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EPA Announces Final SNUR for Asbestos Will “Close Loophole and Protect Consumers”

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On April 17, 2019, the U.S. Environmental Protection Agency (EPA) released a [final significant new use rule \(SNUR\) for asbestos](#) using the definition in Title II, Section 202 of the Toxic Substances Control Act (TSCA), which defines asbestos as the “asbestiform varieties of six fiber types -- chrysotile (serpentine), crocidolite (riebeckite), amosite (cummingtonite-grunerite), anthophyllite, tremolite or actinolite.” EPA states that it is promulgating the SNUR “to ensure that any discontinued uses of asbestos cannot re-enter the marketplace without EPA review, closing a loophole in the regulatory regime for asbestos.” The restricted significant new uses of asbestos (including as part of an article) are manufacturing (including importing) or processing for uses that are neither ongoing nor already prohibited under TSCA.

Persons subject to the SNUR may not undertake any of these activities; they are required to notify EPA at least 90 days before commencing any manufacturing (including importing) or processing of asbestos (including as part of an article) for a significant new use. The required notification initiates EPA’s evaluation of the conditions of use associated with the intended use. Manufacturing (including importing) and processing (including as part of an article) for the significant new use may not commence until EPA has conducted a review of the notice, made an appropriate determination on the notice, and taken such actions as are required in association with that determination. The final SNUR will be effective 60 days after being published in the *Federal Register*.

The final SNUR takes pains to clarify that the conditions of use of asbestos that are currently ongoing, including asbestos diaphragms used in the chloralkalai industry, sheet gaskets used in chemical manufacturing, and others, are not affected by the SNUR. EPA also used the rule development process to clarify and reduce the list of ongoing conditions of use of asbestos that are being considered in the asbestos risk evaluation that is currently underway. Thus, certain uses previously included in the risk evaluation (cement products, packings, and woven products) as ongoing were determined by EPA not to be ongoing and were removed from the scope of the risk evaluation and have been included in and are subject to the final SNUR. Finally, according to EPA, all of the ongoing uses of asbestos are specific to the chrysotile form only. Accordingly, manufacture, import, mining, or processing, including as articles, of any other form of asbestos for any use whatsoever is regulated as a significant new use under the final rule.

Restrictions on Discontinued Uses of Asbestos

According to EPA’s “[Frequently Asked Questions Regarding EPA’s Final Asbestos Rule](#),” in response to comments on EPA’s June 11, 2018, [proposed rule](#), EPA “expanded the scope of the final rule to include an additional four categories of products and a ‘catch all’ category.” The following uses are subject to the final SNUR and cannot return to the marketplace without EPA review: adhesives, sealants, and roof and non-roof coatings; arc chutes; beater-add gaskets; cement products; extruded sealant tape and other tape; filler for acetylene cylinders; friction materials (with certain exceptions identified in Table 1 of the final SNUR and [posted online](#)); high-grade



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electrical paper; millboard; missile liner; packings; pipeline wrap; reinforced plastics; roofing felt; separators in fuel cells and batteries; vinyl-asbestos floor tile; woven products; any other building material; and any other use of asbestos not otherwise identified. Consistent with the proposed rule, the final SNUR makes inapplicable the exemption at 40 C.F.R. Section 721.45(f) concerning importation or processing of asbestos-containing articles for the significant new uses included in the final rule.

The SNUR prohibits the discontinued uses of asbestos from restarting without EPA having an opportunity to evaluate each intended use (*i.e.*, significant new use) for potential risks to health and the environment and, as required by TSCA Section 5(a)(3), making an appropriate determination and taking any necessary regulatory action, which may include a prohibition, required by that determination. EPA makes clear that the SNUR does not provide a means by which prohibited uses under the 1989 partial ban under TSCA Section 6(a) could return to the marketplace. The SNUR keeps all prior TSCA Section 6(a) prohibitions on asbestos in place and does not amend them in any way. More information on EPA's June 11, 2018, proposed SNUR is available in our June 5, 2018, memorandum, "[EPA Takes 'Three Important Steps' Intended to Ensure Chemical Safety.](#)"

Risk Evaluation of Asbestos

In December 2016, EPA designated asbestos as one of the first ten chemical substances subject to EPA's chemical risk evaluation rule. EPA is conducting a risk evaluation of asbestos under its conditions of use, pursuant to TSCA Section 6(b)(4)(A). According to the SNUR, through scoping and subsequent research for the asbestos risk evaluation, EPA identified several conditions of use of asbestos to include in the risk evaluation. Through extensive research, review of public comments, and stakeholder engagement, EPA has further refined the conditions of use of asbestos since publication of the proposed SNUR and [Problem Formulation of the Risk Evaluation for Asbestos](#) in June 2018. EPA states that the conditions of use of asbestos currently undergoing risk evaluation are specific to the chrysotile form only and include: imported raw bulk chrysotile asbestos for the fabrication of diaphragms for use in chlorine and sodium hydroxide production; and several imported chrysotile asbestos-containing materials, including sheet gaskets for use in chemical production (*e.g.*, titanium dioxide production), brake blocks used in oil drilling equipment, aftermarket automotive brakes/linings and other vehicle friction products, and other gaskets. EPA has removed cement products, woven products, and packings from the scope of the risk evaluation since publication of the problem formulation document because it found no information to confirm they are conditions of use. EPA states that because additional EPA research indicates that cement products, woven products, and packings are not ongoing uses, the SNUR includes them as significant new uses. The final SNUR does not affect those uses that EPA believes are currently ongoing in the U.S.; again, those uses are being evaluated in the context of EPA's asbestos risk evaluation. More information on the Problem Formulation of the Risk Evaluation for Asbestos is available in our June 5, 2018, memorandum, "[EPA Takes 'Three Important Steps' Intended to Ensure Chemical Safety.](#)"

Commentary

We congratulate EPA for taking strong and decisive action under the final SNUR effectively to prohibit all non-ongoing conditions of use of asbestos. While this prohibition is conditioned by the ability for a person to submit a significant new use notice (SNUN), the legal effect of a SNUR was considerably strengthened by new TSCA which explicitly requires that EPA review and make a determination on the proposed significant new use and take any actions required by that determination, including any needed restrictions or prohibitions. Furthermore, new TSCA makes clear that commercialization cannot proceed until EPA has met these requirements. With this statutory infrastructure in place, we believe that it is appropriate to characterize this regulatory action as having the effect of a prohibition.

We also appreciate the clarity in EPA's discussion of the regulatory effect of the SNUR under amended TSCA by making clear that:

- The SNUR does not provide a means for Section 6(a) prohibited uses to return to the marketplace;
- All ongoing conditions of use of asbestos are being considered in the asbestos risk evaluation and are not subject to the SNUR;
- Any use of the five non-chrysotile forms of asbestos (crocidolite (riebeckite), amosite (cummingtonite-grunerite), anthophyllite, tremolite, and actinolite) require a SNUN; and
- The final SNUR has the effect of closing the "loophole" that otherwise exists whereby the significant new uses identified in the rule may begin at any time without prior notice to EPA.

Furthermore, we commend EPA, in considering and responding to comments, for the decision to include in the final rule's regulatory text a new broad use category to ensure that all other uses of asbestos that are no longer

ongoing and not already prohibited under TSCA are captured in and explicitly subject to the final SNUR.

In our view, the clear, strong, and decisive actions taken by EPA in the final rule should fully address the criticisms and complaints, some misguided, that were raised by some stakeholders in response to the proposed rule.

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