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Re: Testimony on OSHA's Proposed Modifications of Its Hazard Communications Standard (Docket No. OSHA-H022K-2006-0062)

This testimony is submitted by Professor Sidney A. Shapiro¹, a Member of the Board of Directors of the Center for Progressive Reform (CPR), and Mr. James Goodwin, a CPR Policy Analyst.

CPR is an organization of academics specializing in the legal, economic, and scientific issues that surround federal regulation. CPR works to advance the public's understanding of the issues addressed by the country's regulatory laws. In particular, CPR seeks to educate the public and policymakers about how the government's authority and resources may best be used to preserve collective values and to hold accountable those who ignore or trivialize them.

We wish to comment on one aspect of the proposed changes to the Hazard Communication Standard (proposed HazCom rule or proposed rule): an ill-advised provision that would eliminate the longstanding requirement that chemical manufacturers include the American Conference of Governmental Industrial Hygienists' (ACGIH) Threshold Limit Values on Safety Data Sheets (SDS).² OSHA should retain this requirement because:

- 1) Inclusion of this information in SDSs is necessary to fulfill the HazCom standard's goal of providing workers with information regarding workplace chemical hazards so they can make well-informed choices about how to protect themselves while on the job;

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² The proposed HazCom rule would also eliminate the longstanding requirement that chemical manufacturers include the International Agency for Research on Cancer's (IARC) cancer hazard evaluations. The arguments presented in this testimony in favor of retaining TLVs in SDSs apply equally to retaining IARC's cancer hazard evaluations as well. For simplicity and clarity, however, this testimony is limited to discussing TLVs.

- 2) Exclusion of this information from SDSs is not necessary to fulfill the goal of OSHA's proposed HazCom rule, which is intended to bring OSHA's HazCom standard into conformity with the United Nations' (UN) Globally Harmonized System of Classification and Labeling of Chemicals (GHS); and
- 3) Inclusion of this information is consistent with the Information Quality Act (IQA) and its guidelines.

I. INCLUSION OF TLVs ON SDSs IS NECESSARY TO FULFILL THE GOAL OF OSHA'S HAZCOM STANDARD

Under OSHA's HazCom standard, the SDSs serve as a critical vehicle for conveying hazard information to workers. Accordingly, the protection of workers is best served by including more—not less—information in the SDSs.

In most cases, SDSs under the proposed rule would contain no quantitative risk estimates for workplace chemicals at all. OSHA has not established Permissible Exposure Limits (PELs) for the vast majority of the thousands of chemicals used in the workplace. In these cases, workers would have no expert judgment regarding safe exposure limits to refer to when deciding how best to protect themselves.

The proposed rule is inadequate even when OSHA has a PEL. In this circumstance, an SDS would contain only one quantitative estimate of risk posed by workplace chemicals—the PEL. Thus, the SDS would convey a false degree of precision regarding risk; workers are likely to assume that any exposure level below the PEL is objectively “safe.” Multiple estimated exposure limits give workers a greater appreciation of the uncertainty that underlie these estimates.

Even chemical manufacturers recognize the value of including more information on SDSs. They often take advantage of the opportunity to add information to SDSs beyond that which is required under OSHA's existing HazCom standard. For example, regarding the potential cancer hazard of one of its products, one chemical manufacturer added information to the SDS explaining that available tests had only shown the chemical to have carcinogenic properties in mice rather than in humans.³ The proposed HazCom rule would not limit the ability of manufacturers to include information on SDSs. The continued inclusion of TLVs, however, would help to complement the information that manufacturers add to SDSs by providing workers with an even broader range of viewpoints regarding the potential hazards of workplace chemicals.

Significantly, the “behavioral economics” approach to health and safety regulations that the Office of Management and Budget (OMB) in the Obama administration has championed supports the inclusion of TLVs on SDSs.⁴ One key insight of behavioral economics is that well-designed

³ Letter from Adam M. Finkel, Sc.D., CIH, Executive Director of the Penn Program on Regulation, University of Pennsylvania Law School, to the OSHA Docket Office (Dec. 29, 2009) *available at* <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a73a36>.

⁴ *See, e.g.*, OFFICE OF INFO. & REG. AFF., OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE,

information disclosure requirements can provide an effective supplement to traditional regulation by helping people make well-informed choices about how to protect themselves. Disclosure requirements are ineffective, however, if the information they provide is misleading or confusing.⁵ As described above, without TLVs, SDSs will likely leave workers with misleading or even meaningless information regarding the chemical hazards in their workplace. Accordingly, the inclusion of TLVs in SDSs will not only make OSHA's HazCom standard more effective, it is also consistent with the policy preferences of the current OMB.

II. INCLUSION OF TLVs ON SDSs IS CONSISTENT WITH THE HARMONIZATION GOALS OF OSHA'S PROPOSED HAZCOM RULE

The goal of OSHA's proposed HazCom rule is "to modify [OSHA's] existing Hazard Communication Standard (HCS) to conform with the United Nations' (UN) Globally Harmonized System of Classification and Labelling of Chemicals (GHS)."⁶ The achievement of this laudable goal does not require the exclusion of TLVs from SDSs.⁷

OSHA's preamble says the elimination of TLVs would "help[] to minimize differences between the U.S. and other countries."⁸ Instead of requiring chemical manufacturers to include this information, the proposed HazCom rule merely directs manufacturers to "include 'any other exposure limit used or recommended by the chemical manufacturer, importer, or employer preparing the safety data sheet.'"⁹

OSHA's reasoning ignores that the GHS was designed to maintain maximum flexibility in order that regulatory authorities around the world could adapt it to their needs. Even OSHA's preamble recognized this aspect of the GHS:

The GHS is an internationally harmonized system for classifying chemical hazards and developing labels and safety data sheets. However, the GHS is not a model standard that can be adopted verbatim. Rather, it is a set of criteria and provisions that regulatory authorities can incorporate into existing systems, or use to develop a new system.¹⁰

In light of this flexibility of the GHS, OSHA does not need to exclude TLVs. As OSHA recognizes, the GHS establishes minimal guidelines for communicating chemical hazards to workers

LOCAL, AND TRIBAL ENTITIES 35-40 (2009), available at

http://www.whitehouse.gov/omb/assets/legislative_reports/2009_final_BC_Report_01272010.pdf.

⁵ *Id.* at 37.

⁶ Hazard Communication, 74 Fed. Reg. at 50280.

⁷ Even if conforming OSHA's HazCom standard to the GHS did require exclusions of TLVs and IARC's cancer hazard evaluations, these changes would still have to advance the goal of the Occupational Safety and Health Act (OSH Act), which is to provide workers with safe and healthful working conditions. Conformity for conformity's sake is not adequate justification for taking a particular regulatory action under the OSH Act. In the preamble to its proposed HazCom Rule, OSHA failed to demonstrate that including less information on SDSs would not detract from worker health and safety. As noted above in Section I, excluding TLVs and IARC's cancer hazard evaluations will likely leave workers more vulnerable to workplace hazards.

⁸ *Id.* at 50401.

⁹ *Id.*

¹⁰ *Id.* at 50287.

that regulatory authorities around the world can build upon.¹¹ Moreover, to the extent that the GHS, like OSHA’s HazCom standard, is intended to help workers make well-informed decisions about how to protect themselves against chemical hazards, then the goals of the GHS are best achieved by including more—not less—chemical risk information, including quantitative estimates of hazardous exposure levels.

In fact, OSHA’s proposed HazCom rule takes full advantage of the GHS’s flexibility. As noted above, it still requires the inclusion of PELs on SDS (where applicable) even though other countries would not likely include them on their own SDSs.¹² And the proposed rule still authorizes (though does not require) chemical manufacturers to include TLVs on SDSs even though many other countries may not require this information on their own SDSs.¹³ OSHA has not demonstrated any principled reason for why harmonization requires the inclusion of PELs, but does not require the inclusion of TLVs.

In summary, the preamble does not adequately explain why exclusion of TLVs from SDSs is necessary to conform OSHA’s HazCom standard to the GHS. Without such explanation, this aspect of the proposed HazCom rule is vulnerable to challenge as being “arbitrary and capricious” under the Administrative Procedure Act.¹⁴

III. INCLUSION OF TLVs ON SDSs IS CONSISTENT WITH THE IQA AND ITS GUIDELINES

The Information Quality Act (IQA)¹⁵ places no limits on OSHA’s authority to mandate the inclusion of TLVs on SDSs. Adopted in 2000 as a two-paragraph rider buried in a massive appropriations bill, the IQA is ostensibly designed to ensure the quality of information disseminated by federal agencies. Some comments¹⁶ on the proposed rule have raised the issue of whether TLVs and IARC’s cancer evaluations meet the requirements established by OMB’s IQA guidelines,¹⁷ but the guidelines do not apply in this situation.

A. TLVs Do Not Constitute “Information” Under the IQA.

OMB’s IQA guidelines treat information developed by third parties differently from information developed by an agency itself. According to these guidelines, for third-party information

¹¹ To the extent that regulatory authorities in other countries do exercise the freedom to include more information on their SDSs, the elimination of TLVs from SDSs in the United States would *increase* the differences between other countries and ours, rather than “minimize” them.

¹² *Id.* at 50401.

¹³ *Id.*

¹⁴ See 5 U.S.C. §706(2)(A).

¹⁵ Sec. 515 of Title V of Treasury and General Government Appropriations Act for FY 2001, Pub. L. 106-554, 44 U.S.C. §3516 (2010) (“IQA”).

¹⁶ See, e.g., Letter from William G. Kelly, Jr., Center for Regulatory Effectiveness, to the OSHA Docket Office (Dec. 15, 2009) available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a79071>.

¹⁷ Agency Information Quality Guidelines, 67 Fed. Reg. 8452 (Feb. 22, 2002) (“OMB IQA Guidelines”). See also OFF. OF CHIEF INFO. OFFICER, DEP’T OF LAB., GUIDELINES FOR ENSURING AND MAXIMIZING THE QUALITY, OBJECTIVITY, UTILITY, AND INTEGRITY OF INFORMATION DISSEMINATED BY THE DEPARTMENT OF LABOR (Oct. 1, 2002), available at <http://www.dol.gov/cio/programs/InfoGuidelines/InfoQualityGuidelines.pdf> (“DOL IQA, Guidelines”).

to fall under IQA, the disseminating agency must rely on the information or somehow indicate agreement with it.¹⁸

TLVs are developed by an autonomous third-party organization—the ACGIH. TLVs reflect the expert judgment of the ACGIH regarding the exposure level at which specified chemicals pose a hazard to humans.¹⁹ The ACGIH has independently established its own processes for developing quantitative estimates of hazardous exposure levels for chemicals.²⁰

The IQA and its guidelines apply only if OSHA somehow has endorsed the accuracy of this information. There would be no such endorsement if OSHA requires the disclosure of TLVs on SDSs. Claims to the contrary mischaracterize the purpose and goal of the SDSs. The goal of the SDS is to make it easier for workers to obtain information that they could obtain on their own, using the world-wide web. Instead of putting the burden on workers to take this step, OSHA has employers disseminate it, thereby getting information to workers in a more cost-effective manner and ensuring that workers actually do get the information. As noted above, OSHA recognized this function of SDSs in the preamble to its proposed HazCom Rule by characterizing these documents as a “reference source for exposed employees.”²¹

That OSHA does not endorse every piece of information contained in SDSs should also be clear from the fact that its HazCom standard allows chemical manufacturers to include “any other exposure limit used or recommended by the chemical manufacturer, importer, or employer preparing the safety data sheet.” This open-ended authorization underscores how SDSs are not intended to provide workers with OSHA’s exclusive and irrefutable views on the level of risk posed by different workplace chemicals. Instead, the goal is to ensure that workers receive some minimal level of information so that they can make well-informed decisions about how to protect themselves from workplace chemical hazards.

It is clear from the function of the SDSs that OSHA is merely passing on third-party information without its endorsement. But, if any lingering doubt remains, the goals of OSHA’s HazCom standard would be better served if the agency included an explicit disclaimer that OSHA has not endorsed the TLVs,²² as opposed to excluding this information altogether.

¹⁸ See OMB IQA, Guidelines, V.5 (defining the term “information” to exclude “opinions, where the agency’s presentation makes it clear that what is being offered is someone’s opinion rather than fact or the agency’s views”); DOL IQA, Guidelines, *supra* note 15, at 13-14.

¹⁹ Recently, a federal court adopted this view of the ACGIH. The court characterized the ACGIH as “a non-profit association comprised of a group of scientists that adopts workplace safety exposure levels.” *International Brominated Solvents Assoc. v. ACGIH*, 5:04-cv-394 (HL), slip op. at 13 (M.D. Ga. May 2, 2008).

²⁰ For a description of ACGIH’s process for developing TLVs, see Am. Conf. of Governmental Indus. Hygienists, *TLV/BEI Development Process: An Overview*, <http://www.acgih.org/TLV/DevProcess.htm> (last visited Feb. 26, 2010). For a description of IARC’s process for developing cancer hazard evaluations, see INT’L AGENCY FOR RESEARCH ON CANCER, WORLD HEALTH ORG., *IARC MONOGRAPHS ON THE EVALUATION OF CARCINOGENIC RISKS TO HUMANS, Preamble* (2006), available at <http://monographs.iarc.fr/ENG/Preamble/CurrentPreamble.pdf>.

²¹ Hazard Communication, 74 Fed. Reg. at 50286.

²² The IQA guidelines make it clear that the definition of “information” does not apply “where the agency’s presentation makes it clear that what is being offered is someone’s opinion rather than fact or the agency’s views.” OMB IQA Guidelines, V.5”); see also DOL IQA, Guidelines, *supra* note 15, at 13-14. Thus, through the use of a disclaimer, OSHA can make it absolutely clear that the TLVs and IARC cancer hazard evaluations included in the SDSs are not subject to the IQA Guidelines, since the presentation of this information would demonstrate that it does not reflect the “agency’s views.”

B. The Requirement That Chemical Manufacturers and Employers Produce and Distribute SDSs for Their Chemicals Does Not Constitute “Dissemination” Under the IQA.

Under OSHA’s HazCom standard, the agency does not distribute the SDSs to employees that contain TLVs. Instead, chemical manufacturers and employers have the responsibility of producing and distributing these documents. As such, OSHA does not “disseminate” this information, as that term is used in the IQA.

The IQA guidelines define “dissemination” to include any “agency initiated or sponsored distribution of information to the public,”²³ which arguably includes OSHA’s HazCom standard since it directs a third party—chemical manufacturers and employers—to distribute the required SDSs. The overly broad definition of “dissemination” provided in the IQA guidelines lacks statutory support under the IQA, however. When interpreting a particular term in a statute, courts typically begin by looking at the ordinary understanding of the term’s meaning—that is, its dictionary definition.²⁴ Most dictionary definitions of “disseminate” invariably connote some direct action (*i.e.*, by the disseminator).²⁵ Therefore, these definitions would only contemplate direct distribution by the agency, and would not include third-party distribution directed by the agency.

Significantly, the unusual circumstances under which the IQA was adopted provides evidence that Congress did not intend for the term “dissemination” to have anything other than an ordinary meaning. As noted above, the IQA was just a two-paragraph rider buried in a massive appropriations bill. Congress never debated the provision, nor did it conduct any hearings on it.²⁶ Indeed, it is unlikely that many of the legislators that voted in favor of the appropriations bill were even aware of its existence. Accordingly, courts would likely favor a narrow reading of the term “dissemination” as opposed to the expansive one provided in the IQA guidelines. Because this narrow definition does not apply to third-party distribution of information, OSHA’s requirement that chemical manufacturers and employers distribute SDSs does not constitute “dissemination” for the purposes of the IQA.

Thank you for your attention to this testimony.

²³ OMB IQA Guidelines, V.8”); DOL IQA, Guidelines, *supra* note 15, at 14.

²⁴ See generally WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 819-22 (3d ed. 2001) (discussing ordinary meaning cannons of statutory construction).

²⁵ See, e.g., MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 336 (10th ed. 1993) (defining the word “disseminate” to mean “to spread abroad as though sowing seed”).

²⁶ Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform By Appropriations Rider*, 28 WM. & MARY ENVTL. L. & POL’Y REV. 339, 374 (2004).