



EPA's Proposed Requirements for "Non-Intentional" Impurities in Vermiculite and Talc

Eric D. Cook

WILLCOX SAVAGE

Companies manufacturing, importing, or processing vermiculite or talc should take note of the Environmental Protection Agency's (EPA) recently proposed reporting and recordkeeping requirements for asbestos under the Toxic Substances Control Act (TSCA). Asbestos; Reporting and Recordkeeping Requirements Under the Toxic Substances Control Act (TSCA), 87 Fed. Reg. 27060 (proposed May 6, 2022)(to be codified at 40 C.F.R. pt. 704). The EPA emphasized repeatedly that the proposed one-time reporting obligation includes asbestos that is a "non-intentional impurity, such as in vermiculite or talc."

What is Asbestos?

Although a lengthier explanation is included in the proposed rule, "asbestos" is defined in TSCA Title II, section 202 as the "asbestiform varieties of six fiber types—chrysotile (serpentine), crocidolite (riebeckite), amosite (cummingtonite-grunerite), anthophyllite, tremolite or actinolite."

Who Must Comply?

If implemented, the EPA proposal would result in a one-time reporting obligation for certain manufacturers, importers, or processors of asbestos and asbestos containing articles for the four years before the date of publication of the final rule. EPA emphasized that the proposed requirement would include asbestos that is a component of a mixture, and specifically that it includes asbestos that is a "non-intentional impurity" in vermiculite or talc. However, small quantities solely for research and development would be excluded from the requirements.

The reporting and recordkeeping requirements apply when the asbestos content is "known to or reasonably ascertainable." See TSCA section 8(b)(2) "Known to or reasonably ascertainable" includes "all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know." For example, the EPA acknowledged that an importer may not have knowledge that it imported asbestos and thus not report, even after conducting due diligence under the reporting standard. Such an importer should document its activities to support any claims related to its due diligence.

What Must be Reported?

The EPA's proposal would require reporting and recordkeeping under TSCA section 8(a)(2) of the following information:

- The common or trade name, chemical identity and molecular structure of each chemical substance or mixture;
- Categories or proposed categories of use for each substance or mixture;
- Total amount of each substance or mixture manufactured (including imported) or processed, the amounts manufactured (including imported) or processed for each category of use, and reasonable estimates of the respective amounts to be manufactured (including imported) or processed for each of its categories of use or proposed categories of use;
- Descriptions of byproducts resulting from the manufacture (including import), processing,

- use, or disposal of each substance or mixture;
- All existing information concerning the environmental and health effects of each substance or mixture;
- The number of individuals exposed, and reasonable estimates of the number of individuals who will be exposed, to each substance or mixture in their places of employment and the duration of their exposure; and
- The manner or method of disposal of each substance or mixture, and any change in such manner or method.

Next Steps

The EPA requested public comments by July 5, 2022 on all aspects of the proposed rule, and specifically regarding the anticipated ability to know or reasonably ascertain the presence of asbestos. Companies manufacturing, importing, or processing vermiculite or talc during the four years before publication of the final rule would be prudent to: (i) document their due diligence in ensuring asbestos is not an impurity in the talc or vermiculite being manufactured, imported, or processed, and (ii) anticipate that reports of asbestos as a non-intentional impurity (i.e. FDA testing), may be considered to trigger the reporting and recordkeeping requirements of the proposed rule, even if such test results are disputed.

Eric D. Cook
Willcox Savage
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510
ecook@wilsav.com
(757) 628-5661