § 2605.

<sup>29</sup> In 2012, EPA identified 83 chemicals for assessment as part of its chemical safety program. According to EPA, the screening process for identifying the chemicals was based on a combination of hazard, exposure (including via uses), and persistence and bioaccumulation characteristics, and in developing the 2014 Update the agency continued to use the process, which focused on chemicals that meet one or more of the following factors: (i) potential concern for children's health (for example, because of reproductive or developmental effects); (ii) neurotoxic effects; (iii) persistent, bioaccumulative and toxic; (iv) probable or known carcinogens; (v) used in children's products or in products to which children may be highly exposed; and (vi) detected in biomonitoring programs. See *TSCA Work Plan for Chemical Assessments: 2014 Update*, [https://www.epa.gov/sites/production/files/2015-01/documents/tsc\\_a\\_work\\_plan\\_chemicals\\_2014\\_update-final.pdf](https://www.epa.gov/sites/production/files/2015-01/documents/tsc_a_work_plan_chemicals_2014_update-final.pdf).

<sup>30</sup> 15 U.S.C. § 2605(b)(2)(A).

<sup>31</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). The nine other such chemical substances are: 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).

<sup>32</sup> 15 U.S.C. § 2605(b)(4)(A).

each of the Initial Ten TSCA Chemicals, EPA was required to publish the scope of the risk evaluation to be conducted.<sup>33</sup> Under TSCA, those scopes, including for asbestos, had to include the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations the Administrator expected to consider in his analysis.<sup>34</sup>

Moreover, as set forth in Section 26(h)<sup>35</sup> EPA's risk evaluations must "use scientific information, technical procedures, measures, methods, protocols, methodologies, or models, employed in a manner consistent with the "best available science," that is:

[S]cience that is *reliable* and unbiased. Use of best available science involves the use of 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 (if the reliability of the method and the nature of the decision justifies use of the data). Additionally, EPA will consider as applicable:

- (1) The extent to which the scientific information, technical procedures, measures, methods, protocols, methodologies, or models employed to generate the information are reasonable for and consistent with the intended use of the information;
- (2) The extent to which the information is relevant for the Administrator's use in making a decision about a chemical substance or mixture;
- (3) The degree of *clarity and completeness* with which the data, assumptions, methods, quality assurance, and analyses employed to generate the information are documented;
- (4) The extent to which the variability and uncertainty in the information, or in the procedures, measures, methods, protocols, methodologies, or models, are evaluated and characterized; and
- (5) The extent of independent verification or peer review of the information or of the procedures, measures, methods, protocols, methodologies or models.<sup>36</sup>

Additionally, in carrying out its risk evaluation under Section 6,<sup>37</sup> EPA "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

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<sup>33</sup> 15 U.S.C. § 2605(b)(4)(D).

<sup>34</sup> *See* 15 U.S.C. § 2605(b)(4)(D).

<sup>35</sup> 15 U.S.C. § 2625(h).

<sup>36</sup> 40 C.F.R. § 702.33 (emphasis added).

<sup>37</sup> 15 U.S.C. § 2605.

Administrator.”<sup>38</sup> “Reasonably available information “means information that EPA possesses or can reasonably generate, obtain, and synthesize for use in risk evaluations, considering the deadlines [in the statute] for completing such evaluation.”<sup>39</sup>

On July 7, 2017, EPA published its Notice of Availability for the Scopes of the Risk Evaluations To Be Conducted for the First Ten Chemical Substances Under the Toxic Substances Control Act.<sup>40</sup> On June 11, 2018, EPA published its notice regarding, among others, the Asbestos Problem Formulation in the Federal Register,<sup>41</sup> and noted that the problem formulations were meant to refine the earlier-published scopes documents.<sup>42</sup> On August 3, 2018, many of the undersigned Attorneys General submitted the Problem Formulation Comments identifying deficiencies in EPA’s Asbestos Problem Formulation. The subject Asbestos DRE followed.

## II. The Interests of the Participating States

Our states have significant interest in ensuring that the risk evaluation for asbestos is conducted in accordance with TSCA. Asbestos is a known carcinogen, with acute and chronic toxicity associated with inhalation exposures<sup>43</sup>—asbestos fibers released into the air and inhaled cause life-threatening illnesses, including asbestosis (a serious, progressive, long-term disease of the lungs for which there is no known effective treatment), lung cancer, and mesothelioma (a rare form of cancer found in the thin membranes of the lung, chest, abdomen, and heart, that may present only many years after exposure and has no known cure). Asbestos and the other nine of the Initial Ten TSCA Chemicals were drawn from the agency’s 2014 TSCA Work Plan Update,<sup>44</sup> as required by TSCA,<sup>45</sup> and were selected based on their hazard, potential exposure, and other factors such as persistence and bioaccumulation.<sup>46</sup> Asbestos was one of the first candidates chosen for a risk evaluation due to its potential to substantially harm public health and the environment. Thus, the consequences for our states’ residents of EPA’s failure to properly identify the exposure risks associated with asbestos and to regulate accordingly may be dire, 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.

As evidenced by the following overview of actions by many of the participating states and the District of Columbia to manage the continuing severe risks posed by asbestos in the

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<sup>38</sup> 15 U.S.C. § 2625(k).

<sup>39</sup> 40 C.F.R. § 702.33.

<sup>40</sup> 82 Fed. Reg. 31,592 (Jul. 7, 2017).

<sup>41</sup> 83 Fed. Reg. 26,998 (Jun. 11, 2018).

<sup>42</sup> *Id.* at 26,999.

<sup>43</sup> *Id.*

<sup>44</sup> See *TSCA Work Plan for Chemical Assessments: 2014 Update*, [https://www.epa.gov/sites/production/files/2015-01/documents/tsca\\_work\\_plan\\_chemicals\\_2014\\_update-final.pdf](https://www.epa.gov/sites/production/files/2015-01/documents/tsca_work_plan_chemicals_2014_update-final.pdf).

<sup>45</sup> See 15 U.S.C. § 2605(b)(2)(A).

<sup>46</sup> 81 Fed. Reg. 91,927 (Dec. 19, 2016), at 91,928–91,929.

environment, the unreasonable risks to human health posed by asbestos requires strong response by the federal government. In fact, it was the perceived need for similar health-and environment-protective regulation at the federal level that compelled the 2016 amendments to TSCA.

Additionally, the data provided below, which demonstrates the prevalence of asbestos in our states, further confirms the states' significant interest in ensuring that EPA implements TSCA with respect to asbestos, as the Lautenberg Act mandates—i.e., to eliminate “unreasonable risk of injury to health or the environment” from the “intended, known, or reasonably foreseen” manufacturing, processing, distribution in commerce, use, or disposal of chemicals.<sup>47</sup>

### **Massachusetts**

Massachusetts comprehensively regulates asbestos through a set of overlapping state and delegated federal programs involving multiple state agencies to address the risks posed by asbestos:

- From 2012–2016, the U.S. Centers for Disease Control and Prevention (CDC) reports there were 436 new cases of mesothelioma in Massachusetts, and 362 deaths from the disease.<sup>48</sup>
- The Massachusetts Department of Environmental Protection (“MassDEP”) is authorized by the Massachusetts Clean Air Act, M.G.L. c. 111, §§ 142A-O, and the federal Clean Air Act, 42 U.S.C. § 7401, et seq., to prevent air pollution by regulating asbestos handling, transport, and disposal.
- MassDEP requires notice and remediation of releases of asbestos to the environment as a hazardous material under the state’s “superfund” law, M.G.L. c. 21E.
- MassDEP also regulates the disposal of asbestos under the Massachusetts Solid Waste Management Act, M.G.L. c. 111, § 150A.
- The 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 pursuant to M.G.L. c. 149. DLS is also delegated authority under the Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2641, et seq., to regulate asbestos in schools for the safety of the school community.
- Under the Massachusetts Toxics Use Reduction Act, M.G.L. c. 21I (“TURA”), large-quantity chemical users in Massachusetts are required to report annually on their use of toxic chemicals and conduct toxics use reduction planning every two years. Asbestos is on the TURA chemicals list and is subject to TURA’s requirements.
- The Attorney General is empowered to initiate litigation to enforce these state statutes and to seek court orders for compliance and civil penalties. The Attorney

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<sup>47</sup> 15 U.S.C. § 2602(4) and § 2605(b)(4)(A).

<sup>48</sup> See <https://gis.cdc.gov/Cancer/USCS/DataViz.html> (last accessed May 30, 2020).

General has prioritized the Commonwealth’s response to asbestos with an active “Healthy Buildings, Healthy Air” enforcement initiative addressing noncompliance with the state’s asbestos laws, especially in environmental justice communities. Pursuant to the initiative, the Attorney General has secured judgments for violations of asbestos laws totaling more than \$3.4 million in penalties and obtained court orders requiring proper asbestos abatement, license forfeiture by unqualified asbestos contractors, additional training requirements for contractors, property audits, and public service announcements. The Attorney General also conducts other work to encourage the safe use and public awareness of asbestos, such as leading a multi-party stakeholder effort to create a comprehensive online public database of asbestos information about Massachusetts schools.

## California

Because of the significant harm to human health and the environment that asbestos poses, California has implemented regulatory measures to mitigate exposure to asbestos including, but not limited to: regulating exposure to asbestos in construction work,<sup>49</sup> general industry,<sup>50</sup> and shipyards;<sup>51</sup> and prohibiting sale of brake pads with asbestiform fibers above 0.1% weight.<sup>52</sup> Asbestos is listed as a carcinogen under California’s Safe Drinking Water and Toxic Enforcement Act of 1986 known as “Proposition 65.”<sup>53</sup> The adverse impacts of asbestos on California’s residents and to the state generally are further demonstrated by the following:

- From 2012–2016, the CDC reports there were 1,677 new cases of mesothelioma in California, and 1,319 deaths from the disease.<sup>54</sup> Asbestos exposure is the known cause of mesothelioma.
- There are 15 sites in California with asbestos contamination that have been or are subject to EPA investigation; three of them are listed on the National Priorities List (NPL) under the Comprehensive Environment Response, Compensation and Liability Act (CERCLA).<sup>55</sup>
- In 2018, the most current Toxic Release Inventory (TRI) reporting year, a combined total of 2,592,228 pounds of asbestos was reported as having been disposed of or released in California.<sup>56</sup>

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<sup>49</sup> *Id.* tit. 8, § 1529.

<sup>50</sup> *Id.* tit. 8, § 5208.

<sup>51</sup> *Id.* tit. 8, § 8358.

<sup>52</sup> California Health and Safety Code (“Health & Saf. Code”), § 25250.51.

<sup>53</sup> *Id.* § 25249.5, et seq.

<sup>54</sup> See <https://gis.cdc.gov/Cancer/USCS/DataViz.html> (last accessed May 30, 2020).

<sup>55</sup> Data reflected by searching California for all active NPL sites for these contaminants via EPA’s Superfund Enterprise Management System at <https://cumulis.epa.gov/superpad/CurSites/srchsites.cfm>.

<sup>56</sup> Data reflected by searching the TRI for California as to release or disposal of Asbestos via EPA’s TRI Explorer at [https://enviro.epa.gov/triexplorer/tri\\_release.chemical](https://enviro.epa.gov/triexplorer/tri_release.chemical) (last accessed May 20, 2020).

## Maryland

Asbestos exposure is a chronic issue for Maryland's residents.

- From 2012–2016, the CDC reports there were 228 new cases of mesothelioma in Maryland, resulting in 190 deaths from the disease.<sup>57</sup>
- The Maryland Department of the Environment has prescribed strict procedures governing the removal and encapsulation of asbestos, requires businesses engaged in such practices to be licensed by the Department, and requires special training of workers who will engage in asbestos removal and encapsulation.<sup>58</sup>

## Minnesota

To address the historic occurrence of asbestos throughout the state, the Minnesota Asbestos Abatement Act was first enacted in 1987.<sup>59</sup>

- From 2012–2016, the CDC reports there were 371 new cases of mesothelioma in Minnesota, resulting in 323 deaths from the disease.<sup>60</sup>
- Mesothelioma is prevalent in workers, particularly in Minnesota-specific industry. Two counties in Northeast Minnesota with substantial mining operations were among the highest 50 counties in the U.S. for mesothelioma mortality rate in 2000-2009.<sup>61</sup> Minnesota is still dealing with the aftermath of Vermiculite ore processing in certain areas constituting environmental justice communities, such as in North Minneapolis.<sup>62</sup>
- The Minnesota Department of Labor & Industry administers Minnesota Occupational Safety and Health, including federal regulations for building owners on asbestos.<sup>63</sup>
- The Minnesota Pollution Control Agency regulates asbestos as a hazardous waste.<sup>64</sup>
- Minnesota also has significant refining operations from crude oil produced in both the North Dakota Bakken Reserve and the Canadian Alberta oil sands. These

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<sup>57</sup> See <https://gis.cdc.gov/Cancer/USCS/DataViz.html> (last accessed May 30, 2020).

<sup>58</sup> See Annotated Code of Maryland, Env't tit. 6 subtit. 4; Code of Maryland Regulations tit. 26, subtit. 11, ch. 21.

<sup>59</sup> Minn. Stat. § 326.70 *et seq.*

<sup>60</sup> See <https://gis.cdc.gov/Cancer/USCS/DataViz.html> (last accessed May 30, 2020).

<sup>61</sup> See Minnesota Department of Health, Occupational Health and Safety, *Mesothelioma: Northeastern Minnesota* <https://www.health.state.mn.us/news/pressrel/2015/meso021715.html> (collecting studies and releases); <https://www.health.state.mn.us/communities/occhealth/projects/questions.html>.

<sup>62</sup> Alexander, B. et al. (2012). *Radiographic Evidence of Nonoccupational Asbestos Exposure from Processing Libby Vermiculite in Minneapolis, Minnesota*, *Environmental Health Perspective*, 120(1), 44-49, available at <https://www.health.state.mn.us/communities/environment/biomonitoring/docs/radiographicvermiculite.pdf>.

<sup>63</sup> 29 CFR §§ 1910.1001; 1926.1101; *see also* Minnesota Department of Labor and Industry Occupational Safety & Health, *Building owners' responsibilities for asbestos*, <https://www.dli.mn.gov/sites/default/files/pdf/asbestos.pdf>.

<sup>64</sup> Minn. R. 7035.0805, subp. 5(M), subp. 7; *see also* <https://www.pca.state.mn.us/waste/asbestos-demolition-or-renovations> (collecting regulations/requirements for removal, transportation, and disposal of asbestos).

industries rely on plants, machinery, and protective equipment that have historically used asbestos-laden materials. In addition, Minnesota is one of the only states with iron ore mining and taconite production, a significant emitter of asbestos-like elongated fibers, so regulations of asbestos are relevant to addressing these asbestos-like toxic materials.

## New York

Asbestos exposure is a significant concern in New York.

- From 2012–2016, the CDC reports there were 1,004 new cases of mesothelioma in New York, and 673 deaths from the disease.<sup>65</sup>
- Asbestos has been used for a wide range of manufactured goods and building materials in New York. These products include fireproofing and insulation in buildings, insulation for pipes and boilers, roofing shingles and tars, plaster, wallboard and joint compound, putties, caulks, paints, and cements, floor and ceiling tiles, and friction products, such as clutch facings and brake linings in vehicles.<sup>66</sup> New York residents working in industries that make, use or disturb asbestos or who are involved in asbestos mining may be exposed to high levels of asbestos.<sup>67</sup> These include auto mechanics, bricklayers, demolition workers, construction workers, drywallers, furnace workers, insulators, iron workers and sheet metal workers, roofers, plumbers, steam fitters, and tile setters.<sup>68</sup> As EPA has concluded, even brief exposure to asbestos can cause asbestos-related disease.<sup>69</sup> In addition, those who develop asbestos-related disease could show no signs of illness for decades after exposure.<sup>70</sup>
- New York regulates asbestos and has a number of regulatory programs in place: the Department of Health certifies and trains employees who perform asbestos abatement; the Department of Labor regulates asbestos abatement and removal projects; and the Department of Environmental Conservation regulates the transportation and disposal of asbestos waste.<sup>71</sup>

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<sup>65</sup> See <https://gis.cdc.gov/Cancer/USCS/DataViz.html> (last accessed May 30, 2020).

<sup>66</sup> See New York State Department of Labor, *Asbestos in New York State*, available at <https://labor.ny.gov/formsdocs/wp/p224.pdf>.

<sup>67</sup> See New York State Department of Health, *General Information on Asbestos*, available at <https://www.health.ny.gov/environmental/indoors/asbestos/general.htm>.

<sup>68</sup> See New York State Department of Health, *General Information on Asbestos*, available at <https://www.health.ny.gov/environmental/indoors/asbestos/general.htm>.

<sup>69</sup> Asbestos DRE, p.23.

<sup>70</sup> Asbestos DRE, p.23.

<sup>71</sup> See New York State Department of Environmental Conservation, *Asbestos Regulation*, at <https://www.dec.ny.gov/chemical/8791.html>.

## Oregon

Oregon has adopted the following state-specific statutes and regulations to manage the impacts of asbestos:

- From 2012–2016, the CDC reports there were 226 new cases of mesothelioma in Oregon, resulting in 214 deaths from the disease.<sup>72</sup>
- Adopted asbestos emissions, disposal, licensing and certification requirements.<sup>73</sup>
- Adoption of a new, health risk-based program to regulate air toxics industrial air emissions. The rules regulate emissions of hundreds of chemicals, including asbestos. Oregon’s program relies on federal guidance and expertise to help define potential health risks for communities that are exposed to these emissions and to ensure that communities are protected from cumulative risks from other potential exposure pathways.<sup>74</sup>

## Washington

Washington State enforces various regulations to manage the impacts of asbestos exposure:

- From 2012–2016, the CDC reports there were 456 new cases of mesothelioma in Washington State, resulting in 393 deaths from the disease.<sup>75</sup>
- Regulations to control asbestos air emissions,<sup>76</sup> to phase-out asbestos in brake friction material,<sup>77</sup> to control the introduction of asbestos fibers into waters of the state,<sup>78</sup> to require labeling of building materials containing asbestos,<sup>79</sup> and to protect workers engaged in asbestos removal and encapsulation.<sup>80</sup>

### III. Analysis

#### A. EPA Wrongfully Continues to Exclude Asbestos Exposure Pathways Associated with Legacy Uses and Disposal in Evaluating the Risks Posed by Asbestos

In the Problem Formulation Comments, the states expressed our serious concerns that EPA was not planning to evaluate legacy uses and disposals as conditions of use in its risk

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<sup>72</sup> See <https://gis.cdc.gov/Cancer/USCS/DataViz.html> (last accessed May 30, 2020).

<sup>73</sup> Oregon Revised Statutes (ORS) 468A.700 to 468A.760 and Oregon Administrative Rules (OAR) ch. 340, div. 248.

<sup>74</sup> OAR ch. 340, div. 245.

<sup>75</sup> See <https://gis.cdc.gov/Cancer/USCS/DataViz.html> (last accessed May 30, 2020).

<sup>76</sup> Wash. Admin. Code ch. 173-401.

<sup>77</sup> Rev. Code Wash. 70.285.030.

<sup>78</sup> WAC 173-201A-240.

<sup>79</sup> Rev. Code. Wash. ch. 70.310.

<sup>80</sup> Wash. Admin. Code ch. 296-65.

evaluation.<sup>81</sup> And the plaintiffs in *Safer Chemicals Healthy Families v. EPA*, successfully pressed the issue before the Ninth Circuit Court of Appeals, gaining recognition that EPA must include “legacy” uses and future disposals in its TSCA risk evaluations.<sup>82</sup> In *Safer Chemicals*, the court concluded that “TSCA’s definition of ‘conditions of use’ clearly includes uses and future disposals of chemicals even if those chemicals were only historically manufactured for those uses [and] EPA’s exclusion of legacy uses and associated disposals from the definition of ‘conditions of use’ is therefore unlawful.”<sup>83</sup>

Although the vast majority of asbestos in the U.S. exists as legacy material—asbestos currently in place in buildings and on pipes and equipment, vehicles, underground, and elsewhere—EPA is continuing to exclude exposures to legacy asbestos from its Asbestos DRE.<sup>84</sup>

The amount of new asbestos introduced into the U.S., according to EPA’s own Asbestos Problem Formulation,<sup>85</sup> and the Asbestos DRE<sup>86</sup> pales in comparison to the amount of legacy asbestos. While approximately 750 metric tons, or 1,653,467 pounds, of asbestos was imported into the U.S. based on 2019 data,<sup>87</sup> approximately 14,743 metric tons, or 32,501,729 pounds, of asbestos and/or asbestos containing materials was disposed of as solid waste or otherwise released in the U.S. in 2018.<sup>88</sup>

Legacy use materials continue to present significant exposure risks, both in the asbestos abatement process and as a result of environmental releases from the disturbance of legacy materials that are not subject to the abatement process, 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. For example, the cutting and beveling of asbestos cement pipe leads to extremely high airborne concentrations of asbestos fibers, which puts workers at risk.<sup>89</sup> Asbestos in buildings subject to natural disaster—i.e., earthquake, hurricane, fire—also becomes friable,

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<sup>81</sup> Problem Formulation Comments, pp. 13-15.

<sup>82</sup> *Safer Chemicals v. EPA*, , 943 F.3d 397, 425 (9th Cir. 2019).

<sup>83</sup> *Id.* (notes and citation excluded).

<sup>84</sup> *See e.g.*, Asbestos DRE, p. 29, n.3.

<sup>85</sup> *Id.* at pp. 21–22.

<sup>86</sup> *Id.* at pp. 17.

<sup>87</sup> *Id.*

<sup>88</sup> EPA Toxic Release Inventory search for on-site and Off-site Reported Disposed of or Otherwise Released (in pounds), for all 43 facilities, for facilities in All Industries, for ASBESTOS (FRIABLE) chemical, U.S., 2018 , available at: [https://enviro.epa.gov/triexplorer/release\\_fac?p\\_view=USFA&trilib=TRIQ1&sort=RE\\_TOLBY&sort\\_fmt=2&state=All+states&county=All+counties&chemical=001332214&industry=ALL&year=2018&tab\\_rpt=1&fld=RELLBY&fld=TSFDSP](https://enviro.epa.gov/triexplorer/release_fac?p_view=USFA&trilib=TRIQ1&sort=RE_TOLBY&sort_fmt=2&state=All+states&county=All+counties&chemical=001332214&industry=ALL&year=2018&tab_rpt=1&fld=RELLBY&fld=TSFDSP) (last accessed May 20, 2020).

<sup>89</sup> Kumagi S. et al. 1993. “Estimation of Asbestos Exposure Among Workers Repairing Asbestos Cement Pipes Used for Conduits.” *Japan Journal of Industrial Health*, 178-87; Noble W.M. et al. 1977. *Asbestos Exposures During the Cutting and Machining of Asbestos Cement Pipe*. Report prepared for the A/C Pipe Producers Association. Berkeley, CA: Equitable Environmental Health, Inc.

putting those nearby, including first responders, at risk.<sup>90</sup>

EPA's failure to consider legacy uses of asbestos in its risk evaluation process mean EPA will not consider the risks of exposure from aging asbestos-containing tiles, adhesives, and piping in millions of homes, commercial buildings, and in underground infrastructure.<sup>91</sup> This notwithstanding the Ninth Circuit's recent decision compelling EPA to consider legacy uses in its analysis.<sup>92</sup> This exclusion renders the Asbestos DRE fundamentally unlawful.

Instead of including the required analysis of risks posed by legacy uses and future disposals in the Asbestos DRE, EPA has stated it *intends* to undertake this required analysis by way of a supplemental risk evaluation.<sup>93</sup> This approach cannot cure the inadequacies presented by EPA's failures to consider the potentially cumulative exposures from these uses in the current Asbestos DRE. EPA's disregard for these exposure pathways cannot satisfy either TSCA's clear mandate or the *Safer Chemicals* court's requirement that the conditions of use that EPA identifies under TSCA must include legacy uses and associated disposal of asbestos.

### **B. EPA Wrongfully Limits the Scope of its "Systematic Review" by Applying Arbitrary Exclusion Criteria**

EPA states that it conducted a comprehensive literature search related to different discipline-specific evidence supporting its risk evaluation (e.g., environmental fate and transport, engineering releases and occupational exposure, exposure to general pollution, consumers and environmental exposure, and environmental and human health hazard), which resulted in a very large number of papers for all areas.<sup>94</sup> However, EPA then arbitrarily applied so-called "inclusion and exclusion criteria" which excluded nearly all of the sources:

EPA did not have a previous, recent risk assessment of asbestos on which to build; therefore, initially the Systematic Review included a very large number of papers for all areas. Initially, studies were limited to those published after 1987, containing at least one of the six fiber types identified under TSCA. In addition, only observational human studies were searched for the health hazard assessment. The risk evaluation was

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<sup>90</sup> EPA Guidance for Catastrophic Emergency Situations Involving Asbestos (2009) available at: <https://www.epa.gov/sites/production/files/documents/guidance-catastrophic-emergency-asbestos-200912.pdf> (last accessed May 20, 2020); EPA "Dealing with Debris and Damaged Buildings" available at: <https://www.epa.gov/natural-disasters/dealing-debris-and-damaged-buildings#f> (last accessed May 20, 2020).

<sup>91</sup> Legacy uses of asbestos excluded from the scope of the risk evaluation include: asbestos arc chutes; asbestos packings; asbestos pipeline wrap; asbestos protective clothing; asbestos separators in fuel cells and batteries; asbestos-cement flat sheet; asbestos-cement pipe and fittings; asbestos-cement shingles; asbestos-reinforced plastics; automatic transmission friction components; beater-add gaskets; clutch facings; corrugated asbestos-cement sheet; extruded sealant tape; filler for acetylene cylinders; high-grade electrical paper; millboard; missile liner; roofing felt; and vinyl-asbestos floor tile. *See* Scope of the Risk Evaluation for Asbestos, Jun. 2017, pp. 24-25, 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>92</sup> *See Safer Chemicals v. EPA*, 943 F.3d at 425 (EPA must include "legacy" uses in its TSCA risk evaluations).

<sup>93</sup> *See, e.g.*, Asbestos DRE, p. 18.

<sup>94</sup> *Id.* at pp. 43-45.

further refined to identify studies pertaining to only mesothelioma and lung cancer as health outcomes, as well as studies containing information specific to chrysotile asbestos only.<sup>95</sup>

Specifically, as part of its data screening process, EPA excluded 7,687 of 7,698 key/supporting data sources for environmental fate (99.8%); 1,425 of 1,509 of key/supporting sources for consumer and environmental exposure (94.4%); 2,976 of 3,034 key/supporting data sources for environmental hazard (98.0%); 24,012 of 24,050 key/supporting data sources for human health hazard (99.8%).<sup>96</sup>

EPA's exclusion criteria are arbitrary.<sup>97</sup> For example, there are six types of asbestos identified for this risk evaluation—chrysotile (serpentine), crocidolite (riebeckite), amosite (cummingtonite-grunerite), anthophyllite, tremolite or actinolite.<sup>98</sup> The latter five fiber types are amphibole varieties.<sup>99</sup> All types pose harmful health and environmental risks. However, EPA limits the risk evaluation to chrysotile asbestos only and excludes studies involving chrysotile and amphibole asbestos exposure.<sup>100</sup> Purportedly to support this exclusion, EPA asserts that “the only form of asbestos known to be imported, processed, or distributed for use in the United States at the posting of this draft risk evaluation is chrysotile.”<sup>101</sup> However, there is no rational basis to limit the risk evaluation to forms of asbestos currently imported, processed, or distributed. Moreover, EPA states that chrysotile asbestos may also contain amphibole asbestos as well, further demonstrating why limiting its evaluation to chrysotile alone is arbitrary.<sup>102</sup>

EPA also concludes that asbestos may cause lung cancer, mesotheliomas, larynx cancer, ovarian cancer, pharynx cancer, stomach cancer, colorectum cancer,<sup>103</sup> and pleural and pulmonary effects (e.g., asbestosis and pleural thickening).<sup>104</sup> However, EPA improperly limits the risk evaluation to only studies pertaining to lung cancer and mesothelioma and excludes all other types of cancers as well as non-cancer health effects.<sup>105</sup> In addition, EPA only considers

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<sup>95</sup> *Id.* at pp. 43-50.

<sup>96</sup> *Id.* at pp. 46-50.

<sup>97</sup> EPA also offers no justification for limiting its systematic review to studies published after 1987.

<sup>98</sup> *Id.* at p. 31.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at pp. 31, 134.

<sup>101</sup> *Id.* at p.17.

<sup>102</sup> *Id.* at pp. 30-31, 132, 134. Furthermore, conducting a supplemental risk evaluation will not cure EPA's failure to conduct a risk evaluation for all six types of asbestos, as explained below.

<sup>103</sup> *Id.* at pp. 22, 131.

<sup>104</sup> *Id.* at p. 198.

<sup>105</sup> *Id.* at pp. 45, 198.

deaths from lung cancer and mesothelioma as opposed to also considering non-lethal incidence data.<sup>106</sup>

By failing to consider the risk of injury to health or the environment posed by asbestos under the conditions of use, EPA fails to fulfill the mandate of Section 6(b)(4)(A) of TSCA.<sup>107</sup>

### C. The Asbestos DRE Relies on Incomplete Information

The draft evaluation reflects admissions that EPA failed to obtain sufficient information to be able to evaluate risks to people from imported articles containing asbestos, information that EPA has the authority to obtain, and could have obtained much earlier in the process:

- “EPA has also identified the importation of asbestos-containing products; *however, the import volumes of those products are not fully known.* The asbestos-containing products that EPA has identified as being imported and used are sheet gaskets, brake blocks, aftermarket automotive brakes/linings, other vehicle friction products, and other gaskets.”<sup>108</sup>
- “[I]t is not known how many sites fabricate imported sheet gaskets containing asbestos in the United States. If other companies stamp gaskets in the same way that EPA observed at one facility, it could then be assumed that there will not be water releases. However, it is not possible to rule out incidental releases of asbestos fibers in wastewater at other fabrication facilities if different methods are used, but any amounts of release cannot be quantified.”<sup>109</sup>
- “[T]he number of workers potentially exposed for other [non-chlor-alkali plants] [conditions of use] is less certain.”<sup>110</sup> And, “[m]ost data sources do not sufficiently describe the proximity of these employees to the exposure source.”<sup>111</sup>

EPA had the authority and the duty under TSCA to do more to acquire this important information prior to publishing the Asbestos DRE. TSCA Section 8 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].”<sup>112</sup> The term “manufacture” means to import into the United States, produce, or manufacture.<sup>113</sup> The power to compel information from the entities profiting from the manufacture/import of subject chemicals is central to TSCA. In the original TSCA preamble in 1976, unchanged by the 2016 reform, Congress said: “It is the policy

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<sup>106</sup> *Id.* at p. 22.

<sup>107</sup> 15 U.S.C. § 2605(b)(4)(A).

<sup>108</sup> *Id.* at p. 17 (emphasis added).

<sup>109</sup> *Id.* at p. 54.

<sup>110</sup> *Id.* at p. 21.

<sup>111</sup> *Id.* at p. 22.

<sup>112</sup> 15 U.S.C. § 2607(a)(1)(A).

<sup>113</sup> 15 U.S.C. § 2602(9).

of the United States that—(1) *adequate information* should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that *the development of such information should be the responsibility of those who manufacture and those who process such chemical substances and mixtures.*<sup>114</sup> EPA need not, and should not, rely on manufacturers/importers voluntarily offering such crucial information.

The undersigned States petitioned EPA<sup>115</sup> to exercise its Section 8 authority to adopt an asbestos information-gathering regulation. The regulation the States sought would have assisted EPA in filling the data gaps it had acknowledged even in the Asbestos Problem Formulation, including that it does not know the volume of imported asbestos-containing products.<sup>116</sup> The States pointed out that these data gaps “justified EPA adding new provisions to the CDR Regulations that would: (1) eliminate the applicability of the “naturally occurring substance” exemption to asbestos reporting; (2) apply the reporting requirements to processors, as well as manufacturers/importers of asbestos; (3) eliminate the impurities exemption to asbestos reporting; and (4) require reporting about articles that contain asbestos.”<sup>117</sup>

The asbestos-specific data regulation the States sought would have included EPA requiring necessary information about articles that contain asbestos and products, such as talc powders and others, that may be contaminated with asbestos as an impurity.<sup>118</sup> The mineral talc, in particular, is used in a variety of consumer and industrial products including baby powder, and cosmetics. Because talc is often naturally found near asbestos in the earth, it can become contaminated by asbestos while being mined. In recent years, this has led to much concern over exposure to contaminated talcum powder products, which have been linked to cases of ovarian cancer.<sup>119</sup> Johnson & Johnson, after facing thousands of lawsuits from cancer patients who claim that its talc was contaminated with asbestos, recently announced it will end talc-based baby powder sales in North America.<sup>120</sup> Yet EPA collects no information about asbestos-containing articles or products that could contain impurities. And in the Asbestos DRE, EPA makes no mention of the risks of asbestos as an impurity in articles; and it finds that the import of asbestos and asbestos-containing products pose no unreasonable risk to human health.<sup>121</sup>

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<sup>114</sup> 15 U.S.C. § 2601(b)(1) (emphases added).

<sup>115</sup> Multistate Asbestos Reporting Petition available at: [https://www.epa.gov/sites/production/files/2019-02/documents/tsca\\_section\\_21\\_rulemaking\\_petition\\_for\\_asbestos\\_reporting\\_1\\_31\\_2019\\_2.pdf](https://www.epa.gov/sites/production/files/2019-02/documents/tsca_section_21_rulemaking_petition_for_asbestos_reporting_1_31_2019_2.pdf) (last accessed Jun. 1, 2020).

<sup>116</sup> See, e.g., *Problem Formulation of the Risk Evaluation for Asbestos*, May 2018, p. 39, 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) (last accessed January 29, 2020).

<sup>117</sup> Multistate Asbestos Reporting Petition, pp. 11-19.

<sup>118</sup> *Id.* at pp. 17-18.

<sup>119</sup> See Roni Caryn Rabin and Tiffany Hsu, *Johnson & Johnson Feared Baby Powder’s Possible Asbestos Link For Years*, *The New York Times* (Dec. 14, 2018), available at <https://www.nytimes.com/2018/12/14/business/baby-powder-asbestos-johnson-johnson.html>.

<sup>120</sup> See Tiffany Hsu and Roni Caryn Rabin, *Johnson & Johnson to End Talc-Based Baby Powder Sales in North America*, *The New York Times* (May 19, 2020), available at <https://www.nytimes.com/2020/05/19/business/johnson-baby-powder-sales-stopped.html>.

<sup>121</sup> Asbestos DRE, pp. 27, 218.

Section 8 requires EPA to promulgate rules to have manufacturers (and importers) and processors report the number of individuals exposed and their places of employment, including the duration of such exposure.<sup>122</sup> This also results in EPA's acquiring the operative information from the party in the best position to have it: manufactures, importers, and processors. The reporting requirement the States sought would have provided an avenue for EPA to learn the volume of asbestos in imported asbestos-containing products, as well as exposure information, that it otherwise does not have and would have helped ensure that EPA possessed this information as it proceeded with its risk evaluation. Unfortunately, EPA denied the States' rulemaking petition.<sup>123</sup>

In the Asbestos DRE, EPA also acknowledges that some of its findings of no unreasonable harm are based on assumptions. EPA found that the "[i]mport and distribution in commerce of asbestos for all the conditions of use" do not pose an unreasonable risk to human health, because such products are "*assumed* to be imported and distributed in commerce in a non-friable state, enclosed in sealed boxes, where fibers are not expected to be released."<sup>124</sup> EPA also found "no unreasonable risk to health or the environment for occupational populations for the disposal of asbestos sheet gaskets scraps during gasket stamping and the disposal of spent gaskets used in chemical manufacturing plants" because EPA *assumes* the absence of asbestos exposure.<sup>125</sup> Such findings, based on incomplete information and unsupported "assumptions," does not satisfy EPA's obligations under TSCA to act on reasonably available information where, as here, EPA has not even attempted to exercise its information-gathering authority under TSCA.

As such, the Asbestos DRE fails to consider data collected by accepted methods or best available methods as required by TSCA's "best available science" standard<sup>126</sup> and fails to obtain information that EPA could reasonably generate, obtain, and synthesize for use in the risk evaluation as required by TSCA's "reasonably available information" standard.<sup>127</sup> Thus, EPA's determination that "[i]mport of asbestos and asbestos-containing products" does not pose an unreasonable risk to human health is admittedly unsupported by the record.

The Asbestos DRE's treatment of potential occupational exposures to asbestos is concerning, with the described uses demonstrating the potential for worker exposures to asbestos fibers in their work.<sup>128</sup> For example, repair of automotive friction products (brakes and clutches) has been documented to cause extremely high asbestos exposures, many times the current

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<sup>122</sup> See Multistate Asbestos Reporting Petition, p. 10; see also 15 U.S.C. § 2607(a)(2)(F) (emphasis added).

<sup>123</sup> See *TSCA Section 21 Petition To Initiate a Reporting Rule Under TSCA Section 8(a) for Asbestos; Reasons for Agency Response; Petition for rulemaking; denial*, 84 Federal Register 20,062 (May 8, 2019) available at: <https://www.govinfo.gov/content/pkg/FR-2019-05-08/pdf/2019-09335.pdf> (last accessed Jun. 1, 2020).

<sup>124</sup> Asbestos DRE, pp. 27, 218 (emphasis added).

<sup>125</sup> *Id.* at p. 28.

<sup>126</sup> 15 U.S.C. § 2625(h).

<sup>127</sup> 15 U.S.C. § 2625(k).

<sup>128</sup> See Asbestos DRE, pp. 56-106.

permissible exposure limit (PEL) established by the U.S. Occupational Safety and Health Administration.<sup>129</sup> And the treatment of asbestos use by the chlor-alkali industry is particularly disturbing, with reported high exposure levels, a high potential for accidental release during the shipment of asbestos from ports to plants, and the unjustified assumption that respiratory protection will suffice to mitigate possible exposures.<sup>130</sup>

Seemingly to justify making a determination based on admittedly incomplete data, EPA states that while it will make “*an effort to adopt as many best practices as practicable* from the systematic review community, EPA expects modifications to the process to ensure that the identification, screening, evaluation and integration of data and information can support timely regulatory decision making under the aggressive timelines of the statute.”<sup>131</sup> EPA was aware that the amount of asbestos in consumer goods was unknown in 2018 when it issued the Asbestos Problem Formulation, when it noted that: “[c]onsumer exposures will be difficult to evaluate since the quantities of these [asbestos-containing] products that still might be imported into the United States is not known.”<sup>132</sup> It could and should have addressed this lack of information then. Hence, to the extent EPA alleges an inability to use the information the States sought EPA to acquire through their rulemaking petition for data reporting in time for its TSCA risk evaluation is no one’s fault but its own.<sup>133</sup>

Exposure to asbestos irrefutably carries a risk of devastating disease. By failing to use its statutory authority, including its data collection authority under Section 8, to gather sufficient information about exposure pathways and mitigate those risks, EPA has not produced an Asbestos DRE that can form the basis for its final Section 6 risk evaluation for asbestos.

#### **D. EPA Wrongfully Fails to Evaluate General Population Exposures and Other Exposure Pathways That It Says Are Addressed Under Other Statutes Administered by EPA**

EPA recognizes that “[a]sbestos is a persistent mineral fiber that can be found in soils, sediments, lofted in air and windblown dust, surface water, ground water and biota.”<sup>134</sup> EPA

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<sup>129</sup> See, e.g., Rohl, A.N., et al., *Asbestos Exposure During Brake Lining Maintenance and Repair*, Environmental Research 12, 110-128 (1976), Academic Press, Inc., available at: <https://www.sciencedirect.com/science/article/abs/pii/001393517690013X> (reviewed Jun. 1, 2020).

<sup>130</sup> See Asbestos DRE, Table 2-24, pp. 106-07, summarizing EPA’s estimates of occupational exposures and reflecting that all uses entail exposures well-above ambient background levels, representing unacceptable risks to workers.

<sup>131</sup> Asbestos DRE, p. 43 (emphasis supplied).

<sup>132</sup> *Problem Formulation of the Risk Evaluation for Asbestos*, May 2018, p. 39, 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) (last accessed January 29, 2020).

<sup>133</sup> See *Portland Cement Association v. EPA*, 665 F.3d 177, 188 (D.C. Cir. 2011) (finding that an agency’s own timing choices (that as a result, led to insufficient data) is not a good reason for publishing a misinformed rule, noting that “. . . reasoned decisionmaking is not a dispensable part of the administrative machine that can be blithely discarded even in pursuit of a laudable regulatory goal”).

<sup>134</sup> Asbestos DRE, p. 51.

states that “[a]sbestos may be released to the environment through industrial or commercial activities, such as processing raw asbestos, fabricating/processing asbestos containing products, or the lofting of friable asbestos during use, disturbance and disposal of asbestos containing products.”<sup>135</sup> However, EPA excludes numerous of these exposure pathways in its risk evaluation:

EPA did not evaluate the following: emission pathways to ambient air from commercial and industrial stationary sources or associated inhalation exposure of the general population or terrestrial species; the drinking water exposure pathway for asbestos; the human health exposure pathway for asbestos in ambient water; emissions to ambient air from municipal and industrial waste incinerators and energy recovery units; on-site releases to land that go to underground injection; or on-site releases to land that go to asbestos National Emission Standards for Hazardous Air Pollutants (NESHAP) (40 CFR part 61, subpart M) compliant landfills or exposures of the general population (including susceptible populations) or terrestrial species from such releases.<sup>136</sup>

EPA wrongfully asserts that it need not evaluate general population exposures and other conditions of use because such exposures might be covered under other environmental statutes administered by EPA, such as the Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act.<sup>137</sup> By way of example, EPA concluded:

Because stationary source releases of asbestos to ambient air are adequately assessed and any risks are effectively managed when under the jurisdiction of the CAA, EPA did not evaluate emission pathways to ambient air from commercial and industrial stationary sources or associated inhalation exposure of the general population or terrestrial species in this TSCA evaluation.<sup>138</sup>

Although the protections under other regulatory schemes may reduce the potential for exposure from a particular pathway, it is EPA’s charge under TSCA to eliminate the unreasonable risk to human health and the environment posed by the chemical through all exposure pathways, a duty that EPA can satisfy only by evaluating all known exposure pathways assessed cumulatively. Nothing in TSCA justifies EPA dispensing with evaluation of a risk to the general population because EPA, without any supporting data, asserts its other regulatory programs sufficiently address the issue.

Indeed, the lack of regulatory authority under other environmental laws to comprehensively address the risks of toxics exposure was one of the key drivers for the toxics

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<sup>135</sup> *Id.* at p. 52.

<sup>136</sup> *Id.* at p. 216.

<sup>137</sup> *Id.* at p. 25.

<sup>138</sup> *Id.* at p. 215.

legislation that resulted in TSCA's passage in 1976.<sup>139</sup> As the Commerce Committee report noted: "there is no agency which has the authority to look comprehensively at the hazards associated with the chemical. Existing authority allows the agencies to only look at the hazards within their jurisdiction in isolation from other hazards associated with the same chemical. The bill would grant [EPA] the authority to look at the hazards in total."<sup>140</sup> Thus, a foundational TSCA principle was to provide a mechanism for a *comprehensive* review of a chemical's hazards—an "all hazards" approach providing a mechanism to account for and address all routes of exposure to a chemical—rather than through the lenses of compartmentalized air, water and solid waste regulatory programs. The Asbestos DRE arbitrarily ignores this principle.

Accordingly, the Asbestos DRE must be revised and the agency's subsequent risk evaluation must consider exposures that may result despite the fact that other environmental statutes may address certain releases of asbestos to the environment.

## CONCLUSION

We ask EPA to revise its approach to the asbestos risk evaluation to comply with its obligations under TSCA and obtain the information it concedes it needs to conduct thorough evaluation of the risks presented by asbestos before issuing any final asbestos risk evaluation. While EPA certainly has an obligation to meet its TSCA deadlines, and had EPA acted appropriately and in response to the States' Problem Formulation Comments as to asbestos and the rulemaking petition the States sought, it could have done so, it is of utmost importance for EPA to satisfy TSCA's express standards for conducting an adequate risk evaluation for asbestos and carry out its statutory mandate to prevent unreasonable risks to health and the environment.

At minimum, EPA should withdraw the Asbestos DRE pending its evaluation of the risks presented by legacy asbestos and by asbestos present as an impurity in various products and thereafter issue a draft risk evaluation that provides the states with an adequate document on which to comment. We are confident that a thorough evaluation will support a determination that asbestos presents an unreasonable risk of injury to public health that requires EPA proceed with a long-overdue regulation prohibiting the manufacture (including importing), processing, and distribution in commerce of asbestos in the U.S.

We would be pleased to provide further input as EPA continues its Section 6 risk evaluation of asbestos under TSCA. Please do not hesitate to contact us if you wish to engage us further in this important effort.

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<sup>139</sup> See *Report to Senate from the Committee on Commerce*, S. Rep. No. 94-698 (Mar. 16, 1976).

<sup>140</sup> *Id.*

Sincerely,

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AND THE DISTRICT OF COLUMBIA

July 12, 2019

The Honorable Frank Pallone, Jr.  
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U.S. House of Representatives  
2107 Rayburn House Office Building  
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The Honorable Greg Walden  
Ranking Member  
Committee on Energy and Commerce  
U.S. House of Representatives  
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The Honorable Paul Tonko  
Chairman  
Subcommittee on Environment  
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The Honorable John Shimkus  
Ranking Member  
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Re: *H.R. 1603, the Alan Reinstein Ban Asbestos Now Act of 2019*

Dear Committee Chairman Pallone and Ranking Member Walden and  
Subcommittee Chairman Tonko and Ranking Member Shimkus:

We, the undersigned Attorneys General, write in support of the “Alan Reinstein Ban Asbestos Now Act of 2019,” H.R. 1603 (the “Reinstein Bill”), introduced March 7, 2019, and referred to the Subcommittee on Environment and Climate Change on March 8, 2019, amending the Toxic Substances Control Act (“TSCA”).<sup>1</sup> The Reinstein Bill would prohibit the manufacture, processing, and distribution of asbestos in the U.S., effectively reinstating the ban the U.S. Environmental Protection Agency (“EPA”) adopted thirty years ago.<sup>2</sup> That ban was vacated by the Fifth Circuit Court of Appeals in 1991<sup>3</sup>—a decision widely recognized as a primary driver of Congress’s toxics reform efforts culminating in the amendments to TSCA enacted in the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act of 2016.<sup>4</sup>

Our states and the District are committed to safeguarding our residents from the risks posed by asbestos, a chemical for which there is no safe level of exposure. Asbestos is a known

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<sup>1</sup> 15 U.S.C. § 2601, et seq.

<sup>2</sup> See *Final Rule: Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions*, 54 Fed. Reg. 29,460, 29,467 (Jul. 12, 1989).

<sup>3</sup> See *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

<sup>4</sup> Pub. L. No. 114—182, 130 Stat. 448 (Jun. 22, 2016).

carcinogen and it is ubiquitous in our built environment.<sup>5</sup> The potential for harm posed by 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. . . . [W]e have made asbestos a priority in this bill.<sup>6</sup>

Asbestos fibers released into the air and inhaled can and do cause life-threatening illnesses, including asbestosis (a serious, progressive, long-term disease of the lungs for which there is no known effective treatment), lung cancer, and mesothelioma (a rare form of cancer found in the thin membranes of the lung, chest, abdomen, and heart, that may present only many years after exposure and has no known cure). As discussed below, we strongly support the Reinstein Bill and its prohibition against the manufacture, importation, processing, and distribution in commerce of asbestos in any of its many forms (including in any mixture or article that contains asbestos)—a ban already in place in more than 60 countries around the world. We also support the bill’s requirement that EPA report to Congress on the presence of, and exposure risks to human health associated with, legacy asbestos in buildings and make recommendations to address those risks. We believe that a ban at the federal level is the appropriate governmental response to the dire risks that asbestos poses to human health, and we support Congress’ efforts to accomplish this, particularly in light of EPA’s failure to take appropriate actions to address asbestos risks since TSCA was amended in 2016.

#### Congressional Action Is Warranted Given EPA’s Actions Since The Revision of TSCA

The protections afforded by the Reinstein Bill are necessary now because EPA clearly has demonstrated that it is unable and unwilling to use its authority under TSCA to address the unreasonable risks of injury to health and the environment posed by asbestos. The EPA’s refusal to take appropriate action is evidenced by the following examples of EPA’s decision-making.

#### *EPA Has Excluded Exposures to Legacy Asbestos From its Asbestos Risk Evaluation*

Many of the undersigned Attorneys General submitted comments for their respective states (“Problem Formulation Comments”)<sup>7</sup> identifying deficiencies in EPA’s *Problem*

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<sup>5</sup> See *Occupational Safety and Health Administration Safety and Health Topics: Asbestos*, available at <https://www.osha.gov/SLTC/asbestos/>.

<sup>6</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>7</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*

*Formulation of the Risk Evaluation for Asbestos* (“Asbestos Problem Formulation”).<sup>8</sup> Among other infirmities, the Asbestos Problem Formulation presents a woefully incomplete and inadequate array of conditions of use for asbestos risk evaluation. This approach contradicts 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 vast majority of asbestos in the U.S. exists as legacy material—asbestos currently in place in buildings and on pipes and equipment, vehicles, underground, and elsewhere. The amount of new asbestos introduced into the U.S., according to EPA’s Asbestos Problem Formulation,<sup>9</sup> pales in comparison to the amount of such legacy asbestos. While approximately 300 metric tons, or 661,387 pounds, of asbestos was imported into the U.S. in 2017,<sup>10</sup> approximately 11,598 metric tons, or 25,568,292 pounds, of asbestos containing materials was disposed as solid waste or otherwise released in the U.S. in 2015.<sup>11</sup> Legacy use materials continue to present extremely significant exposure risks, both in the asbestos abatement process and as a result of environmental releases from the disturbance of legacy materials that are not subject to the abatement process. For example, the cutting and beveling of asbestos cement pipe leads to extremely high airborne concentrations of asbestos fibers, which puts workers at risk.<sup>12</sup> Asbestos in buildings subject to natural disaster—i.e., earthquake, hurricane, fire—also becomes friable putting those nearby, including first responders, at risk.<sup>13</sup>

Thus, any reasonable construction of “conditions of use” as contemplated by TSCA includes legacy uses and disposal of asbestos. Certain populations may be chronically exposed to asbestos through legacy uses and associated disposal. Without considering all such exposure pathways, EPA is poised to underestimate the cumulative risk associated with the ongoing

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*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).

<sup>8</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>9</sup> *Id.* at pp. 21–22.

<sup>10</sup> *Id.* at p. 22.

<sup>11</sup> *Id.* at p. 28.

<sup>12</sup> Kumagi S. et al. 1993. “Estimation of Asbestos Exposure Among Workers Repairing Asbestos Cement Pipes Used for Conduits.” *Japan Journal of Industrial Health*, 178-87; Noble W.M. et al. 1977. *Asbestos Exposures During the Cutting and Machining of Asbestos Cement Pipe*. Report prepared for the A/C Pipe Producers Association. Berkeley, CA: Equitable Environmental Health, Inc.

<sup>13</sup> EPA Guidance for Catastrophic Emergency Situations Involving Asbestos (2009) available at: <https://www.epa.gov/sites/production/files/documents/guidance-catastrophic-emergency-asbestos-200912.pdf> (last accessed June 18, 2019); EPA “Dealing with Debris and Damaged Buildings” available at: <https://www.epa.gov/natural-disasters/dealing-debris-and-damaged-buildings#f> (last accessed June 18, 2019).

manufacturing, processing, and distribution of asbestos in the U.S. Nonetheless, EPA has excluded legacy uses and disposal of asbestos from its risk evaluation under Section 6.

EPA's failure to consider legacy uses of asbestos in its risk evaluation process, and the agency's failure to otherwise identify properly the conditions of use for asbestos, mean EPA will not consider the risks from, among others, aging asbestos-containing tiles, adhesives, and piping in millions of homes, commercial buildings, and in underground infrastructure nationwide.<sup>14</sup> Because EPA has decided to ignore the health risks from exposure to legacy uses, the states support the Reinstein Bill's efforts to compel agency action to study and effectively address these risks.

*EPA Has Decided to Rely on Incomplete Information For Its Asbestos Risk Evaluation*

Robust reporting on the importation and use of asbestos in the U.S. is necessary both for EPA to satisfy its obligations under TSCA 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 information necessary for them to evaluate such risks.<sup>15</sup> As the states noted in the Problem Formulation Comments, and which many of them reiterated in a TSCA Section 21(a)<sup>16</sup> petition submitted to EPA under TSCA Section 8(a)<sup>17</sup> (the "AGs' Asbestos Reporting Petition"),<sup>18</sup> EPA has arbitrarily failed to pursue all reasonably available information about asbestos for its risk evaluations.

The AGs' Asbestos Reporting Petition asks EPA to initiate a rulemaking under TSCA Section 8(a)<sup>19</sup> to issue a new asbestos reporting rule to address those infirmities in asbestos

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<sup>14</sup> Legacy uses of asbestos excluded from the scope of the risk evaluation include: asbestos arc chutes; asbestos packings; asbestos pipeline wrap; asbestos protective clothing; asbestos separators in fuel cells and batteries; asbestos-cement flat sheet; asbestos-cement pipe and fittings; asbestos-cement shingles; asbestos-reinforced plastics; automatic transmission friction components; beater-add gaskets; clutch facings; corrugated asbestos-cement sheet; extruded sealant tape; filler for acetylene cylinders; high-grade electrical paper; millboard; missile liner; roofing felt; and vinyl-asbestos floor tile. See Scope of the Risk Evaluation for Asbestos, Jun. 2017, pp. 24-25, 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>15</sup> 15 U.S.C. § 2605(a).

<sup>16</sup> *Id.* § 2620(a).

<sup>17</sup> *Id.* § 2607(a).

<sup>18</sup> *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*, Jan. 31, 2019, available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2019-0038-0003>. EPA denied the petition and published in the Federal Register its reasons for the denial (84 Fed. Reg. 20062 (May 8, 2019)), available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2019-0038-0001>. The appeal of the denial of the petition is pending in the U.S. District Court for the Northern District of California, *State of California, et al. v. United States Environmental Protection Agency, et al.*, 4:19-cv-03807-KAW.

<sup>19</sup> 15 U.S.C. § 2607(a).

reporting under EPA's Chemical Data Reporting rule ("CDR"), 40 C.F.R. Part 711. A new reporting rule is needed to ensure that data as to the importation and use of asbestos and asbestos-containing products in the U.S., and possible avenues for exposures, that are necessary for EPA to administer TSCA are adequately reported to EPA.<sup>20</sup>

Instead, the CDR exempts imported raw asbestos as a "naturally occurring substance,"<sup>21</sup> and exempts asbestos as an impurity<sup>22</sup> and as a chemical substance imported as part of an article.<sup>23</sup> Moreover, the CDR applies to those who manufacture asbestos, but not those who process asbestos.<sup>24</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. The limitations also hamper states' ability to design and implement programs necessary to protect the public's health from this highly toxic chemical.

Thus, in addition to evaluating an insufficiently limited number of conditions of use of asbestos, which excludes the most pervasive exposure pathways to legacy asbestos, EPA is evaluating asbestos risk without information crucial to its ability to conduct a TSCA-compliant risk evaluation. Instead, EPA will rely on information that it acknowledges presents an incomplete picture of the potential exposures.<sup>25</sup> As a result of these decisions, the states cannot expect that EPA's regulatory response to asbestos will be remotely sufficient. Consequently, we support Congress taking action to ban asbestos with the Reinstein Bill.

### *The Asbestos SNUR Opens The Door To New Uses*

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<sup>20</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 many of the undersigned Attorneys General supported. EPA denied the petition and published in the Federal Register its reasons for the denial (84 Fed. Reg. 3396 (Feb. 12, 2019)), available at <https://www.govinfo.gov/content/pkg/FR-2019-02-12/pdf/2019-01533.pdf>. The appeal of the denial of the NGO petition is pending in the U.S. District Court for the Northern District of California, *Asbestos Disease Awareness Organization, et al. v. Wheeler*, 3:19-cv-00871-EMC.

<sup>21</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>22</sup> See 40 C.F.R. §§ 711.10(c), 711.5, and 720.30(h)(1).

<sup>23</sup> See *id.* §§ 711.10(b) and 710.3.

<sup>24</sup> See *id.* § 711.3 (processing not included in definition of "manufacture"); *id.* § 711.8.

<sup>25</sup> In the Problem Formulations, among other things, EPA stated that "[i]t is important to note that the import volumes of products containing asbestos is [sic] unknown." (Problem Formulation of the Risk Evaluation for Asbestos, p. 22.)

The states' support for the long-overdue protections afforded by the Reinstein Bill is intensified by EPA's recently published TSCA Section 5<sup>26</sup> Significant New Use Rule *Restrictions on Discontinued Uses of Asbestos* (the "Asbestos SNUR").<sup>27</sup> Although EPA framed its action as closing the loophole through which discontinued, but not prohibited, uses of asbestos could lawfully return to the market without notice to the agency, the Asbestos SNUR nonetheless provides a mechanism for EPA to allow the future use of asbestos notwithstanding the agency's longstanding conclusion that there is no safe level of exposure to asbestos and that banning asbestos is necessary to prevent unreasonable risk of injury to health or the environment.<sup>28</sup>

As Chairman Pallone recently stated:

[The Asbestos SNUR] does nothing to restrict ongoing uses of asbestos; instead it provides a pathway to market for uses that had previously been phased out, such as in floor tiles and insulation . . . . The EPA should be protecting Americans from this toxic substance, not inviting manufacturers to revive its use in our homes.<sup>29</sup>

These concerns are echoed by Rebecca L. Reindel, MS, MPH, Senior Safety and Health Specialist for the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), in the AFL-CIO's testimony before this Committee strongly supporting the Reinstein Bill:

Through this SNUR mechanism, EPA would be notified when raw asbestos and asbestos-containing articles manufactured or processed in other countries are imported into the U.S., or when asbestos-containing materials are produced here in the U.S. and that EPA could allow these uses. *The very issuance of this rule is a declaration by the agency that some uses of asbestos are safe, as well as an indication the agency refuses to use its authority to ban this dangerous substance.*<sup>30</sup>

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<sup>26</sup> 15 U.S.C. § 2604.

<sup>27</sup> 84 Fed. Reg. 17345 (Apr. 25, 2019).

<sup>28</sup> See *Final Rule: Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions*, 54 Fed. Reg. 29,460, 29,467 (Jul. 12, 1989).

<sup>29</sup> Statement of House Committee on Energy & Commerce Chairman Frank Pallone, Jr., "Pallone on EPA's New Rule Regulating Asbestos," Press Release (April 17, 2019), available at <https://energycommerce.house.gov/newsroom/press-releases/pallone-on-epa-s-new-rule-regulating-asbestos>.

<sup>30</sup> Submitted testimony of Rebecca L. Reindel, MS, MPH, Senior Safety and Health Specialist, AFL-CIO, Before the House Committee on Energy and Commerce's Subcommittee on Environment and Climate Change, *Ban Asbestos Now: Taking Action to Save Lives and Livelihoods*, Legislative Hearing on H.R. 1603—Alan Reinstein Ban Asbestos Now Act of 2019, May 8, 2019 (emphasis supplied), available at [https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony\\_05.08.19\\_Reindel.pdf](https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_05.08.19_Reindel.pdf).

Indeed, because EPA has opened the door to future “new” uses of asbestos through the Asbestos SNUR<sup>31</sup> and failed to engage in a meaningful robust risk evaluation for the deadly substance (both by failing properly to identify the conditions of use for asbestos and by failing to require adequate reporting for asbestos to ensure that the agency has the information it needs to conduct a TSCA-compliant risk evaluation of asbestos), EPA is supporting the perception that there is a future for the commercial use of asbestos in the U.S.<sup>32</sup> Such an approach is particularly egregious given the chemical has been banned by more than 60 countries.<sup>33</sup>

Despite the patent risks posed by asbestos, and that TSCA was overhauled in 2016 to give EPA regulatory authority to ban it, EPA’s actions on asbestos to date, including its decisions about how to frame the risk evaluation of asbestos; its choosing to base its asbestos risk evaluation on incomplete information; and its issuing the Asbestos SNUR; give the undersigned states no confidence that EPA will use its authority under TSCA and ban this dangerous substance once and for all.

#### Appropriate Time For Chlor-Alkali Industry To Adapt

The undersigned Attorneys General are mindful both of the demand for chlorine in the U.S. for water system treatment and other beneficial uses and that approximately one-third of U.S. chlor-alkali plants currently use asbestos-containing diaphragms in producing chlorine. As a result of the Reinstein Bill, these plants will instead have to manufacture (or secure from others) and use asbestos-free diaphragms. The undersigned Attorneys General appreciate that the U.S. chlor-alkali industry may require additional reasonable time to transition from the use of asbestos diaphragms in its production processes and, subject to an adequate demonstration of need, recognize that it may be appropriate to include a mechanism in the Reinstein Bill for these manufacturers to fully institute an asbestos ban. That said, we understand that it is economically feasible to meet chlorine demands using asbestos-free production methods. In fact, as of 2013, only one plant in the European Union was still using asbestos diaphragms, with some using asbestos-free diaphragms since 2003.<sup>34</sup> In addition to eliminating potential exposures to

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<sup>31</sup> We respectfully disagree with the characterization of the Asbestos SNUR as preventing the return of asbestos to the market, as expressed by Representative John Shimkus during the hearing “Ban Asbestos Now: Taking Action to Save Lives and Livelihoods,” on the Reinstein Bill (May 8, 2019), *archived and available at* <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-ban-asbestos-now-taking-action-to-save-lives-and-livelihoods>. Rather, the Asbestos SNUR merely provides a process through which uses of asbestos that have not been prohibited can return to the market.

<sup>32</sup> There are reports that a Russian mining company recently praised the Trump Administration for downplaying the health risks of the cancer-causing mineral. *See, e.g.,* <http://www.newsweek.com/trumps-face-stamped-russian-asbestos-products-tied-putin-donald-our-side-1018327> (last accessed Jul. 11, 2018).

<sup>33</sup> *See* Current Asbestos Bans, International Ban Asbestos Secretariat, revised Oct. 23, 2018, *available at* [http://ibasecretariat.org/alpha\\_ban\\_list.php](http://ibasecretariat.org/alpha_ban_list.php).

<sup>34</sup> Best Available Techniques (BAT) Reference Document for the Production of Chlor-alkali, 2014, European Commission Integrated Pollution Prevention and Control Bureau, Brinkmann, et al., p. 24, *available at* [http://publications.jrc.ec.europa.eu/repository/bitstream/JRC91156/cak\\_bref\\_102014.pdf](http://publications.jrc.ec.europa.eu/repository/bitstream/JRC91156/cak_bref_102014.pdf).

asbestos, non-asbestos diaphragms also use less energy and last longer than asbestos diaphragms.<sup>35</sup>

Conclusion

The undersigned Attorneys General strongly support the “Alan Reinstein Ban Asbestos Now Act of 2019,” H.R. 1603, to prohibit the manufacture, processing and distribution in commerce of asbestos and to require EPA to report to Congress on legacy asbestos in buildings. We would welcome the opportunity to work with your Committee to ensure that the legislation that results from your consideration of the bill adequately addresses the unreasonable risk to health and environment posed by asbestos, both with respect to future uses and the consideration of ongoing exposure risk from past uses.

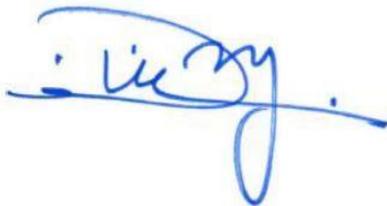
Sincerely,



XAVIER BECERRA  
California Attorney General



MAURA HEALEY  
Massachusetts Attorney General



WILLIAM TONG  
Connecticut Attorney General



KATHLEEN JENNINGS  
Delaware Attorney General



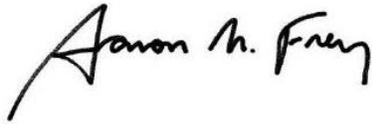
CLARE E. CONNORS  
Hawaii Attorney General



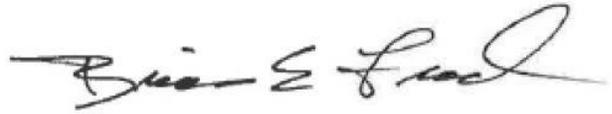
TOM MILLER  
Iowa Attorney General

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<sup>35</sup> *Id.* at pp. 68, 119-121.



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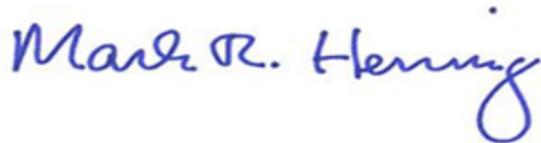
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CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON,  
AND THE DISTRICT OF COLUMBIA

March 3, 2020

The Honorable Nancy Pelosi  
Speaker  
U.S. House of Representatives  
1236 Longworth House Office Building  
Washington, DC 20515

The Honorable Steny Hoyer  
Majority Leader  
U.S. House of Representatives  
1705 Longworth House Office Building  
Washington, DC 20515

Re: *H.R. 1603, the Alan Reinstein Ban Asbestos Now Act of 2019*

Dear Speaker Pelosi and Majority Leader Hoyer:

We, the undersigned Attorneys General, write to commend the Committee on Energy and Commerce for reporting out the “Alan Reinstein Ban Asbestos Now Act of 2019,” H.R. 1603 (the “Reinstein Bill”) and to express strong support for scheduling the bill for floor consideration with due dispatch.

Asbestos is a known carcinogen for which there is no safe level of exposure, and it is ubiquitous in our built environment.<sup>1</sup> Asbestos fibers released into the air and inhaled can and do cause life-threatening illnesses, including asbestosis (a serious, progressive, long-term disease of the lungs for which there is no known effective treatment), lung cancer, and mesothelioma (a rare form of cancer found in the thin membranes of the lung, chest, abdomen, and heart, that may present only many years after exposure and has no known cure). The potential for harm posed by the chemical is universally recognized, and addressing its risks was a significant priority in Congress’ effort to reform the Toxic Substances Control Act (TSCA) in 2016.<sup>2</sup> In the four years since the passage of TSCA reform, this urgent priority has not been adequately addressed by the United States Environmental Protection Agency (EPA) as the agency proceeds to implement the statute.

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<sup>1</sup> See *Occupational Safety and Health Administration Safety and Health Topics: Asbestos*, available at <https://www.osha.gov/SLTC/asbestos/>.

<sup>2</sup> 15 U.S.C. §§ 2601, *et seq.*, as amended by the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act of 2016, Pub. L. No. 114—182, 130 Stat. 448 (Jun. 22, 2016).

On July 12, 2019, the undersigned Attorneys General submitted a letter supporting the Reinstein Bill in committee,<sup>3</sup> detailing the many reasons for promptly moving the bill, including EPA's marked lack of progress in regulating asbestos, such as excluding exposures to legacy asbestos from the agency's risk evaluation, relying on incomplete information in the risk evaluation, and potentially opening the door to new uses of asbestos through the significant new use rule process under TSCA, 15 U.S.C. § 2604(a)(2).<sup>4</sup>

We believe the Reinstein Bill provisions are what is required to address the dire risks that asbestos continues to pose to human health in light of the failure to date to institute a proper ban of the toxic chemical. The bill would prohibit the manufacture, including importing, processing, and distribution, of asbestos in the U.S. within one year of enactment, effectively reinstating the ban EPA adopted thirty years ago.<sup>5</sup> Other important aspects of the bill are its: "Right-to-Know" requirements that would compel all asbestos importers and users of asbestos and asbestos-containing products during the last three years to report the amount of asbestos they have used and number of people exposed to it; mechanisms to study the risks presented by "legacy" asbestos; and broad coverage to include asbestos contaminated construction materials and consumer products.

We believe that this ban and other provisions are an appropriate and necessary governmental response to the dire risks that asbestos poses to human health. We accordingly support Congress' continuing efforts to advance the bill, particularly in light of EPA's failure to take appropriate action to address asbestos risks since TSCA was amended in 2016.

We urge leadership to move this crucial health and public safety legislation and promptly schedule the Reinstein Bill for consideration by the full House.

Sincerely,



XAVIER BECERRA  
California Attorney General



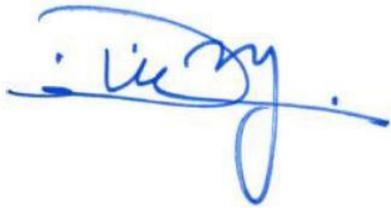
MAURA HEALEY  
Massachusetts Attorney General

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<sup>3</sup> In addition to the eighteen Attorneys General who joined the prior letter, the Attorney General of Illinois has joined this letter in further support of the bill.

<sup>4</sup> We hereby reaffirm and incorporate by reference the positions expressed in that prior letter, *available at* <https://www.mass.gov/doc/multistate-letter-to-congress-advocating-for-a-ban-on-asbestos/download>.

<sup>5</sup> See *Final Rule: Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions*, 54 Fed. Reg. 29,460, 29,467 (Jul. 12, 1989).



WILLIAM TONG  
Connecticut Attorney General



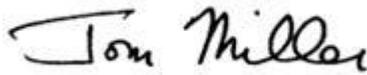
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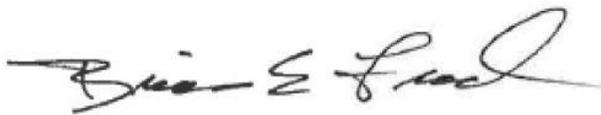
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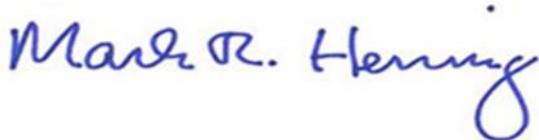
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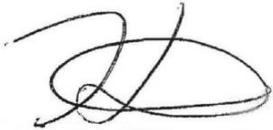
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BOB FERGUSON  
Washington State Attorney General



KARL A. RACINE  
District of Columbia Attorney General

cc: The Honorable Kevin McCarthy  
The Honorable Frank Pallone, Jr.  
The Honorable Greg Walden  
The Honorable Paul Tonko  
The Honorable John Shimkus  
The Honorable Suzanne Bonamici  
The Honorable Edward J. Markey  
The Honorable Tom Carper  
The Honorable Jeff Merkley