



October 2009

HEALTH AND SAFETY LAW ALERT: OSHA PLANS TO DROP TLVs FROM MSDS**HEALTH AND SAFETY LAW ALERT**

In a major victory for U.S. industry, brought about by Patton Boggs LLP on behalf of its clients, the Occupational Safety and Health Administration (OSHA) has formally proposed deletion of its Hazard Communication rule provision that mandates the use of American Conference of Governmental Industrial Hygienists (ACGIH) exposure limits, called TLVs[©].

As part of a proposed 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 TLVs[©] on Material Safety Data Sheets (MSDS), nor in employee training, nor in hazard analyses that form the core of the United States' 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 has decided only to maintain the requirement to list OSHA's mandatory permissible exposure limits (PELs) on the Safety Data Sheets and not the TLVs[©].

For the last 10 years, Patton Boggs has been leading an effort that involves coordination of 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 "nonprofit" 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 TLVs(c) were merely opinion. Both lawsuits resulted in extensive discovery of evidence of conflicts of interest and TLV[©] scientific invalidity that led to the withdrawal of additional TLVs[©], although some of the tainted ones are still in place.

Following the lawsuits, OSHA, MSHA and NIOSH have issued new policies that address conflicts of interest and ostensibly govern involvement in organizations such as ACGIH.

This client alert provides only general information and should not be relied upon as legal advice. For more information, contact your Patton Boggs LLP attorney or one of the lawyers listed below.

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Yet, agency personnel participation in ACGIH continues to warrant continued vigilance of the TLV© 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 many 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 validating and continually advancing our unique position in the legal/policy community that permits us to achieve the goals of our clients."

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