

Committee on Education and the Workforce  
**Hearings**

**WRITTEN TESTIMONY|**  
**BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES**  
**COMMITTEE ON EDUCATION AND THE WORKFORCE**  
**SUBCOMMITTEE ON WORKFORCE PROTECTIONS**  
**By**

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**I. Introduction**

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to present testimony on the safety and health rulemaking process, a system that is broken and in need of reform. I reach this conclusion from the perspective of a partner at the law firm of Patton Boggs LLP, representing employers in safety and health matters since 1978, and with fifteen years of teaching experience as an Associate Professor of Safety and Health Law at the Johns Hopkins University Graduate School of Public Health. On behalf of hundreds of companies and major trade associations, I have participated in dozens of rulemaking proceedings, and represented industry clients in seven regulatory challenges in the United States Circuit Courts of Appeal, and literally thousands of enforcement actions for regulatory violations. My law practice includes regulatory counseling, crisis management, dispute resolution, and litigation at the trial and appellate levels. I have also had the privilege of working with this Subcommittee in years past to identify potential safety and health statutory and procedural improvements and serving on Congressman Paul Henry's Task Group for Safety Law Reform. I believe that Mr. Henry would be gratified that his commitment to achieving employee protections through sound law and public policy is being carried forward by this Congress.

While numerous problems have caused the deterioration of the rulemaking process, my focus today is the one of greatest concern to me and the one with the easiest achievable public policy solution. Rules and standards mandated by the federal government, or relied on or used by the federal agencies, should be the result of a transparent, open process. This process should provide meaningful input to the affected parties, prohibit conflicts of interest by those engaged in writing the rules, and be subject to the due process protections of the law and the oversight of our elected representatives. The OSHA and MSHA use of, and reliance on, declarations of hazards and standards not subject to

meaningful private sector input or public accountability, in my opinion constitutes illegal rulemaking, a misuse of taxpayers dollars, and a conflict of interest that should be prohibited. OSHA and MSHA do this through groups such as the American of Governmental Industrial Hygienists (ACGIH), in private sessions, under the leadership of federal employees who have enforcement or rulemaking government duties.

## **II. ACGIH – CREATED AND CONTROLLED BY FEDERAL OFFICIALS**

Mr. Chairman, a renowned leader of ACGIH put the potential problem created by governmental "private" organizations best when, referring to ACGIH, he stated:

An organization of this sort can very often accomplish things which an organization of more official character is unable to do, because of certain limitations imposed upon official organizations. . . . [An unofficial organization] very often makes statements and takes action on matters which [an official organization] would not dare to do, even though the same people are talking.

ACGIH was created in 1938 by employees of the Public Health Service, funded under the Social Security Act. *See generally* Jacqueline Karnell Corn, *Protecting the Health of Workers: The American Conference of Governmental Industrial Hygienists 1938-1988* (ACGIH 1989). The federal role in ACGIH continues today with U.S. Department of Labor and the U.S. Department of Health and Human Services personnel chairing and holding seats on the ACGIH Board and key ACGIH committees. Board members include two OSHA officials and two HHS officials. The current TLV committee has three DOL and HHS officials as voting members, all of whom have related responsibilities in their day-to-day federal jobs.

Threshold Limit Values (TLVs) have been published annually since 1946, and are credited with advancing the cause of employee health and safety by institutionalizing the concept that numerical exposure limits can be developed and used to protect workers, long before OSHA, MSHA and NIOSH were created. Today, there are TLVs for more than 700 chemical substances and physical agents, as well as fifty Biological Exposure Indices for selected chemicals. TLVs are adopted and used by governments around the world. The ACGIH even carries out its own foreign policy by working with other countries and governments towards "harmonization" of standards.

The ACGIH name and the TLV trademark are recognized and respected around the world, based on a fifty year history of advancing the health protection of the workforce. However, this well earned respect has been abused over the last decade, and ACGIH has risked its reputation and the institution itself by failing to solve significant structural problems that permit abuses of its power. The federal government contributes to these problems through the involvement of its personnel and its reliance and use of ACGIH TLVs.

It is an established fact that federal agency officials charged with developing, using, and enforcing government standards, develop ACGIH TLVs in their so-called "volunteer" ACGIH role, often while being paid by the federal government for ACGIH dedicated time and expenses, and while intermingling agency materials and opinions in closed ACGIH deliberations. Although the ACGIH has several thousand members, the TLV process is controlled by a small group of non-elected people. A number of these individuals are federal employees. Some of these officials have stayed in key TLV committee positions for a decade or more and some for their entire careers. Others have selected their successors or been hired directly by ACGIH after their federal retirement, through an appointment process controlled by the existing leadership.

A new or proposed TLV is generally developed and documented by one person, acting independently on behalf of the TLV Committee and its Subcommittees. All TLV proposals are adopted in mass by the Board of Directors of the ACGIH, based upon recommendations of its committees. Board members readily acknowledge that, due to the amount of materials presented at Board meetings, they rely on the committees and subcommittees.

Previously, TLVs were voted on by the entire ACGIH membership at an open meeting permitting discussion. However, this practice has been eliminated in favor of a faster and more convenient process. While speed and convenience have been realized, transparency and reasoned decision-making have been sacrificed.

Yet TLVs are not widgets and based on the reputation they carry and their critical impact, they should be sound scientific determinations. Everyone should agree that TLVs should be carefully reviewed by experts and the process by which they are adopted should be transparent. After all, a defective TLV can either cause worker harm, if it is not a safe level, or industry dislocations and economic disaster for the communities and companies that produce a product improperly labeled as "hazardous."

The subcommittees that develop ACGIH TLVs assign the analysis of the scientific literature to one person to determine if a TLV is needed or if changes to an existing TLV are justified. There are no criteria published for making this crucial determination. There is no outside peer review by experts of the TLV

proposal or the documentation that underlies it. Nor is there a public hearing for the recommendation to permit open discussion. While there is a generous one year opportunity for written comments on a proposed TLV, the opportunity for in person scientific discussions and presentations to the TLV Subcommittee and Committee, which at one time was routinely available, has been prohibited in recent years.

Recommendations for TLV adoption are formed by the TLV Subcommittees in closed session. There are no minutes of the meetings, and the documents and scientific evidence considered or rejected at the meetings are not revealed. Even the names of the members of the TLV Subcommittees are undisclosed. While our governmental institutions and professional organizations have become more open, the TLV process has grown more secretive and insular. At the same time, the number of chemicals and materials for analysis has grown along with the complexity of scientific determinations.

Yet, ACGIH funding for outside assistance and internal staff and technical resources for TLV development is severely limited, and the TLV process is hampered by a resource shortage. One recent TLV Committee chairman resigned due to the lack of resources available for the development of sound TLVs. Unfortunately, an attempt by the leaders of the industrial hygiene professional community to cure the ACGIH problem, through the merger of ACGIH and the larger, more open American Industrial Hygiene Association, failed for many reasons, including the perceived desire of the TLV Committee to maintain closed sessions and government personnel control, described by some as "independence" and by me as illegal rulemaking.

#### **IV. AGENCY USE, RELIANCE, AND ENFORCEMENT OF ACGIH TLVS**

TLVs have been and are utilized by DOL (OSHA and MSHA) and HHS in many ways. First, HHS research agencies (*e.g.* NIOSH) routinely use TLVs as reference and as definitions of safe exposure levels. OSHA will enforce an ACGIH TLV for a substance under the General Duty Clause if there is no substance-specific OSHA standard (PEL) or if the ACGIH TLV is perceived as more protective. Some OSHA regulations require a TLV for a substance to be adhered to if there is no applicable OSHA-developed, substance-specific standard. OSHA regulations also adopt specific TLVs or TLV lists, promulgated in the year the regulation was adopted. Additionally, MSHA has acknowledged that it enforces ACGIH TLVs.

OSHA and MSHA have frequently utilized ACGIH TLVs to support new regulations and regulatory proposals and to give credibility to their regulations, actions and proposals. In fact, rarely has a new rule been proposed or promulgated without a supporting reference to the ACGIH TLV addressing the

substance at issue. Both the massive OSHA PEL update project (still pending) and the corresponding MSHA TLV update project (pending) admitted their near complete reliance on the ACGIH TLVs for hundreds of substances in the original proposed rules.

OSHA and MSHA have directly incorporated the latest edition of the ACGIH TLVs into their generic training and hazard communication regulations. OSHA's Hazard Communication Standard requires that employers treat chemicals listed in the latest ACGIH TLV Booklet as "hazardous chemicals." MSHA's recently published Interim Final Rule entitled "Hazard Communication," also adopts by reference current and future ACGIH TLV lists. Thus, a single ACGIH action, if not reversed or prevented, could subject a vital U.S. industry to a "hazardous substance" designation and new mandates that did not undergo any public scrutiny or MSHA or OSHA rulemaking.

Although ACGIH prints statements indicating that their TLVs are not intended to be used as regulatory standards, the ACGIH leadership, and its members, including the OSHA, MSHA, and NIOSH officials who vote on them, know full well that they are being used for that very purpose. A NIOSH official, who served as chairman of the ACGIH TLV committee for many years, wrote that the adoption by OSHA of some 400 TLVs in the early 1970s resulted in "the great satisfaction of the TLV committee members."

#### **V. Diesel Exhaust and Trona: Examples of ACGIH and Rulemaking Problems**

In 2001, ACGIH published in its TLV Booklet a proposed TLV for respirable diesel exhaust as elemental carbon of 0.02 mg/m<sup>3</sup> (milligrams per cubic meter of air). The proposal was published as a "Notice of Intended Change." The booklet lists the reason for the proposed TLV as "cancer" and "lung" effects and with a notation that ACGIH considers diesel exhaust to be a suspected human carcinogen. The ACGIH originally published a proposed TLV for diesel exhaust as particulate less than one micrometer in the 1999 and 2000 TLV Booklets. Those proposals listed a TLV of 0.05 mg/m<sup>3</sup> and the reason for the proposals as "cancer." The notation that ACGIH considered diesel exhaust to be a suspected human carcinogen was also included in the 1999 and 2000 proposals.

MSHA recently published a final rule on diesel particulate matter exposure of underground metal and nonmetal miners. 66 Fed. Reg. 5706 (January 19, 2001). The final rule includes "interim" and "final" concentration limits for total carbon as a surrogate for diesel particulate matter (dpm). Similar to ACGIH, the interim concentration limit for total carbon is equivalent to approximately 0.5 mg/m<sup>3</sup> of dpm, and the final limit is equivalent to approximately 0.2 mg/m<sup>3</sup> of dpm.

Remarkably, one federal official TLV Committee member did not consider it to be a conflict to be charged with developing the ACGIH diesel standard and also the MSHA diesel rule, intermingling the materials, and using government funds and time to support his ACGIH activities. In fact, the last Administration recommended him for a commendation for his diesel rulemaking efforts. This official has stated that there are no federal conflict of interest policies that address his dual role.

Another example of the ACGIH problem is the proposed trona TLV. Trona is a mineral found in deposits left behind by the evaporation of ancient water bodies. Trona is mined from the earth and processed to produce pure sodium sesquicarbonate, sodium carbonate (commonly known as soda ash) and/or sodium bicarbonate (commonly known as baking soda). It is principally mined in southwestern Wyoming and used throughout the United States.

Trona and its products are used in, among other things, commercial and household cleaners, animal feed, and baking soda. Sodium carbonate (soda ash) is used in the production of common consumer products, chemicals, and industrial materials, including glass, paper, detergents, cleaners, and water treatment supplies. Chemical producers use soda ash to manufacture products that sweeten foods and beverages (corn sweeteners) and improve foods and toiletries.

In 1999, 2000, and again in 2001 (as a result of court action that prevented final adoption), ACGIH published in its TLV Booklet for dissemination around the world a proposed TLV for respirable trona of  $0.5 \text{ mg/m}^3$  (milligrams per cubic meter of air). The proposal was published as a "Notice of Intended Change." The proposed  $0.5 \text{ mg/m}^3$  TLV is six times below (stricter than) the existing ACGIH TLV (for respirable nuisance dust) and ten times below the regulatory limits for respirable dust enforced by DOL in trona mines. The booklets list the reason for the proposed change as "irritation" and "pulmonary function," regardless of a NIOSH health study that found no decrease in lung function by employees exposed to high levels of dust over ten years in the 1970s.

In 1999, because the ACGIH acknowledged severe limitations of the evidence used to propose the trona TLV, ACGIH requested documentation concerning the health effects of trona from the industry. Information from animal toxicity studies and a literature search was provided to ACGIH which further demonstrated trona's lack of toxicity, even beyond that found by NIOSH. Notwithstanding the industry's cooperation, ACGIH repeatedly refused to permit the trona industry to make a scientific presentation to the TLV subcommittee that could have resulted in an open discussion and pointed out the fallacy of the TLV proposal, even though they acknowledged that the ACGIH evidence to support the TLV was "weak" and "flawed."

ACGIH, however, in conversations and correspondence, encouraged the trona producers to plan, fund, and perform a study of potential health effects, through the ACGIH TLV Subcommittee Chairman, an OSHA official, who agreed to wait to adopt a new TLV if the industry would conduct a study. The trona industry agreed and expended substantial sums of money to pursue the effort.

The ACGIH TLV Subcommittee then breached its agreement with the trona industry to wait for the pending study. The TLV Subcommittee Chairman reported at the end of October, 2000 that it had finalized its TLV recommendation to the ACGIH Board for adoption at its December 9, 2000 meeting and that it would be futile for the trona industry to try to overcome this recommendation.

In a November 14, 2000 letter to ACGIH, the industry again pointed out the lack of any scientific basis for the proposal, the ongoing study and prior agreement, and asked that ACGIH refrain from voting on the trona proposal at the December 9, 2000 meeting. ACGIH never responded to the letter, necessitating a lawsuit to prevent adoption of the flawed TLV.

Left with no other recourse, the industry sought a temporary restraining order to prevent the December 9 ACGIH Board vote. In a stipulation and agreement approved by the Court on December 4, 2000, ACGIH agreed to defer adopting the trona TLV until October 27, 2001. The permanent injunction and product defamation case is in the discovery phase, and a trial is expected in October. The Departments of Labor and Health and Human services are also defendants, due to Federal Advisory Committee Act violations.

## **VI. THE LACK OF TRANSPARENCY IN RULEMAKING MUST BE REMEDIED**

A fundamental tenet of administrative rulemaking is transparency. The federal utilization of TLVs (and perhaps other, non consensus standards such as the designations of International Agency on Research on Cancer--IARC), which are promulgated in secret, under the leadership of federal employees, with unknown agendas and overlapping job duties, violates this fundamental tenet and should be stopped.

## **VII. THE FEDERAL ADVISORY COMMITTEE ACT IS THE SOLUTION**

Mr. Chairman, I believe that given its current and historical role in influencing federal policies and regulations ACGIH serves as a *de facto* advisory committee to DOL and HHS within the meaning of the Federal Advisory Committee Act (FACA). However, it has never complied with the requirements of that Act. ACGIH is, therefore, under the provisions of FACA, without authority to meet

or to perform such advisory committee functions, and DOL and HHS are prohibited from using or relying on ACGIH products. In its wisdom, Congress passed FACA to establish procedures for advisory committees. These procedures were designed to give credibility to government actions which rely on advisory committees and to make the process open and transparent.

New substance specific TLVs that have not been adopted by OSHA or MSHA rulemaking, or developed with FACA protections, should not be utilized in any way by DOL and HHS. Similarly, the incorporation by reference provisions of pending regulations should be suspended. Finally, until the ACGIH process is reformed, DOL and HHS should be prohibited from using or relying on any new ACGIH TLV not already incorporated by substance specific standards and from using federal funds to support ACGIH.

Furthermore, a new Federal Occupational Health Advisory Committee for the development of health standards for OSHA and MSHA could be created, in compliance with FACA, and ACGIH and AIHA could form the core of the professional contributions while work with industry and labor to provide the basis for expedited and sound development of new federal standards.

Unlike many other reforms to safety and health law that may be needed, no amendments nor new statutory provisions are needed to cure this serious problem. The law is already in existence to stop what amounts to clandestine, closed, private rulemaking. A reformed ACGIH, together with the rest of the industrial hygiene professional community, can continue to play a vital role in the protection of employees around the world. I urge the Congress and the Administration to work together to bring openness and transparency to the process by which DOL and HHS utilize ACGIH TLVs. A reformed process will restore ACGIH to its honored position and permit its membership to help preserve our nation's leadership in worker protection.

Thank you Mr. Chairman and Members. I look forward to working with you to help improve the safety and health regulatory system.