

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,<sup>1</sup> U.S. Chamber Institute for Legal Reform,<sup>2</sup> American Property Casualty Insurance Association,<sup>3</sup> American Tort Reform Association,<sup>4</sup> Aerospace

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> The American Property Casualty Insurance Association is the primary national trade association for home, auto, and business insurers. The American Insurance Association and Property Casualty Insurers Association of America merged to form APCIA in 2019.

<sup>4</sup> Founded in 1986, the American Tort Reform Association is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

Industries Association,<sup>5</sup> Coalition for Litigation Justice,<sup>6</sup> International Association of Defense Counsel,<sup>7</sup> National Federation of Independent Business Small Business Legal Center,<sup>8</sup> Product Liability Advisory Council, Inc.,<sup>9</sup> and Washington Legal Foundation,<sup>10</sup> 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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<sup>5</sup> Founded in 1919, the Aerospace Industries Association is the premier trade association, advocating on behalf of over 300 companies members for policies and investments that keep our country strong, bolster our capacity to innovate and spur economic growth. AIA's members represent the United States of America's leading manufacturers and suppliers of aircraft and aircraft engines, helicopters, unmanned aerial systems, missiles, and space systems.

<sup>6</sup> The Coalition for Litigation Justice, Inc. is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for asbestos and other toxic tort claims. The Coalition includes Century Indemnity Company; Great American Insurance Company; Nationwide Indemnity Company; Allianz Reinsurance America, Inc.; Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

<sup>7</sup> The International Association of Defense Counsel has been serving a distinguished membership of in house and outside defense attorneys and insurance executives since 1920, and currently has approximately 2,500 invitation-only, peer-reviewed members. Its membership includes lawyers in large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives.

<sup>8</sup> The National Federation of Independent Business Small Business Legal Center is a 501(c)(3) public interest law firm that serves as the voice of small business in the nation's courts and a legal resource for small business owners nationwide. It is affiliated with NFIB, the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. Members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

<sup>9</sup> The Product Liability Advisory Council, Inc. is a nonprofit association with approximately 100 corporate members representing a broad cross-section of American and international product manufacturers. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining members of PLAC.

<sup>10</sup> The Washington Legal Foundation is a public interest law firm and policy center. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

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."<sup>11</sup> 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](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.

The COVID-19 pandemic has created added stress on American business in a manner not seen since the Great Depression. For these reasons, any EPA risk assessment report for asbestos

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<sup>11</sup> <https://www.asbestosdiseaseawareness.org/about-adao/who-we-are/>.

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.”<sup>12</sup>

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

The ADAO is an organization that works “towards preventing asbestos exposure by urging lawmakers to ban asbestos, supporting the community of individuals whose lives have been devastated by asbestos, and educating the public about asbestos disease prevention.”<sup>13</sup> ADAO describes itself as “the largest independent 501(c)(3) nonprofit in the U.S. dedicated to preventing asbestos exposure, eliminating asbestos-related diseases, and protecting asbestos victims’ civil rights through education, advocacy, and community initiatives.”<sup>14</sup>

Linda Reinstein is ADAO’s President and CEO.<sup>15</sup> Legislation introduced in Congress, The Alan Reinstein Ban Asbestos Now Act (ARBAN), is named after Ms. Reinstein’s late-husband.<sup>16</sup> 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.
- Passed ARBAN through the Committee on Energy and Commerce in the House of Representatives and onto the House Floor for a vote.
- Ensured the passage of U.S. Senate’s 15th Annual Resolution, which designated April 1-7, 2019 as “National Asbestos Awareness Week.”<sup>17</sup>

Additionally, in May 2019, ADAO testified before the U.S. House Energy and Commerce Subcommittee on Environment and Climate Change during a legislative hearing titled, “Ban Asbestos Now: Taking Action To Save Lives And Livelihoods” which focused on ARBAN.<sup>18</sup>

According to ADAO’s website, “For nearly four years, ADAO and other stakeholders have urged the EPA to use the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Lautenberg Chemical Safety Act) to ban asbestos.”<sup>19</sup> To that end, ADAO has directly requested the EPA to use the Lautenberg Chemical Safety Act as a means to ban asbestos.<sup>20</sup> The Draft Risk

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<sup>12</sup> Cary Stewart Sklaren, *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>.

<sup>13</sup> *Id.*

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

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

<sup>16</sup> <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/>.

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

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

<sup>19</sup> <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/>.

<sup>20</sup> 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.<sup>21</sup>

#### 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.<sup>22</sup> 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.”<sup>23</sup>

Further, Dr. Anderson has testified on behalf of plaintiffs in asbestos personal injury cases since at least 1989.<sup>24</sup> He continues to testify on behalf of plaintiffs in asbestos personal injury cases,<sup>25</sup> charging at least \$400 per hour for this type of testimony.<sup>26</sup>

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

#### Dr. Steven Markowitz

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

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.<sup>31</sup> He has been retained hundreds of times – always by plaintiffs’ firms.<sup>32</sup> As of 2019, he charged \$600 per hour to testify in court,

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<sup>21</sup> March 2020 Draft Risk Evaluation for Asbestos, Executive Summary, 665-666.

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

<sup>23</sup> 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>.

<sup>24</sup> 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.

<sup>25</sup> 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.

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

<sup>27</sup> 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).

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

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

<sup>30</sup> 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, 110<sup>th</sup> Cong., First Sess., June 12, 2007, U.S. Govt. Printing Office, 2011, pp. 170-192, specifically pp. 177 and 192.

<sup>31</sup> 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.

<sup>32</sup> *Id.*

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

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.<sup>35</sup>

#### Dr. Marty Kanarek

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

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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.

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<sup>33</sup> *Id.* at 11:15-24.

<sup>34</sup> *Id.* at 11:25-12:17.

<sup>35</sup> 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).

<sup>36</sup> 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.

<sup>37</sup> *Id.* at 24:23-27:12

<sup>38</sup> *Id.*

<sup>39</sup> *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.

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