



October 2009 OSHA PLANS TO DROP TLVS FROM MSDS

INSIGHTS ALERT

US industry is on the verge of a major victory, aided by Patton Boggs LLP on behalf of its clients. OSHA formally proposed deletion of its Hazard Communication rule provision that mandates the use of American Conference Of Governmental Industrial Hygienists (ACGIH) exposure limits, called Threshold Limit Values or TLVs®.

As part of a major overhaul of its programs for chemical safety to achieve "global harmonization" of chemical warnings and labels, OSHA proposed to no longer mandate the use of TLV® on Material Safety Data Sheets (MSDS), nor in employee training, nor in hazard analyses that form the core of the US and the world's chemical safety communication programs.

The proposed regulations can be found in the September 30, 2009 Federal Register, at <http://edocket.access.gpo.gov/2009/pdf/E9-22483.pdf>. OSHA states, on page 50401, that, after reviewing the comments submitted, it decided only to maintain the requirement to list OSHA's mandatory permissible exposure limits (PELs) on the Safety Data Sheets and not the TLV®. While the remainder of the proposed rule requires close scrutiny to determine if its benefits justify the massive costs of changing millions of labels and safety data sheets, the proposed deletion of the ACGIH role in chemical hazard communication will be a welcome change.

For the last ten years, Patton Boggs led an effort that coordinated litigation, Congressional action and pursuit of Agency remedies to prevent the Federal Government from using and enforcing non-consensus, non-governmental private "standards" for certain exposure limits. These efforts have addressed client issues such as solvents, minerals (e.g. trona, limestone, coal, silica), metals (e.g. copper), and other dusts and physical agents (e.g. vibration).

Patton Boggs' clients and their products were harmed by scientifically invalid ACGIH TLV® limits adopted by the "non-profit" ACGIH group, which was formed by government employees and described by one of its founders as being capable of accomplishing what its members could not accomplish in their official government capacity.

In two cutting edge lawsuits against ACGIH, Patton Boggs discovered extensive evidence proving that certain TLV® exposure limits were adopted in closed, secret meetings, in processes that were rife with conflicts of interest and bias, and were often controlled or drafted by DOL, OSHA, MSHA, HHS, NIOSH or other agency employees, or their grant recipients. This was done while working outside their agency jobs for ACGIH, sometimes while on government payrolls and using agency funds and resources.

One lawsuit was settled when ACGIH withdrew its TLV® for trona and published an apology to our clients. The other was settled after a judge ruled that the TLV® were merely opinion, but did not address the merits of the case. Both lawsuits resulted in extensive discovery of evidence of conflicts of interest and scientific invalidity that led to the withdrawal of additional TLV® although some of the tainted ones are still in place.

Following the lawsuits, OSHA, MSHA and NIOSH issued new policies that address conflicts of interest and ostensibly govern their employee involvement in organizations such as ACGIH. Yet, agency personnel participation in ACGIH continues to warrant vigilance of the process.

In two Congressional hearings and in various federal and state agency rule-making procedures, Patton Boggs Partner Henry Chajet summarized and submitted deposition transcripts and ACGIH documents, demonstrating that suspect TLV® standards were both scientifically invalid and the results of conflicts of interest and bias. Patton Boggs is pleased to report that in response to evidence submitted by the firm, and consistent with OSHA efforts to achieve "global harmonization," OSHA determined that its proposed Hazard Communication rule changes should delete all regulatory ACGIH TLV® mandates.

Patton Boggs partner, Henry Chajet, stated: "Fifteen years ago Mark Savit and I joined Patton Boggs because the firm is positioned at the intersection of traditional legal work, public policy and government lobbying. Once again we are thankful for our firm's efforts to achieve the worthy legal and policy goals of our clients, and for continually supporting and advancing our unique position in the legal/policy community that contributes to our success."

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