WORKSAFE
safety, health, and justice for workers

February 10, 2014

Dave Thomas, Chairman
Occupational Safety and Health Standards Board
Department of Industrial Relations
#350 - 2520 Venture Oaks Way
Sacramento, California 95833

Via email: oshsb@dir.ca.gov

Dear Chairman Thomas and Board members:

Re: Federal Final Rule, Globally Harmonized System:
Proposed modifications to the proposed changes to
California's Hazard Communication Regulation (Health)

Worksafe again is weighing in on this key workers' right in California. As before, we support retaining essential parts of the right-to-know (RTK) in the state's current *Hazard Communication Regulation*. We also have said that the regulation needs to be improved and updated. Our position is consistent with the first principle of the international GHS agreement:

> *the* ***level of protection offered to workers, consumers, the general public and the environment should not be reduced*** *as a result of harmonizing the classification and labeling systems;* (emphasis added)

A California non-profit, we are dedicated to protecting people from job-related injuries, illnesses, and death. We carry out our activities in coalition with unions, environmental groups, legal aid organizations, public health officials and organizations, and others. A meaningful RTK regulation is a long-standing and a key goal when we advocate for protective worker health and safety laws. It is especially important to the low wage workers who are the focus of much of our work.

Since the federal 2012 *Hazard Communication Standard* unfortunately did not meet the GHS goal, we do not want that full federal standard to replace California's unique RTK regulation. This will happen unless the Board

approves this modified proposal in time for it to take effect in early May, 2014.

The proposal will not protect California workers and employers

Changes to the regulation have been the subject of debate in the state for almost a year. The Board and Cal/OSHA got a lot of feedback from worker and public health voices at the Horcher hearings and the advisory committee and after the first formal proposal. Worksafe has been a key player in staying on top of this issue. We made extensive comments and attended meetings and hearings, as did others representing and advocating for public health and workers' occupational health and safety.

However, it's difficult to see that the Board staff or Cal/OSHA addressed any of those questions and concerns in the latest modifications. Nor do we have any idea why our voices were ignored, since the Board staff did not provide the comments and responses to the August 30, 2013 notice with the January 23, 2014 notice of proposed modifications.

It is clear that Cal/OSHA staff tried to implement the first GHS principle, to at least retain current language in the RTK regulation and recognize the state's unique role in the issue getting national attention. We sincerely appreciate those efforts. Unfortunately, and despite all the concerns and detailed feedback, they do not go far enough with this modification.

Yes, there is still language about using one positive study and some floor or source lists. But the exceptions that came out of the blue in the first formal proposal seriously undermine the good intentions; most remain in the latest version. Quite similar to industry's written recommendations in May and October last year, these loopholes give unscrupulous manufacturers and importers easy ways to avoid using lists, and even the mandatory Appendix A [as indicated by a careful reading of subsections (d)(3) and (d)(4)]. They also will require extra time and resources for Cal/OSHA to enforce and for employers and workers to use, if they want to be certain they have complete and accurate information about a product's ingredients and hazards.

The "weight of evidence" doesn't always weigh the same

Please see Appendix 1 of this letter for an informative example of how exceptions and "weight of evidence" can be mis-used and why the exceptions should be removed and lists added. There, you will see data sheets about the same product (styrene) from the same company (Chevron Philips) from the company website (http://www.cpchem.com/bl/aromatics/en-us/Pages/StyreneMonomer.aspx). All but one are dated February 5, 2014 and appear to come from the same source.

However, the information you get depends on where you live and work. If you are in China, you won't know that styrene has toxic properties. The GHS classification list for that country's data sheet includes only four of the nine GHS categories on the most recent US data sheet, four of the 14 on the Japanese one, and four of the 10 on the Korean sheet. As a consequence, the labels are different in China; the toxicity one is missing.

How will this affect downstream users, workers, and regulatory authorities in the US and elsewhere? What will they have to spend in time, money and effort to make sure that styrene from China, or in Chinese products, is accurately categorized on labels and data sheets?

The U.S. 2011 Chevron styrene data sheet said the chemical met the GHS criteria of 1B for carcinogenicity. That's gone in 2014, as though the GHS-required "weight of evidence" has mysteriously shrunk in the United States and nowhere else. The 2014 data sheet removed that GHS category and mentions carcinogenicity on the next page. It's difficult to understand why, unless you know about the "weight of evidence" change to the federal *Hazard Communication Standard* in 2012 and the somewhat-hidden requirement (in Appendix D of the revised standard) to note on a data sheet if a substance is on the National Toxicology Program (NTP) or International Agency for Research on Cancer (IARC) lists. The two authoritative organizations use a "weight of evidence" approach that led them to conclude, after extensive reviews, that styrene should be considered carcinogenic. Federal OSHA appears to consider their lists meet the "total weight of evidence" required to categorize a chemical.

Chevron chose to add the ACGIH determination, making it easy for readers to assume that the private organization uses the same criteria and review methods as the NTP and IARC; they don't, and ACIGH has not categorized styrene as a carcinogen. For 99.9 percent of employers and workers, the ACGIH reference casts doubt on the other two listings. To avoid the understandable confusion, the reader needs to know the full story about how all three organizations evaluate possible carcinogens.

Furthermore, U.S. workers and employers are not told about styrene's other effects, such as germ cell mutagenicity, reproductive toxicity, and effects on the blood and nervous systems and the liver.

This is not what is supposed to happen in a globally harmonized system where first principles include "the comprehension of chemical hazard information, by the target audience, e.g. workers, consumers and the general public should be addressed" and the one we cited earlier about not reducing protection.

Taken together, these 2014 data sheets belie industry claims at Board and Cal/OSHA meetings and hearings, and in the recent story where a spokesman said they agreed to support the federal OSHA changes to accommodate the GHS because of the "weight of evidence" approach in categorizing carcinogens (see http://insideoshaonline.com/OSHA-Online-Daily-News/OSHA-Daily/industry-backs-hazcom-change-using-weight-of-evidence-in-carcinogen-labeling/menu-id-622.html).

If a multinational company like Chevron "harmonizes" its labels and data sheets to what they can get away with in a particular jurisdiction, and tells different stories in different countries, what will others do? How can the chemical industry and its allies be trusted to provide complete and accurate information about their products without being told to use authoritative lists for carcinogens and other health hazards? How can they be trusted to use exceptions properly?

Next steps

At the same time, given the process deadlines, delays, and the consequences that so many of us want to avoid, we have little choice but to urge the Board to approve this latest proposal. We also expect Cal/OSHA to only make changes that are possible without another 15-day notice or other delays. The ones we believe the agency should consider are:

- Specify where information about chemical names and health hazards should go on data sheets, if they must be added to comply with the exceptions and one positive study requirements. They should be in Sections 2 and 3 of the new sheets, where users expect to find this kind of information.
- Clarify and make consistent who is to get documentation about the classification of chemicals. Sub-section (d)(6) in the proposal allows "designated representatives, the Director and NIOSH" to get documentation about classification procedures. For the exceptions in sub-section (d)(5), those doing the classifying are to make "that documentation available to employees, employers and the Division". Furthermore, if the entity doing the classification is not the employer, how do a downstream employer and their workers get the documentation? Why are workers' representatives and NIOSH left off the list of those who must get it but included for similar documentation about mixtures [sub-section (d)(6)]? The consistent list of recipients should integrate both sub-sections' requirements and ensure downstream users also receive the information they need.
- Federal OSHA recommended inconsistent language in subsections (d)(3) to (5); it also seems to be at odds with the intentions stated in their letter of December 3, 2013. The federal agency representative said:

Section 5194 (d)(3) currently states that chemicals included on any of the four chemical lists provided by this section are presumed to have met the total weight of evidence as described in Appendix A. Because chemical lists generally do not provide the chemical's hazard class and/or hazard categories, classification using the criteria found in Appendix A must still be performed. ***Recommend revising this regulatory text to clarify that a chemical's presence on any of these lists triggers classification*** (emphasis added).

Yet the recommended language -- to "consider" the chemical to be hazardous -- and then perhaps to use an exception, seems to say that the classification does not have to be done, and that Appendix A can be ignored. If the lists trigger classification, how can there be exceptions? Why "consider" rather than "treat" as in (d)(4)? Why remove the "total weight of evidence" from (d)(3) and not (d)(4)? Inconsistent language confuses workers, employers and DOSH inspectors alike, and gives lawyers a field day. The language should consistently use either "consider" or "treat" and include "total weight of evidence".

In the longer term, something also needs to be done to deal with the outcomes of the dilemma caused by delays and other timing-related issues. Surely California can do better than this current version of the RTK regulation, reflecting more that has been recommended by worker health, and other public health, voices. We all -- including the Board members -- have a long, unique and honorable history to uphold.

Therefore, we urge the Board to tell Cal/OSHA to take immediate follow-up actions that fully consider and respond to the previous comments from worker and public health advocates, along with ones that would be made if there was time to do so in this process (e.g., the chemical name and health effect/s are noted for the exceptions and one study requirement, but there are no related recommendations for prevention and control measures). Furthermore, the Board should specify that Cal/OSHA return within a few months with revised language that improves worker protection beyond what is in the proposal before you. California's workers, employers, and residents deserve nothing less. Without updates and improvements that protect workers and their downstream employers, the result of the modified proposal undermines claims that the state sets a high standard for the rest of country to follow when it comes to chemicals policies (e.g., the green chemistry regulation that is now in effect).

<u>Serious process issues also must be addressed</u>

Finally, we want to register our serious concerns about the process for these changes to California's RTK regulation. The Horcher process was supposed to

provide time to avoid adoption of the full federal standard and get made-in-California language that reflected the discussions here.

We still had a time crunch that is problematic for the Board members, employers, workers, and the public alike. In particular, this modified proposal notice was published too late for further changes to be made. We are expected to live with this modified proposal and look for other routes to maintain and improve the RTK in California. And, we are expected to do this without knowing the rationale for the changes (and lack of them) in the current proposal. While it may be legal, the time crunch and leaving out the comments and responses is not part of a fair process that meets the goals of Cal/OSHA and the Board to protect California workers' health and safety.

The bottom line

Despite all these difficulties, we do urge Board members to vote for the modified proposal and to find ways to improve it quickly, with full participation from worker and public health voices. We would be pleased to be part of any meaningful efforts to do that.

Thank you for your consideration.

Sincerely

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Worksafe

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