

June 2, 2020

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Re: Draft Risk Evaluation for Asbestos: Docket EPA-HQ-OPPT-2019-0501

Dear Administrator Wheeler and Drs. Wong, Barone and Peterson:

The U.S. Chamber of Commerce,¹ U.S. Chamber Institute for Legal Reform,² American Property Casualty Insurance Association,³ American Tort Reform Association,⁴ Aerospace

¹ The U.S. Chamber of Commerce is the world's largest business organization representing the interests of more than three million businesses of all sizes, sectors, and regions. Our members range from mom-and-pop shops and local chambers to leading industry associations and large corporations. All sources cited in the footnotes are on file and available upon request.

² The U.S. Chamber Institute for Legal Reform is the country's most influential and successful advocate for civil justice reform, both in the U.S. and abroad. ILR is a 501(c)(6) tax-exempt, separately incorporated affiliate of the U.S. Chamber of Commerce.

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Industries Association,⁵ Coalition for Litigation Justice,⁶ International Association of Defense Counsel,⁷ National Federation of Independent Business Small Business Legal Center,⁸ Product Liability Advisory Council, Inc.,⁹ and Washington Legal Foundation,¹⁰ and submit this comment to voice our strong objection to the one-sided inclusion of paid experts for asbestos plaintiffs' law firms, whose opinions have routinely been rejected by courts as not having a scientific basis, on the Toxic Substances Control Act (TSCA) Science Advisory Committee on Chemicals (SACC) and TSCA SACC Ad Hoc Peer Reviewers for the March 2020 Draft Risk Evaluation for Asbestos. It is disappointing that EPA chose to include a number of highly compensated experts for plaintiffs in asbestos personal injury cases but to exclude any testifying experts with differing opinions from both the SACC and Ad Hoc Peer Reviewers. We have a substantial interest in the balance and credibility of the reviewers and the fairness of the process given the potential impact of the risk evaluation in asbestos litigation against our members and clients.

Due to the unique and ubiquitous nature of asbestos litigation – which is approaching its fifth decade – we appreciate that many of the experts in the field have testified at one time or another in asbestos cases. Thus, it may not be possible to form a committee of the top experts in the field who have never been involved in asbestos litigation in some way. Indeed, experts with experience in the asbestos litigation should be included on EPA panels assessing the risk of asbestos as they possess unique and relevant expertise. But the participation of experts involved in the litigation must be balanced and provide EPA with a diversity of perspectives.

EPA's decision to select experts who exclusively testify in support of asbestos plaintiffs may lead other distinguished members of the SACC and Ad Hoc Reviewers to stray from objective science. Additional experts are likely to file comments that identify significant flaws in the Draft

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Risk Evaluation for Asbestos, but the opportunity to file a comment is not an adequate substitute for direct participation on the SACC and Ad Hoc Reviewer committees.

EPA should understand that the committees will not be able to perform their functions adequately unless they are comprised of objective experts and/or experts who represent a broad range of interests and expertise, so that divergent opinions can be expressed and discussed in the decision-making process. To achieve a balanced committee of experts, additional asbestos experts, including those who testify in litigation on behalf of defendants, must be included with the plaintiffs' experts who currently sit on the committees: Drs. Henry Anderson, Steven Markowitz, and Marty Kanarek.

Even when an expert attempts to leave self-interest at the door, it is bound to infect decision-making to some extent. Here, our concern goes beyond questioning whether plaintiff-side experts can cast aside their financial self-interest in perpetuating asbestos litigation in order to properly serve the EPA and public. Drs. Markowitz and Anderson have documented ties to the Asbestos Disease Awareness Organization (ADAO), a lobbying group that advocates for the "need for a global asbestos ban."¹¹ As discussed further below, these individuals have an agenda that permeates their work and, in our opinion, compromises their objectivity.

We therefore ask EPA to modify the composition of the SACC and Ad Hoc Reviewer committees before the Draft Risk Evaluation for Asbestos is reviewed. Either the paid experts for asbestos plaintiffs' law firms should be removed or other testifying experts, including those who testify in support of defendants, must be added to the committees to allow EPA to hear from all perspectives and be fully informed.

Our position tracks EPA's stated objectives of selecting peer reviewers to achieve an "overall balance of different scientific perspectives on the Committee" and avoid the "appearance of loss of impartiality, lack of independence" when selecting ad hoc panelists. 83 Fed. Reg. No. 178 (Sept. 13, 2018), at 46487, at <https://www.govinfo.gov/content/pkg/FR-2018-09-13/pdf/2018-19952.pdf>; see also U.S. EPA, *Science and Technology Policy Council: Peer Review Handbook* § 5.2.2, at 70 (4th ed. Oct. 2015) ("[P]eer reviewers should be impartial and free from financial COIs or other ethics issues...such as an appearance of a loss of impartiality.... [I]t also is important to include a broad enough spectrum of other related experts to consider wider dimensions of the issue(s)."), at https://www.epa.gov/sites/production/files/2016-03/documents/epa_peer_review_handbook_4th_edition.pdf. Only a change in the composition of the committees will meet these EPA objectives.

As the Draft Risk Assessment points out, asbestos has not been mined or otherwise produced in the U.S. in almost twenty years. Further, none of the potent forms of asbestos are imported into the U.S. Only the serpentine variety, chrysotile, is sold in the U.S., and even that is limited to a handful of applications that are discussed in the draft report.

Indeed, because of the exceptionally limited present-day use of asbestos, the impact of the findings of any report on asbestos are most likely to appear in litigation. Asbestos personal injury litigation has bankrupted some 120 companies, costs industry and insurers billions of dollars annually, shows no sign of abating, and is anticipated to continue for several decades.

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must be objective and guided by sound science. EPA should avoid “memorializing a distortion of the scientific literature which could be used by opposing experts to influence juries in finding against some entities that have historically manufactured and sold asbestos-containing products.”¹²

Below we provide background with regard to our concerns as to Drs. Henry Anderson, Steven Markowitz, and Marty Kanarek and the ties of Drs. Markowitz and Anderson to the ADAO.

Background of ADAO

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Linda Reinstein is ADAO’s President and CEO.¹⁵ Legislation introduced in Congress, The Alan Reinstein Ban Asbestos Now Act (ARBAN), is named after Ms. Reinstein’s late-husband.¹⁶ Just in 2019, in order to advocate for an international ban on asbestos use, ADAO publicly asserts that it:

- Worked with lawmakers to get the ARBAN introduced in both the Senate and the House.
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¹² Cary Stewart Sklare, *EPA Calls for Public Comment on “Draft Risk Evaluation for Asbestos,”* Apr. 15, 2020, at <http://www.schnader.com/wp-content/uploads/2020/04/EPA-Calls-for-Public-Comment-on-Draft-Risk-Evaluation-for-Asbestos2.pdf>.

¹³ *Id.*

¹⁴ <https://www.asbestosdiseaseawareness.org/about-adao/>.

¹⁵ <https://www.asbestosdiseaseawareness.org/about-adao/leadership/>.

¹⁶ <https://www.asbestosdiseaseawareness.org/newsroom/blogs/u-s-senate-and-house-of-representatives-introduced-the-alan-reinstein-ban-asbestos-now-act-of-2019-arban-bill-would-ban-asbestos-importation-and-use-within-one-year-of-enactment/>.

¹⁷ <https://www.asbestosdiseaseawareness.org/newsroom/blogs/2019-asbestos-disease-awareness-organization-year-in-review/>.

¹⁸ <https://www.asbestosdiseaseawareness.org/newsroom/blogs/title-congressional-champions-stand-behind-alan-reinstein-ban-asbestos-now-act-and-urge-congress-to-ban-asbestos/>.

¹⁹ <https://www.asbestosdiseaseawareness.org/newsroom/blogs/epa-reschedules-the-science-advisory-committee-on-chemicals-draft-risk-evaluation-for-asbestos-public-meeting-to-june-8-11-2020/>.

²⁰ March 15, 2017, Letter from Linda Reinstein on behalf of the ADAO to Administrator Scott Pruitt.

Evaluation for Asbestos was performed in accordance with the Frank R. Lautenberg Chemical Safety for the 21st Century Act.²¹

Dr. Henry Anderson

In November 2016, the ADAO pushed the EPA to act on asbestos by completing a campaign to collect support for an international sign-on letter to former EPA Administrator Gina McCarthy.²² Dr. Anderson joined an ADAO letter urging the EPA “to prioritize asbestos as one of the 2016 top ten high-risk chemicals for evaluation under TSCA, leading toward the prohibition of asbestos in manufacturing, processing, use, distribution in commerce, and disposal.”²³

Further, Dr. Anderson has testified on behalf of plaintiffs in asbestos personal injury cases since at least 1989.²⁴ He continues to testify on behalf of plaintiffs in asbestos personal injury cases,²⁵ charging at least \$400 per hour for this type of testimony.²⁶

Courts have rejected Dr. Anderson’s “any exposure” view of causation of asbestos disease because it is unsupported by the scientific literature.²⁷

Dr. Steven Markowitz

Dr. Markowitz is a member of the ADAO’s Science Advisory Board.²⁸ He is also recognized on the ADAO website as an ADAO 2019 and 2020 Emerald Donor.²⁹ In the past, Dr. Markowitz has signed on in support of Ms. Reinstein’s statements to Congress on behalf of ADAO.³⁰

In addition to his active role in ADAO, Dr. Markowitz has testified on behalf of plaintiffs in asbestos personal injury lawsuits for more than thirty years.³¹ He has been retained hundreds of times – always by plaintiffs’ firms.³² As of 2019, he charged \$600 per hour to testify in court,

²¹ March 2020 Draft Risk Evaluation for Asbestos, Executive Summary, 665-666.

²² <https://www.asbestosdiseaseawareness.org/newsroom/blogs/ban-asbestos-efforts-kick-hyperdrive-trump-victory-draws-future-epa-question/>.

²³ Letter from signatories (including Henry Anderson) to Administrator McCarthy, Nov. 9, 2016, at <https://www.asbestosdiseaseawareness.org/wp-content/uploads/2016/11/ADAO-Administrator-Gina-McCarthy-Sign-on-letter-FINAL.pdf>.

²⁴ Deposition of Henry Anderson, Oct. 21, 1989, *In re Asbestos Cases*, W. Va. Cir. Ct. Magnolia County, pp. 67:10-68:21, 104:22-105:5, 109:6-110:6.

²⁵ Dr. Anderson’s testimony list from Nov. 1, 2013 to Nov. 1, 2013, attached as Exhibit 6, to deposition of Dr. Anderson, dated Nov. 5, 2019, *Merline v. Building Serv. Indus. Supply Inc.*, Wis. Cir. Ct. Brown County, Consolidated Case Nos. 09-CV-11257, 11-CV-281.

²⁶ Deposition of Dr. Anderson, Nov. 19, 2018, *Ebel vs. Sprinkmann Sons Corp.*, Wis. Cir. Ct. Milwaukee County, No. 2016CV001390, p. 10:19-22.

²⁷ See *In re W.R. Grace & Co.*, 355 B.R. 462, 482 (Bankr. D. Del. 2006) (“Dr. Anderson’s analysis is unreliable. Dr. Anderson’s opinion, therefore, does not satisfy *Daubert* and its progeny and is not admissible. We exclude this evidence.”), *appeal denied*, 2007 WL 1074094 (D. Del. Mar. 26, 2007).

²⁸ <https://www.asbestosdiseaseawareness.org/about-adao/leadership/>; see also March 30, 2020, Letter from Linda Reinstein to Administrator Andrew Wheeler.

²⁹ <https://www.asbestosdiseaseawareness.org/newsroom/blogs/2019-adao-conference-sponsors/>; <https://www.asbestosdiseaseawareness.org/newsroom/blogs/2020-adao-conference-sponsors-and-donors/>.

³⁰ Examining the Human Health Effects of Asbestos and the Methods of Mitigating Such Impacts: Hearing Before the Committee on Environment and Public Works, U.S. Senate, 110th Cong., First Sess., June 12, 2007, U.S. Govt. Printing Office, 2011, pp. 170-192, specifically pp. 177 and 192.

³¹ Deposition testimony of Steven Markowitz, June 20, 2019, *Reinert v. American Biltrite, Inc.*, N.J. Super. Ct. Court Middlesex County, No. MID-L-2527-18AS, pp. 10:13-11:14.

³² *Id.*

and \$3,600 for each review and report he drafts.³³ He earned approximately \$240,000 in 2018 performing medical legal consulting in asbestos matters, which was roughly 40% of his total income.³⁴

Dr. Markowitz's trial opinions that encapsulated chrysotile products are a cause of mesothelioma have been struck by judges because they lack a scientific basis.³⁵

Dr. Marty Kanarek

Drs. Kanarek and Anderson have authored several studies together and are affiliated with the same academic institution.³⁶ Dr. Kanarek testifies on behalf of plaintiffs in asbestos personal injury cases.³⁷ He charges \$400 per hour for review of materials and \$600 per hour for his testimony.³⁸ In 2019, he made over \$100,000 testifying on behalf of plaintiffs in asbestos litigation matters.³⁹

* * *

EPA's Draft Risk Evaluation is a scientific document that should be analyzed by reference to published peer-reviewed literature. The risk evaluation process should not be unduly influenced by experts whose scientific theories have been rejected as not representative of mainstream science and whose involvement in asbestos advocacy organizations calls into question the impartiality of their work on the Risk Assessment.

The March 2020 Draft Risk Evaluation for Asbestos is not a policy document. It is a scientific document upon which policy decisions can be based. Thus, it is critical that the Risk Evaluation be based on sound science. Drs. Anderson, Markowitz, and Kanarek do not meet the criteria to serve as peer reviewers under the EPA's own guidelines, which require avoiding even an "appearance of loss of impartiality." The committees should be restructured to include additional experts, including experts who testify in support of asbestos defendants, to provide balance. In the alternative, testifying experts for plaintiffs should be removed so the committees are balanced and the peer review process is fair.

³³ *Id.* at 11:15-24.

³⁴ *Id.* at 11:25-12:17.

³⁵ See *Matter of New York City Asbestos Litig.*, 48 Misc. 3d 460, 483-484 (Sup. Ct. NY County, NY 2015) ("For all of these reasons, Markowitz's opinions, either individually or collectively, do not establish that asbestos contained in friction products can cause mesothelioma, and as he conceded, he could identify no study to support his proposition that there is an increased risk of contracting mesothelioma from exposure to auto brakes, clutches, or gaskets or that there is an increased risk of mesothelioma from the use of friction products or work on friction materials in the automobile industry.... Markowitz not only cited no study to support his opinion, but he also conceded that numerous studies contradict it."), *aff'd*, 32 N.Y.3d 1116 (2018).

³⁶ Deposition of Dr. Marty Kanarek, Feb. 24, 2020, *King v. ABB, Inc.*, Fla. Cir. Ct. Hillsborough County, No. 19-CA-002884, pp. 10:22-11:3, 12:2-24, 80:7-16, 90:8-18, 139:12-16, 184:23-187:25, 191:5-192:5.

³⁷ *Id.* at 24:23-27:12

³⁸ *Id.*

³⁹ *Id.*

Sincerely yours,

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U.S. Chamber Institute for Legal Reform

Aerospace Industries Association

American Property Casualty Insurance Association

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Coalition for Litigation Justice, Inc.

International Association of Defense Counsel

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¹⁶ <https://www.asbestosdiseaseawareness.org/newsroom/blogs/u-s-senate-and-house-of-representatives-introduced-the-alan-reinstein-ban-asbestos-now-act-of-2019-arban-bill-would-ban-asbestos-importation-and-use-within-one-year-of-enactment/>.

¹⁷ <https://www.asbestosdiseaseawareness.org/newsroom/blogs/2019-asbestos-disease-awareness-organization-year-in-review/>.

¹⁸ <https://www.asbestosdiseaseawareness.org/newsroom/blogs/title-congressional-champions-stand-behind-alan-reinstein-ban-asbestos-now-act-and-urge-congress-to-ban-asbestos/>.

¹⁹ <https://www.asbestosdiseaseawareness.org/newsroom/blogs/epa-reschedules-the-science-advisory-committee-on-chemicals-draft-risk-evaluation-for-asbestos-public-meeting-to-june-8-11-2020/>.

²⁰ March 15, 2017, Letter from Linda Reinstein on behalf of the ADAO to Administrator Scott Pruitt.

Evaluation for Asbestos was performed in accordance with the Frank R. Lautenberg Chemical Safety for the 21st Century Act.²¹

Dr. Henry Anderson

In November 2016, the ADAO pushed the EPA to act on asbestos by completing a campaign to collect support for an international sign-on letter to former EPA Administrator Gina McCarthy.²² Dr. Anderson joined an ADAO letter urging the EPA “to prioritize asbestos as one of the 2016 top ten high-risk chemicals for evaluation under TSCA, leading toward the prohibition of asbestos in manufacturing, processing, use, distribution in commerce, and disposal.”²³

Further, Dr. Anderson has testified on behalf of plaintiffs in asbestos personal injury cases since at least 1989.²⁴ He continues to testify on behalf of plaintiffs in asbestos personal injury cases,²⁵ charging at least \$400 per hour for this type of testimony.²⁶

Courts have rejected Dr. Anderson’s “any exposure” view of causation of asbestos disease because it is unsupported by the scientific literature.²⁷

Dr. Steven Markowitz

Dr. Markowitz is a member of the ADAO’s Science Advisory Board.²⁸ He is also recognized on the ADAO website as an ADAO 2019 and 2020 Emerald Donor.²⁹ In the past, Dr. Markowitz has signed on in support of Ms. Reinstein’s statements to Congress on behalf of ADAO.³⁰

In addition to his active role in ADAO, Dr. Markowitz has testified on behalf of plaintiffs in asbestos personal injury lawsuits for more than thirty years.³¹ He has been retained hundreds of times – always by plaintiffs’ firms.³² As of 2019, he charged \$600 per hour to testify in court,

²¹ March 2020 Draft Risk Evaluation for Asbestos, Executive Summary, 665-666.

²² <https://www.asbestosdiseaseawareness.org/newsroom/blogs/ban-asbestos-efforts-kick-hyperdrive-trump-victory-draws-future-epa-question/>.

²³ Letter from signatories (including Henry Anderson) to Administrator McCarthy, Nov. 9, 2016, at <https://www.asbestosdiseaseawareness.org/wp-content/uploads/2016/11/ADAO-Administrator-Gina-McCarthy-Sign-on-letter-FINAL.pdf>.

²⁴ Deposition of Henry Anderson, Oct. 21, 1989, *In re Asbestos Cases*, W. Va. Cir. Ct. Magnolia County, pp. 67:10-68:21, 104:22-105:5, 109:6-110:6.

²⁵ Dr. Anderson’s testimony list from Nov. 1, 2013 to Nov. 1, 2013, attached as Exhibit 6, to deposition of Dr. Anderson, dated Nov. 5, 2019, *Merline v. Building Serv. Indus. Supply Inc.*, Wis. Cir. Ct. Brown County, Consolidated Case Nos. 09-CV-11257, 11-CV-281.

²⁶ Deposition of Dr. Anderson, Nov. 19, 2018, *Ebel vs. Sprinkmann Sons Corp.*, Wis. Cir. Ct. Milwaukee County, No. 2016CV001390, p. 10:19-22.

²⁷ See *In re W.R. Grace & Co.*, 355 B.R. 462, 482 (Bankr. D. Del. 2006) (“Dr. Anderson’s analysis is unreliable. Dr. Anderson’s opinion, therefore, does not satisfy *Daubert* and its progeny and is not admissible. We exclude this evidence.”), *appeal denied*, 2007 WL 1074094 (D. Del. Mar. 26, 2007).

²⁸ <https://www.asbestosdiseaseawareness.org/about-adao/leadership/>; see also March 30, 2020, Letter from Linda Reinstein to Administrator Andrew Wheeler.

²⁹ <https://www.asbestosdiseaseawareness.org/newsroom/blogs/2019-adao-conference-sponsors/>; <https://www.asbestosdiseaseawareness.org/newsroom/blogs/2020-adao-conference-sponsors-and-donors/>.

³⁰ Examining the Human Health Effects of Asbestos and the Methods of Mitigating Such Impacts: Hearing Before the Committee on Environment and Public Works, U.S. Senate, 110th Cong., First Sess., June 12, 2007, U.S. Govt. Printing Office, 2011, pp. 170-192, specifically pp. 177 and 192.

³¹ Deposition testimony of Steven Markowitz, June 20, 2019, *Reinert v. American Biltrite, Inc.*, N.J. Super. Ct. Court Middlesex County, No. MID-L-2527-18AS, pp. 10:13-11:14.

³² *Id.*

and \$3,600 for each review and report he drafts.³³ He earned approximately \$240,000 in 2018 performing medical legal consulting in asbestos matters, which was roughly 40% of his total income.³⁴

Dr. Markowitz's trial opinions that encapsulated chrysotile products are a cause of mesothelioma have been struck by judges because they lack a scientific basis.³⁵

Dr. Marty Kanarek

Drs. Kanarek and Anderson have authored several studies together and are affiliated with the same academic institution.³⁶ Dr. Kanarek testifies on behalf of plaintiffs in asbestos personal injury cases.³⁷ He charges \$400 per hour for review of materials and \$600 per hour for his testimony.³⁸ In 2019, he made over \$100,000 testifying on behalf of plaintiffs in asbestos litigation matters.³⁹

* * *

EPA's Draft Risk Evaluation is a scientific document that should be analyzed by reference to published peer-reviewed literature. The risk evaluation process should not be unduly influenced by experts whose scientific theories have been rejected as not representative of mainstream science and whose involvement in asbestos advocacy organizations calls into question the impartiality of their work on the Risk Assessment.

The March 2020 Draft Risk Evaluation for Asbestos is not a policy document. It is a scientific document upon which policy decisions can be based. Thus, it is critical that the Risk Evaluation be based on sound science. Drs. Anderson, Markowitz, and Kanarek do not meet the criteria to serve as peer reviewers under the EPA's own guidelines, which require avoiding even an "appearance of loss of impartiality." The committees should be restructured to include additional experts, including experts who testify in support of asbestos defendants, to provide balance. In the alternative, testifying experts for plaintiffs should be removed so the committees are balanced and the peer review process is fair.

³³ *Id.* at 11:15-24.

³⁴ *Id.* at 11:25-12:17.

³⁵ See *Matter of New York City Asbestos Litig.*, 48 Misc. 3d 460, 483-484 (Sup. Ct. NY County, NY 2015) ("For all of these reasons, Markowitz's opinions, either individually or collectively, do not establish that asbestos contained in friction products can cause mesothelioma, and as he conceded, he could identify no study to support his proposition that there is an increased risk of contracting mesothelioma from exposure to auto brakes, clutches, or gaskets or that there is an increased risk of mesothelioma from the use of friction products or work on friction materials in the automobile industry.... Markowitz not only cited no study to support his opinion, but he also conceded that numerous studies contradict it."), *aff'd*, 32 N.Y.3d 1116 (2018).

³⁶ Deposition of Dr. Marty Kanarek, Feb. 24, 2020, *King v. ABB, Inc.*, Fla. Cir. Ct. Hillsborough County, No. 19-CA-002884, pp. 10:22-11:3, 12:2-24, 80:7-16, 90:8-18, 139:12-16, 184:23-187:25, 191:5-192:5.

³⁷ *Id.* at 24:23-27:12

³⁸ *Id.*

³⁹ *Id.*

Sincerely yours,

U.S. Chamber of Commerce

U.S. Chamber Institute for Legal Reform

Aerospace Industries Association

American Property Casualty Insurance Association

American Tort Reform Association

Coalition for Litigation Justice, Inc.

International Association of Defense Counsel

National Federation of Independent Business

Small Business Legal Center

Product Liability Advisory Council, Inc.

Washington Legal Foundation

Comments on Draft Risk Evaluation for Asbestos – Docket EPA-HQ-OPPT-2019-0501

We write to express our concern that the Agency’s statutorily-mandated risk evaluation for asbestos process, as evidenced by its “Draft Risk Evaluation for Asbestos” published in March 2020 (“Draft Risk Evaluation”), has been coopted to serve a non-statutory purpose, *i.e.*, the creation of evidence for use by plaintiffs in asbestos personal injury litigation. We are attorneys who routinely represent defendants in asbestos personal injury actions, pending throughout the United States.

The Draft Risk Evaluation ignores the substantial body of scientific evidence that specifically pertains to the “aftermarket automotive brakes/linings” condition of use, and misstates the current state of scientific understanding about brakes manufactured with asbestos. Publication of a Final Risk Evaluation that ignores the best available science concerning this condition of use will directly harm defendants in asbestos litigation, by creating an erroneous regulatory pronouncement that carries the imprimatur of the United States, which plaintiffs’ counsel and their retained experts will attempt to rely on in asbestos personal injury litigation.

Our concern arises from factors in addition to the failure to even consider the brake specific science noted above, and is not limited to disagreement with the conclusions expressed in the Draft Risk Evaluation. These factors include:

- Although the Agency has no concrete evidence of on-going use within the United States of brakes manufactured using asbestos as a raw material, the Agency chose to include brake linings/automotive friction products as a *current* condition of use and grossly overstates the potential number of exposed workers and exposed ONUs.
- The Draft Risk Evaluation ignores the best available evidence, including the substantial body of epidemiologic and toxicological evidence focused on evaluation of the brakes/linings condition of use.
- The Agency, in crafting the Draft Risk Evaluation, appears to have been actively lobbied and guided by an organization – the Asbestos Disease Awareness Organization – and affiliated individuals, some of whom testify routinely as plaintiff experts in asbestos cases, who are deeply committed to perpetuating the narrative that brakes manufactured with chrysotile asbestos pose a risk. Though such lobbying is common and acceptable with adequate disclosure, the participation of plaintiff experts here is not limited to lobbying. The Agency has placed three experts on its Scientific Advisory Committee on Chemicals (“SACC”), including ad hoc members, who earn significant sums by testifying for plaintiffs in asbestos litigation and, therefore, have a clear financial stake in the risk evaluation’s outcome. This participation is contrary to the Agency’s own rules for conflicts of interest in connection with participation on the SACC.
- Plaintiffs’ counsel routinely seek to introduce regulatory agency pronouncements and decisions (including from this Agency) into evidence at trial of asbestos cases, in support of plaintiffs’ claims that friction products manufactured with asbestos cause disease generally and contributed to disease in a particular case. Consequently, this

use of the Agency's work-product is foreseeable. The Agency is legally obliged to be a neutral arbiter of available relevant science in this and each of its risk assessments. The fact that the Final Risk Evaluation will have a significant impact on private litigation with many stakeholders is an additional, practical reason for creating a risk assessment process which provides a voice to the positions of defendants as well as plaintiffs, and which is based upon current applicable science, unimpaired by the agenda of one set of litigants or the other.

1. The Agency has little evidence of the current use in the United States of brake linings manufactured using chrysotile as a raw material and inexplicably and grossly overestimates potential exposures.

At Section 2.3.1.7.1 of the Draft Risk Evaluation, the Agency acknowledges that brakes manufactured with chrysotile are no longer manufactured in the United States, nor are they available on any car made for the United States market. This has been the case for almost two decades. The Agency pins the prospect of *current* use on the possibility that such brakes might *potentially* be used on older cars (i.e., cars manufactured before 2000), or cars made for a foreign market and brought into the United States. To substantiate this use concern, the Agency cites to three pieces of evidence:

- a. Researchers (not occupational brake users) were able to buy such brakes from a "vintage auto parts facility," in 2008. [Draft Risk Evaluation, Lines 3202-03] This purchase occurred *12 years ago* from what was even then described as a "vintage" parts facility – meaning incidentally available antique parts are sometimes sold. There is nothing about this reported purchase that supports a finding of "current" use of such brake linings by occupational users.
- b. The Motor and Equipment Manufacturers Association's (MEMA) submission, asserting that \$2.2M worth of such linings were imported in 2014. [Draft Risk Evaluation, Lines 3220-22]. MEMA's assertion, in turn, relied upon data compiled by the Department of Commerce, in response to a special request from Congress in 2015. On its face, the reported data raises questions about its accuracy, and suggests that it likely overestimates the value of brakes manufactured with asbestos that were imported into the United States. For instance, three of the countries listed as exporters of such brakes to the United States – Germany, Spain and Argentina -- had banned the use of asbestos in manufacturing many years *before* their alleged export of brakes. More recently, Canada enacted a similar ban as well. These four countries are unlikely to be a current source of brake linings made with asbestos, since the manufacture of such brakes is illegal in those countries. Finally, brakes manufactured with asbestos from China have been subjected to very significant tariffs since mid-2018.
- c. The USGS Mineral Commodities Summary for Asbestos, 2019, in which the USGS states – without citation or supporting data – that some "unknown quantity" of asbestos was imported in the form of various manufactured products, including brakes. [Draft, Lines 3222-23]. As both the Agency and the USGS acknowledge, the quantity – if any – of brakes manufactured with asbestos

imported into the United States currently is “unknown”: in other words, it could very well be “zero” and to state otherwise is speculation.

In sum, the Agency has identified a “current” condition of use that occurs with infrequency, if at all. Under these circumstances, the Draft Risk Evaluation is far more relevant to the historic manufacture and use of brakes manufactured with chrysotile asbestos – which are the subject of personal injury litigation – not an authorized statutory purpose for a risk assessment under TSCA. (To the extent that the Ninth Circuit has overruled the Agency’s omission of legacy uses and disposal from the scope of the Draft Risk Evaluation, requiring future Agency action, the Agency may decide that a “condition of use” includes removal and disposal of asbestos-containing brakes installed during a period when they were manufactured and used in the United States. That potential condition of use, which involves wholly different exposure scenarios, is not addressed in the Draft Risk Evaluation.)

Additionally, although the Agency acknowledges the very limited or nominal use of brakes manufactured with chrysotile in the United States currently, the Draft Risk Evaluation wildly over-estimates the potential exposure to such brakes. The Agency states that the number of exposed workers includes the *total* number of employed automotive mechanics in the United States (749,900), and the Agency further assumes that every one of those mechanics will have a co-worker proximate to their work (equal number of ONUs). [Draft, Lines 3336-47]. The automotive brake lining market has recently been estimated to be approximately \$11 billion. At the Agency’s worst current case, brakes manufactured with asbestos imported to the United States are \$2.2 million. It is simply not rational to conclude that 100% of workers in automotive repair, plus 100% of co-workers, could be potentially exposed to 0.002% of brakes on the market.

2. The Draft Risk Evaluation ignores published peer-reviewed science, including epidemiology and toxicology that pertains specifically to exposure to brakes manufactured using asbestos, and inexplicably relies on a limited set of exposure studies that are confounded by mixed asbestos fiber type exposure circumstances.

The Draft Risk Evaluation fails to properly execute a weight of the evidence approach based on the best available science. There is a wealth of peer-reviewed studies that specifically address whether there are risks of mesothelioma and lung cancer associated with working with brakes manufactured using asbestos as a raw material. There are at least 33 peer-reviewed publications – including two meta-analyses -- concerning the risks of mesothelioma and 22 publications concerning the risk of lung cancer in brake workers in the epidemiological literature. There are a number of publications concerning pathology findings and the absence of any association between brake work and mesothelioma. And, the results of various inhalation toxicological studies concerning brake dust *specifically* – a 5-day exposure biopersistence study, a 28-day exposure range-finding study, and a subchronic 90-day exposure study – are all available to the Agency in the published peer reviewed literature. Combined, these studies provide substantial evidence that that working with automotive brakes manufactured with chrysotile *does not increase the risk of disease and that exposure to brake dust does not cause disease*.

The Agency’s Draft Risk Evaluation does not even pretend to comprehensively and adequately consider this brake-specific risk-related science. Instead, the Agency opts to rely upon the

results of a narrow set of studies of asbestos textile manufacturing plant workers in North and South Carolina, which address mixed asbestos exposure scenarios very different than brake workers, and suffer from numerous methodological issues (discussed in other submitted comments). This simply does not comport with the requirements of 15 U.S.C. §2605(b)(4)(F). Moreover, it suggests a motive different than a desire to evaluate the full range of the best, most current and relevant science in connection with this Risk Evaluation.

The approach taken by the Agency in the Draft Risk Evaluation is more akin to the approach taken by plaintiffs' counsel in asbestos personal injury cases in that it uses an absolute risk model that is contrary to the current best available science. As noted in several comments otherwise made part of the docket, the general consensus in the medical and scientific community is that not all mesotheliomas are asbestos related. In asbestos personal injury litigation, Plaintiffs' cases frequently depend upon introducing evidence of the hazards of "asbestos" generally, and arguments for why scientific evidence concerning the specific exposures at issue should be disregarded. This is an advocacy position in private litigation, not an approach that the Agency can take (as a matter of statutory authority), nor an approach the Agency should, in good conscience, take.

3. The Draft Risk Evaluation has been influenced (and may yet be influenced) by individuals with a financial stake in developing evidence for use by plaintiffs in asbestos personal injury litigation.

We understand the Agency, in connection with developing the Draft Risk Evaluation, has had several communications with the Asbestos Disease Awareness Organization ("ADAO"). These communications apparently included correspondence from Dr. Arthur Frank and a meeting attended, *inter alia*, by members of the ADAO's Scientific Advisory Board. You should be aware of the following: a) the ADAO's annual conferences have always been sponsored by law firms which represent plaintiffs in asbestos litigation and, in many years, these have been the conference's only sponsors; and, b) some or all of the current and former members of the ADAO's Scientific Advisory Board serve as experts for plaintiffs in asbestos litigation.¹

As noted by other commentators, we also point out that three members of the SACC (including ad hoc members) serve as plaintiffs' expert witnesses in asbestos litigation, including in cases alleging that exposure to brake linings manufactured using asbestos contributed to mesothelioma or lung cancer. None of these three are known to have done work for defendants in such litigation. To the best of our knowledge, none of the members of the SACC have accepted engagements from defendants in asbestos personal injury litigation.

The Agency made clear, early on, that individuals with any stake in the outcome of the risk assessment process would not be qualified to serve on the SACC. Given the clarity of the Agency's position, how these individual experts managed to avoid the Agency's screening process and be placed on the SACC is a serious question. In direct violation of the Agency's stated factors for SACC members, the facts here do not demonstrate the absence of conflicts of

¹ We submitted a Freedom of Information Act request to the Agency for materials in connection with these communications, and would like to have been able to elaborate further on this point, but the Agency advised that it will not respond to our FOIA request until October 2020. We will seek to supplement these comments at that time.

interest or appearance of loss of impartiality, independence with respect to the matters under review, and lack of bias.

These facts make clear that the outcome of the Agency's Draft Risk Evaluation is of importance to those with a financial stake in the success of plaintiffs in asbestos litigation, advocating for a results-oriented and comprehensive assessment of asbestos friction products, notwithstanding the absence of any demonstrated current use.

4. Agency documents are routinely used as evidence in asbestos personal injury litigation, both as exhibits and as reliance materials by expert witnesses.

Documents published by the Agency carry the imprimatur of the United States government. Thus, such documents can be particularly persuasive evidence with civil juries. Not surprisingly, then, parties who find statements or information in Agency publications that they believe support their positions seek to have such documents admitted as evidence at trial. This has been particularly true in asbestos personal injury litigation.

For example, in 1986, the Agency issued "Guidance for the Prevention of Asbestos Disease Among Auto Mechanics," also known as the "Gold Book." The Gold Book made a number of statements which were not then and are not now supported by peer-reviewed scientific evidence, and no peer-reviewed epidemiological study concluding that mechanics were at increased risk of disease were cited by the Gold Book. Nonetheless, the 1986 Gold Book is routinely offered into evidence by plaintiffs' counsel at trial in cases involving alleged friction exposure and included on the list of plaintiff expert witness reliance materials, in support, *inter alia*, of the proposition that the Agency believes that brake work contributes to asbestos disease. Incredibly, the 1986 Gold Book is still offered into evidence, notwithstanding that it was superseded in 2006 by the "Current Best Practices for Preventing Asbestos Exposure Among Brake and Clutch Repair Workers."

Taken together, the foregoing leads to a significant concern about the purpose of the Agency's Draft Risk Assessment and the increased likelihood – as demonstrated by the Draft Risk Assessment – that the Agency will issue a final document which:

- Fails to properly apply a weight of the evidence approach using the best available science in that it ignores the great weight of published peer-reviewed science that specifically addresses the biological impacts and actual risk associated with exposure to brake linings manufactured with asbestos;
- Reaches grossly distorted conclusions regarding degree of exposure and risk, by finding a risk where none exists based in part on significantly overstating the frequency of exposures and unsubstantiated assumptions regarding re-entrainment following brake repair (see, for example, Draft Risk Evaluation at pages 183-185); and,
- Puts the Agency in the position of supporting plaintiffs in asbestos litigation, by issuing a risk evaluation that addresses only an illusory current condition of use.

Defendants in asbestos personal injury litigation will be significantly and directly harmed by such a result, forced to defend cases based upon the product-specific science, and also explain how and why the Agency's risk evaluation process entirely disregarded that science, thus reaching an erroneous conclusion. Such harm can be avoided and ameliorated only if the Agency adheres to its statutorily mandated objectivity and mission, and is equally careful to ensure that it permits no exceptions to its conflict of interest requirements and follows the best available science on the issue.

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June 2, 2020

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Re: Draft Risk Evaluation for Asbestos: Docket EPA-HQ-OPPT-2019-0501

Dear Administrator Wheeler, Doctor Wong and Doctor Barone

Morse TEC LLC, f/k/a BorgWarner Morse TEC LLC, as successor-by-merger to Borg-Warner Corporation (“Morse TEC”)¹ objects to the EPA’s identification and evaluation of “aftermarket automotive brakes/linings” and “other vehicle friction products” as Conditions of Use (“COU”) in its Draft Risk Evaluation for Asbestos (“Draft Risk Evaluation”). Morse TEC also adopts the comments submitted by other similarly situated parties but faces unique challenges should the Draft Risk Evaluation go into effect as currently written. As discussed in detail below, the factual basis supporting a prospective risk evaluation of

¹ As successor by merger to Borg-Warner Corporation (“BWC”), Morse TEC holds liabilities with respect to BWC’s manufacture of asbestos-containing automotive clutches from 1928-86 and is a named defendant in many of the thousands of lawsuits filed each year by plaintiffs against companies that made and sold asbestos-containing automotive friction products from the 1950s-90s. These lawsuits involve many of the same issues raised by the EPA’s Draft Risk Evaluation and Morse TEC will be greatly impacted by any Proposed Rule or document that results from such evaluation. For the reasons discussed herein, automotive clutches should be removed from the EPA’s analysis.

these products at this time is woefully lacking and extremely prejudicial to companies such as Morse TEC. In particular, Morse TEC objects to the EPA's inclusion and evaluation of asbestos-containing clutches as part of this COU. As is clear from the Draft Risk Evaluation itself, not only is the exposure assessment and risk evaluation of asbestos-containing clutches fundamentally flawed but there is no credible information or evidence that asbestos-containing clutches are currently being imported or are available in the aftermarket, or that any workers or DIY consumers are working with or directly exposed to asbestos from such products.

"EPA's overall objectives in the risk evaluation process are to conduct timely, relevant, high-quality, and scientifically credible risk evaluations... and to evaluate the conditions of use that raise greatest potential for risk." (82 FR 33726, 33728 (July 20, 2017).) TSCA § 26(h) and (i) require EPA to use scientific information, technical procedures, measures, methods, protocols, methodologies and models consistent with the best available science and to base its decisions on the weight of the scientific evidence.

As it relates to automotive brakes and clutches, the EPA's Draft Risk Evaluation is anything but scientific. It lacks important information and empirical data, lacks precision, makes unreasonable and unreliable assumptions, contains critical deficiencies, inaccuracies and uncertainties, and seeks to address an issue that no longer exists. While it is true that asbestos was used in the manufacture of automotive brakes and clutches many decades ago, the following is presently beyond dispute:

- (1) By 2000, manufacturers had eliminated asbestos from virtually all brake assemblies in automobiles. (DRE 3188.)
- (2) By the 1980s, automobile manufacturers began using various asbestos-free substitutes in clutch assemblies; and by 2000, most automobiles in the United States were no longer made with asbestos-containing clutches. (DRE 3244-3247.)
- (3) As of November 2019, only 1.1% of new cars sold contained manual transmissions,² and EPA presents no evidence that any new cars sold with manual transmissions contain asbestos.
- (4) The use of asbestos-containing products in the United States occurs primarily in the chlor-alkali industry where chrysotile asbestos is used in semipermeable diaphragms for chlorine and caustic soda production.
- (5) The U.S. Geological Survey for Asbestos 2020 states that "a small, but unknown, quantity of asbestos was imported within manufactured products, including brake blocks for use in the oil industry, rubber sheets for gaskets used to create a chemical containment seal in the production of titanium dioxide, certain other types of preformed gaskets, and some vehicle friction products." (U.S. Geological Survey, Mineral Commodities Survey, January 2020.) EPA is not aware of the imported volume of those imports. (DRE 1305-1307.)
- (6) EPA received verification from five major vehicle manufacturers that asbestos-containing automotive parts are no longer used on new cars for domestic distribution. (DRE 3501-3502.)

² <https://www.caranddriver.com/news/a29732878/electric-cars-sales-manual-transmission/>

- (7) Currently, one car manufacturer imports asbestos-containing brakes for use in a single model of vehicle which is manufactured domestically, but only exported and sold outside of the United States (DRE 3120-3121, 3126-3127), and EPA presents no information regarding the number of workers involved in this activity.
- (8) EPA presents no information that any U.S. automotive manufacturer is currently importing or installing asbestos-containing clutches on any vehicles.
- (9) EPA provides no support for the statement that “individual consumers can find aftermarket automotive products marketed as containing asbestos through online retailers” or the extent of such products.
- (10) EPA staff conducted an online search using various search terms to determine any currently available asbestos-containing products in the United States and did not identify automotive brakes or clutches.³
- (11) EPA has no information regarding the volume or number of asbestos-containing clutches, if any, that are currently imported to the U.S.
- (12) EPA does not know the number of asbestos containing brakes or clutches that are being purchased online and installed in cars (classic cars or new cars) in the U.S.
- (13) EPA states that “the potential remains for some older vehicles to have asbestos-containing parts and for foreign-made aftermarket parts that contain asbestos to be imported and installed by consumers in cars when replacing brakes or clutches” (DRE 3121-3124) but provides no evidence or information to support the actuality of this statement.
- (14) While EPA asserts that aftermarket automotive parts made from asbestos exist in older stockpiles, EPA provides no evidence or information to support this assertion.
- (15) The fact that asbestos-containing replacement brake materials were available from parts suppliers into the 2000s and researchers were able to purchase these materials in 2008 from a vintage auto parts facility (DRE 3201-3203) does not speak to the availability or actual use of asbestos-containing brakes in 2020.
- (16) Similarly, the fact that 27 boxes of asbestos-containing clutch discs were purchased from a parts warehouse in or about 2008 (DRE 3248-3251) provides no evidence that previously manufactured asbestos-containing clutch assemblies are available in 2020, nor does it speak to the actual use of such clutch discs by any potential purchasers.
- (17) State laws and regulations have limited sales of asbestos-containing aftermarket brake parts, even among existing stockpiles, to the extent they exist. (DRE 3207-3208.)
- (18) The not-to-exceed limit of 0.1 percent asbestiform fibers in aftermarket brake parts extends nationwide, due to a memorandum of understanding between EPA and multiple industry stakeholders. (DRE 3211-3215.)

³ Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: Asbestos, Feb 2017, Table 1 - EPA-HQ-OPPT-2016-0736.

- (19) EPA has not identified any studies that contain exposure data related to the installation of asbestos-containing brakes from an Original Equipment Manufacturer. (DRE 3513.) Thus, EPA's exposure assessment is very likely an overestimate. (DRE 3523.)
- (20) Despite acknowledging that historical asbestos exposures from clutch repair are lower than comparable brake repair exposures, EPA inexplicably treats brakes and clutches the same for the purposes of its risk evaluation and exposure analysis. (DRE 3323-3327; 3152-3153.)
- (21) EPA provides no information or empirical data regarding the composition of asbestos-containing brakes and/or clutches imported into the U.S. and how the percentage of asbestos in brakes and clutches manufactured today in China and India, for example, compares to the percentage of asbestos in brakes and clutches manufactured in the 1950s-90s. Without such information, EPA's exposure analysis is entirely speculative.
- (22) By its own admission, the aftermarket auto brakes/linings and clutches exposure value used by the EPA to assess this COU may be an overestimate. (DRE 3352.)
- (23) For the aftermarket automotive brakes/linings and other vehicle friction products COU, "no estimates of the number of potentially exposed workers were submitted to EPA by industry or its representatives, so estimates were used and were based on market estimates for that work category; but with no information on the market share for asbestos containing products." (DRE 894-897.)
- (24) EPA presents no information regarding the actual number of vehicles in the U.S. that contain asbestos-containing brakes or clutches.
- (25) EPA does not know the actual number of workers in the U.S. who are currently exposed to asbestos from working directly with asbestos-containing brakes or clutches.
- (26) EPA acknowledges that its estimate of the numbers of workers potentially exposed to aftermarket automotive brake and clutches has a high range of uncertainty. (DRE 890-900.)
- (27) EPA has no empirical data to support the suggestion that 750,000 workers are directly exposed to asbestos from asbestos-containing aftermarket automotive products.

In light of the above undisputed facts, together with the missing, deficient and inadequate information, and related uncertainties that are apparent from the Draft Risk Evaluation itself, the EPA has fundamentally failed to establish a basis for assuming that there will be "known, intended, or reasonably foreseen" exposures to asbestos from aftermarket automotive brakes/linings and other vehicle friction products, as required by TSCA § 3(4). This is particularly true as it relates to automotive clutches. First, manual transmissions have all but disappeared and there does not appear to be any suggestion that asbestos-containing clutches are currently being used as original equipment or replacement parts on new vehicles. Second, asbestos-containing clutches were phased out in the mid to late 1980s, some 35 years ago. Third, EPA fails to provide any credible information or evidence that asbestos-containing clutches are currently imported into the U.S. or that asbestos-containing clutches are actually being purchased online or via other means. Fourth, EPA's risk evaluation of clutches is fundamentally flawed, as while EPA acknowledges that historic exposures to

asbestos from clutch repair are lower than from brake repair, EPA treats both exposures the same. Fifth, EPA fails to provide any actual evidence that any workers or DIY consumers are currently being exposed to asbestos from automotive clutch repairs.

Consequently, EPA has failed to establish the necessary justification or rationale for including automotive clutches in its Draft Risk Evaluation and automotive clutches should be removed from its analysis, particularly given the immense impact this evaluation and document will have on the thousands of lawsuits filed by plaintiffs each year against companies that, many decades ago, manufactured and sold asbestos-containing clutches and other automotive friction products.

In addition to the above remarks, Morse TEC also joins in the objection of the U.S. Chamber of Commerce to the inclusion of Drs. Steven Markowitz, Marty Kanarek, and Henry Anderson on the Toxic Substances Control Act Science Advisory Committee on Chemicals Peer Review panel for the Draft Risk Evaluation, as presently constituted, because of their financial conflicts of interest, the appearance of loss of impartiality, a lack of independence, and bias that should result in the disqualification of each of them from this panel. Drs. Markowitz, Kanarek, and Anderson are experts for plaintiffs in asbestos litigation and are paid significant amounts of money by plaintiffs to testify in asbestos personal injury cases. Drs. Markowitz and Anderson also have documented ties to the Asbestos Disease Awareness Organization, a lobbying group that advocates for the “need for a global asbestos ban.” The Draft Risk Evaluation is thus not based on independent, unbiased current scientific information.

Finally, Morse TEC joins in the critiques of the Draft Risk Evaluation’s scientific methodology as set forth in the comments of Dr. David Garabrant, Dr. Victor Roggli, Dr. Brooke Mossman, Dr. Christy Barlow, Dr. Dennis Paustenbach and Drs. Suresh Moolgavkar, Gabor Mezei & Fionna Mowat.

Thank you for your consideration.

Sincerely yours,



Kelvin T. Wyles

KW:dk