

**ADDRESSING CONCERNS ABOUT  
THE U.S. DEPARTMENT OF LABOR'S  
USE OF NON-CONSENSUS STANDARDS  
IN WORKPLACE HEALTH AND SAFETY**

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**HEARING**

BEFORE THE  
SUBCOMMITTEE ON WORKFORCE PROTECTIONS  
OF THE  
COMMITTEE ON EDUCATION  
AND THE WORKFORCE  
U.S. HOUSE OF REPRESENTATIVES  
ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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**ADDRESSING CONCERNS ABOUT  
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**Wednesday, June 14, 2006  
U.S. House of Representatives  
Subcommittee on Workforce Protections  
Committee on Education and the Workforce  
Washington, DC**

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The subcommittee met, pursuant to call, at 10:35 a.m., in room 2175, Rayburn House Office Building, Hon. Charlie Norwood [chairman of the subcommittee] presiding.

Present: Representatives Norwood, Kline, McKeon, Owens, and Kucinich.

Staff present: Steve Forde, Communications Director; Rob Gregg, Legislative Assistant; Jessica Gross, Press Assistant; Richard Hoar, Professional Staff Member; Jim Paretti, Workforce Policy Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Deborah L. Emerson Samantar, Committee Clerk/Intern Coordinator; Loren Sweatt, Professional Staff Member; Michele Evermore, Legislative Associate/Labor; Tylease Fitzgerald, Legislative Assistant/Labor; Peter Galvin, Senior Legislative Associate; Marsha Renwanz, Legislative Associate/Labor.

Chairman NORWOOD [presiding]. A quorum being present, the Subcommittee on Workforce Protections will come to order.

We are meeting here today to hear testimony on addressing concerns about the U.S. Department of Labor's use of nonconsensus standards in workplace health and safety.

Under committee rule 12(b), opening statements are limited to the chairman and the ranking minority member of the subcommittee. Therefore, if other members have statements, they may be included in the hearing record.

With that, I ask unanimous consent for the hearing record to remain open for 14 days to allow member statements and other extraneous material referenced during the hearing to be submitted in the official hearing record.

Without objection, so ordered.

The last time I called this subcommittee to order in late April, I declared the Department of Labor's reliance on nonconsensus standards set by nongovernment organizations had to stop. I was not kidding then and I am deadly serious about it today. I have

called this hearing to further this subcommittee's investigation into the use of nonconsensus standards in workplace health and safety regulations.

As most of you know, I am particularly concerned that DOL's hazardous communication rule automatically incorporates such standards behind closed doors without public input and without transparency. This is simply unacceptable and it is high time that Congress stepped in to force a change.

During our April hearing, witnesses described attempts to provide one specific group, the American Council of Government and Industrial Hygienists, with information before they set threshold limit values, or TLVs, on exposure limits. We heard that stakeholders are frustrated by the lack of communication, the lack of input, and the closed nature of the process in which TLVs are set.

Quite frankly, I do not blame them. After all, if my small business was forced to adjust my operations every time a TLV changes, I would be fit to be tied as well.

Let me speak bluntly. I believe that many TLVs fail the smell test when it comes to sound science. I believe many are adopted with little critical analysis other than a literature search. And not to put too fine a point on this matter, I believe many are produced by government employees acting on a personal agenda that they cannot accomplish during their day job.

Now, I might not be able to change the TLV process. That is for the organization's board of directors to decide. But if TLVs are to influence Federal regulation that business, labor and employees everywhere must abide by, the Department of Labor must require the same scrutiny that other Federal regulations undergo before they are made. For in effect, when you make a regulation or a rule, it is law.

For that reason, I have introduced the Workplace Safety and Health Transparency Act of 2006, known as H.R. 5554.

[The bill follows:]

#### **H.R. 5554**

*To amend the Occupational Safety and Health Act of 1970 and the Federal Mine Safety and Health Act of 1977 to prohibit the promulgation of safety and health standards that do not meet certain requirements for national consensus standards.*

IN THE HOUSE OF REPRESENTATIVES

JUNE 8, 2006

Mr. NORWOOD (for himself, Mrs. MILLER of Michigan, Mr. WICKER, and Mr. TIAHRT) introduced the following bill; which was referred to the Committee on Education and the Workforce

A BILL

To amend the Occupational Safety and Health Act of 1970 and the Federal Mine Safety and Health Act of 1977 to prohibit the promulgation of safety and health standards that do not meet certain requirements for national consensus standards.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### **SECTION 1. SHORT TITLE.**

This Act may be cited as the "Workplace Safety and Health Transparency Act of 2006".

**SEC. 2. ADOPTION OF NONGOVERNMENTAL STANDARDS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT.**

(a) ADOPTION BY OSHA.—The Occupational Health and Safety Act of 1970 (29 U.S.C. 651 et seq.) is amended by adding after section 6 the following:

“ADOPTION OF NONGOVERNMENTAL STANDARDS

“SEC. 6A. (a) Effective on the date of enactment of this section, the Secretary shall not promulgate or incorporate by reference any finding, guideline, standard, limit, rule, or regulation based on a determination reached by any organization, unless the Secretary affirmatively finds that such determination—

“(1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption;

“(2) was formulated in a manner which afforded an opportunity for diverse views to be considered; and

“(3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

Such finding and a summary of its basis shall be published in the Federal Register and shall be considered a final action subject to review by a United States District Court in accordance with section 706 of title 5, United States Code.

“(b) With respect to rulemaking proceedings initiated by the Secretary but not finalized prior to the date of enactment of this section, the Secretary shall, within 180 days of the date of enactment of this section, investigate and identify the use of, influence of, or reliance upon any finding, guideline, standard, limit or any other recommendation that has not been made by an organization and procedure that does not comply with the requirements set forth in subsection (a). The Secretary shall publish the results of such investigations in the Federal Register and, in any final rule, standard, or official recommendation that is prescribed under such proceedings, shall not incorporate, use, or rely upon any finding, guideline, standard, limit, or other recommendation that does not comply with the requirements set forth in subsection (a). The Secretary’s actions under this section shall be subject to review by a United States district court of appropriate jurisdiction.”.

(b) APPROVAL OF STATE PLANS.—Section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667) is amended by adding at the end the following:

“(i) The Secretary shall not approve a State plan under this section that incorporates by reference any finding, guideline, standard, limit, rule, or regulation based on a determination reached by any organization, unless the Secretary determines that the standards adopted in such plan are standards that—

“(1) have been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the State that persons interested and affected by the scope or provisions of such standards have reached substantial agreement on their adoption; and

“(2) were formulated in a manner which afforded an opportunity for diverse views to be considered.”.

**SEC. 3. ADOPTION OF NONGOVERNMENTAL STANDARDS UNDER THE FEDERAL MINE SAFETY AND HEALTH ACT.**

Section 101 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 811) is amended by adding at the end the following:

“(f)(1) Effective on the date of enactment of this section, the Secretary shall not promulgate or incorporate by reference any finding, guideline, standard, limit, rule, or regulation based on a determination reached by any organization, unless the Secretary affirmatively finds that such determination—

“(A) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption;

“(B) was formulated in a manner which afforded an opportunity for diverse views to be considered; and

“(C) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

Such finding and a summary of its basis shall be published in the Federal Register and shall be considered a final action subject to review by a United States District Court in accordance with section 706 of title 5, United States Code.

“(2) With respect to rulemaking proceedings initiated by the Secretary but not finalized prior to the date of enactment of this subsection, the Secretary shall, within 180 days of the date of enactment of this subsection, investigate and identify the

use of, influence of, or reliance upon any finding, guideline, standard, limit or any other recommendation that has not been made by an organization and procedure that does not comply with the requirements of paragraph (1). The Secretary shall publish the results of such investigations in the Federal Register and, in any final rule, standard, or recommendation that is prescribed under such proceedings, shall not incorporate, use, or rely upon any finding, guideline, standard, limit, or other official recommendation that does not comply with the requirements of paragraph (1). The Secretary's actions under this section shall be subject to review by a United States district court of appropriate jurisdiction.”

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Chairman NORWOOD. My legislation would prohibit the Department of Labor from incorporating or relying upon a nongovernmental organization's standard unless the secretary of labor determines and certifies that the standard complies with the OSH Act definition of a consensus standard.

My legislation would also require that OSHA plans to certify to the secretary of labor that the standards they administer meet those same consensus standard criteria. In short, my goal in drafting H.R. 5554 is to reestablish transparency in the rulemaking process. The legislation will ensure that any outside workplace standard that DOL incorporates by reference meets the high standards required by the OSH Act.

After all, any standard, recommendation or guidance produced by an outside organization should be subject to a fair, open and transparent process if it plays an official role in influencing that regulation.

I now want to say this. The right to petition and redress your government is a fundamental constitutional right. Offer what criticism you would like of this bill, but I do not believe anyone here would dispute that principle. I am simply trying to reestablish that right within OSHA regulations.

I am pleased to have the OSHA administrator with us today, and I welcome his comments and views on the agency's standard-setting practice. I also look forward to hearing from our witnesses about their concerns regarding DOL's use of nonconsensus standards, and how H.R. 5554 will hopefully improve that practice.

I would now like to yield to my friend, Mr. Owens, for whatever opening statement he wishes to make.

**Prepared Statement of Hon. Charlie Norwood, Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce**

The last time I called this subcommittee to order in late April, I declared the Department of Labor's reliance on non-consensus standards set by non-government organizations had to stop. I was not kidding then, and I am deadly serious about it now.

I've called this hearing to further this subcommittee's investigation into the use of non-consensus standards in workplace health and safety regulation.

As most of you know, I am particularly concerned that DOL's Hazard Communications rule automatically incorporates such standards behind closed doors without public input and without transparency. This is unacceptable, and it is high time that Congress step in to force a change.

During our April hearing, witnesses described attempts to provide one specific group, the American Council of Government Industrial Hygienists, with information before they set Threshold Limit Values, or TLVs, on exposure limits.

We heard that stakeholders are frustrated by the lack of communication, the lack of input, and the closed nature of the process in which TLVs are set. Quite frankly, I do not blame them. After all, if my small business was forced to adjust my operations every time a TLV changes, I'd be fit-to-be-tied as well.

Let me speak bluntly. I believe that many TLVs fail the smell test when it comes to sound science. I believe many are adopted with little critical analysis other than a literature search. And not to put too fine a point on the matter, I believe many are produced by government employees acting on a personal agenda that they cannot accomplish at their day job.

Now I might not be able to change the TLV process—that's for the organization's board of directors to decide. But if TLVs are to influence federal regulation that business, labor and employees everywhere must abide by, the Department of Labor must require the same scrutiny that other federal regulations undergo before they are made final.

For that reason, I have introduced the Workplace Safety and Health Transparency Act of 2006, H.R. 5554. My legislation would prohibit the Department of Labor from incorporating or relying upon a non-governmental organization's standard unless the Secretary of Labor determines and certifies that the standard complies with the OSH Act definition of a consensus standard.

My legislation would also require state OSHA plans to certify to the Secretary of Labor that the standards they administer meet these same "consensus standard" criteria.

In short, my goal in drafting H.R. 5554 is to reestablish transparency in the rule-making process. The legislation will ensure that any outside workplace standard that DOL incorporates by reference meets the high standards required by the OSH Act. After all, any standard, recommendation or guidance produced by an outside organization should be subject to a fair, open, and transparent process if it plays an official role in influencing regulation.

Finally, I want to say this. The right to petition and redress your government is a fundamental, Constitutional right. Offer what criticism you would like to the bill, but I do not believe any one disputes this principal. I am simply trying to reestablish that right within OSHA regulations.

I am pleased to have the OSHA Administrator with us today, and I welcome his comments and views on the Agency's standard-setting practice.

I also look forward to hearing from our witnesses about their concerns regarding DOL's use of nonconsensus standards and how H.R. 5554 will hopefully improve that practice.

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Mr. OWENS. Thank you, Mr. Chairman.

Mr. Chairman, since taking office, the Bush administration has seriously undermined enforcement of the Occupational Safety and Health Act of 1970, placing them at odds with an American public that overwhelmingly supports efforts to strengthen safety and health in the workplace. In 2004, for example, the Wall Street Journal published a poll in which close to eight out of every ten respondents said they wanted Congress to focus on ways to ensure greater on-the-job safety protection and health.

To date, this administration and this Congress have failed to address the American people's strong desire for more safeguards in the workplace. In fact, the Occupational Safety and Health Administration has been relaxing worker safety rules and enforcement, as opposed to strengthening them. Unlike Presidents Reagan, Bush I, and Clinton, for example, the current President Bush's political appointees at OSHA failed to issue a single significant safety standard during his first 4 years in office.

From 2001 through 2004, OSHA also withdrew 24 rules designed to safeguard workers from the processing of reactive and potentially explosive chemicals, exposure to the highly toxic metal-working fluids, industry standards in oil and gas drilling services, hazardous energy and construction, and scaffolding collapses in construction work, among others.

At the same time, the current Bush administration has chosen to delay indefinitely the release of other important OSHA rules. One such rule placed in limbo by OSHA is a proposal to clarify that

employers must not only provide all workers with appropriate personal protective equipment, PPE, but also pay for it. This clarification was proposed by the Clinton Administration and scheduled for completion in the fall of 2000.

In the spring of 2001, however, the Bush administration changed course and reclassified the rule as a "long-term project." Next, OSHA reopened public comments on the rule, inviting discussion of whether PPE is a tool of the trade. If PPE is deemed a tool of the trade, workers would then be solely responsible for paying all associated costs. This is especially problematic for lower-wage immigrants and guestworkers.

A recent investigative series in the Sacramento Bee documented worker deaths and such serious bodily injuries as blindness and paralysis due to the lack of protective goggles, boots and gloves among Pineros or forest workers on H(2)(b) visas in our national forests. I ask unanimous consent that this series of articles entitled "The Pineros: Forest Workers Caught in a Web of Exploitation," be placed into the record.

Chairman NORWOOD. So ordered.\*

Mr. OWENS. I also mention on the record that the public comment period on PPE ended well over a year ago, yet OSHA still persists in postponing its final release.

Another rule indefinitely delayed by OSHA would update permissible exposure limits, PELs, and require specific controls over silicon in mines and on construction sites. Since 2001, OSHA has ignored recommendations by the National Institute for Occupational Safety and Health, NIOSH, to make exposure limits to silicon more stringent in light of its classification as a carcinogen, and high correlation with silicosis, a disease which results in the deaths of thousands of miners and construction workers.

Since 2001, OSHA has also postponed any action on updating exposure limits and requiring controls on such powerful carcinogens as beryllium and ethylene dioxide.

In addition, OSHA is dragging its feet on updating electrical safeguards, safeguarding construction workers in confined spaces, revising respiratory protections, strengthening fire protection in shipyards, and improving safety standards for general industry, marine terminals, and construction sites, among others.

The fact that OSHA has become less attentive to worker safety and more focused on special corporate interests has not gone unnoticed in the press. Mr. Chairman, I ask unanimous consent that a Washington Post article entitled "Bush Forces a Shift in Regulatory Thrust, OSHA Made More Business-Friendly," be included in the record in its entirety.

Chairman NORWOOD. So ordered.

[The information referred to follows:]

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\*Submitted and placed in the permanent archive file, Tom Knudson and Hector Amezcua, "The Pineros: Forest Workers Caught in a Web of Exploitation," the Sacramento Bee, 13-15 November 2005, Metro Final Edition. sec. Main News, A1.

[From the Washington Post, August 15, 2004]

## **Bush Forces a Shift In Regulatory Thrust; OSHA Made More Business-Friendly**

By AMY GOLDSTEIN and SARAH COHEN,  
Washington Post Staff Writers

*First of three articles*

Tuberculosis had sneaked up again, reappearing with alarming frequency across the United States. The government began writing rules to protect 5 million people whose jobs put them in special danger. Hospitals and homeless shelters, prisons and drug treatment centers—all would be required to test their employees for TB, hand out breathing masks and quarantine those with the disease. These steps, the Occupational Safety and Health Administration predicted, could prevent 25,000 infections a year and 135 deaths.

By the time President Bush moved into the White House, the tuberculosis rules, first envisioned in 1993, were nearly complete. But the new administration did nothing on the issue for the next three years.

Then, on the last day of 2003, in an action so obscure it was not mentioned in any major newspaper in the country, the administration canceled the rules. Voluntary measures, federal officials said, were effective enough to make regulation unnecessary.

The demise of the decade-old plan of defense against tuberculosis reflects the way OSHA has altered its regulatory mission to embrace a more business-friendly posture. In the past 31/2 years, OSHA, the branch of the Labor Department in charge of workers' well-being, has eliminated nearly five times as many pending standards as it has completed. It has not started any major new health or safety rules, setting Bush apart from the previous three presidents, including Ronald Reagan.

The changes within OSHA since George W. Bush took office illustrate the way that this administration has used the regulatory process to redirect the course of government.

To examine this process, The Washington Post explored the Bush administration's approach to regulation from three perspectives. This article about OSHA traces the impact on one regulatory agency. Tomorrow's story will look at a lobbyist's 32-line, last-minute addition to a bill that created a tool for attacking the science used to support new regulations. Tuesday's article will document a one-word change in a regulation that allowed coal companies to accelerate efforts to strip away the tops of thousands of Appalachian mountains.

The Post also analyzed a database from the Office of Management and Budget containing the 38,000 regulatory actions considered by agencies over the past two decades.

The analysis, combined with the more detailed look at specific regulatory decisions, shows how an administration can employ this subtle aspect of presidential power to implement far-reaching policy changes. Most of the decisions are made without the public attention that accompanies congressional debate. Under Bush, these decisions have spanned logging in national forests, patients' rights in government health insurance programs, tests for tainted packaged meats, Indian land transactions and grants to religious charities.

All presidents have written or eliminated regulations to further their agendas. What is distinctive about Bush is that he quickly imposed a culture intended to put his anti-regulatory stamp on government.

Unlike his two predecessors, Bush has canceled more of the unfinished regulatory work he inherited than he has completed, according to The Post's analysis. He has also begun fewer new rules than either President Bill Clinton or President George H.W. Bush during the same period of their presidencies. Since the younger Bush took office, federal agencies have begun roughly one-quarter fewer rules than Clinton and 13 percent fewer than Bush's father during comparable periods.

President Bush's closest advisers and sharpest critics agree that the shift in regulatory climate since he took office in January 2001 has been profound. But they disagree over whether that shift represents a harmful turn away from federal protections to benefit business or a useful streamlining of costly government rules.

Sally Katzen, who oversaw all federal regulation for five years under Clinton as deputy budget director for information and regulatory affairs, said new regulations were, in those days, embraced as a means to improve the quality of water, of air—in short, of people's lives. "Bush, or at least the people around him, are skeptical, if not hostile to that notion," she said.

John D. Graham, who holds the same job in the Bush White House, said regulations are "a form of unfunded mandate that the federal government imposes on the

private sector or on state or local governments.” A president, he said, should not be judged solely by the number of regulations he starts or cancels.

This White House, Graham said, has initiated regulations when the benefits clearly outweigh the costs—for example, a decision last year that eventually will require labeling of trans fatty acids in food. “We’ve just been much more selective about expensive new regulatory requirements than previous administrations have been,” he said.

At OSHA, the administration’s regulatory philosophy has translated into a smaller staff to develop new standards, less reliance on the views of organized labor and an enlarged role for businesses.

As Bush set out in 2001 to recast the government along more conservative lines, workplace standards seemed an unlikely focus. During his transition period, the new president did not assign anyone to assess OSHA; the transition “team” for the entire Labor Department consisted of one longtime congressional aide.

A relatively small part of the department for three decades, OSHA has the large mission of sifting through research on potential hazards to workers and deciding when the government should step in. It writes federal standards, conducts inspections to determine whether employers follow them and metes out punishment when they do not.

Bush offered the job of running OSHA to a career-long industrial hygienist from St. Louis who was a virtual stranger to Washington.

John L. Henshaw had worked for two decades at Monsanto Co., a giant manufacturer of agricultural chemicals. Most recently, he had been the director of environment, safety and health at Astaris LLC, another chemical company.

Even though he had come from industry, Henshaw was viewed by the administration’s critics as a more palatable choice than they had expected. “He’s a competent, well-regarded safety and health professional,” Peg Seminario, the longtime occupational safety and health director of the AFL-CIO, the umbrella labor organization, said at the time. “Well qualified for this important responsibility,” Sen. Edward M. Kennedy (D-Mass.), then chairman of the labor panel, said when Henshaw was approved unanimously by the committee on Aug. 3, 2001, and immediately confirmed without debate.

During his first days in Washington, Henshaw made it clear that he would carry out a directive from Labor Secretary Elaine L. Chao instructing the entire department to comb through the regulatory work Clinton’s aides had left unfinished and find items to eliminate. Chao explained the order in a letter in 2001 to John J. Sweeney, the AFL-CIO president. The list of incomplete work left over from the Clinton days, she wrote, “had swollen to unmanageable size, containing many items that had been moribund for years, making it an inaccurate and effectively useless document.”

Chao’s order was in keeping with the new White House philosophy.

The day Bush was sworn in, his chief of staff, Andrew H. Card Jr., issued a memo that, in an unprecedented move, put a two-month freeze on final rules across the government that had not yet gone into effect. The new administration wanted time to decide whether to change or reverse them.

A few months later, Graham, the White House’s top regulatory official, was alerting agencies that they would face closer scrutiny from the OMB when they proposed new rules. The day after he was confirmed by the Senate, he sent the first of 14 letters to agencies saying they had failed to prove the need for regulations they had proposed. That was more than had been sent during Clinton’s eight years.

The most dramatic symbol of the new regulatory climate arose from a joint action by Bush and Congress.

Two months after he took office, a Republican Congress, making first use of a recent power to review regulations, repealed the biggest worker-safety standard of the Clinton years. The standard was a set of rules that created broad safeguards against ergonomic injuries. Without Bush’s signature, the repeal could not have taken effect.

The death of the ergonomics standard, Democrats and Republicans now agree, exposed a weakness of Clinton’s regulatory strategy at OSHA in his last few years—putting so much emphasis on that standard that others were left unfinished.

The agency had concentrated nearly all its energy and political capital on the effort to protect workers against musculo-skeletal injuries, such as repetitive-stress injuries and carpal tunnel syndrome. The rules would have required employers to redesign workplaces if they were hazardous and compensate people who became disabled. The Clinton administration believed the standard, covering more than 6 million work sites at an estimated cost of \$4.5 billion for employers, was the biggest step the government could take to protect the greatest number of employees.

As a result, OSHA left other major proposals, including the tuberculosis rules, unfinished—and thus easier to cancel. Those dangling rules, combined with the sudden end of the ergonomics standard, emboldened Bush's corporate allies to fight new rules from OSHA—and the expense they could entail.

"In the past, the business community worked to develop regulations that were acceptable," said Patrick R. Tyson, an Atlanta lawyer representing corporations in occupational safety matters who held senior positions at OSHA in the 1970s and '80s. "But now the game has changed, and the business community feels like they can kill any regulation they want."

The new administration began by trying to cut staff and money at OSHA. In his first year in office, Bush wanted to eliminate nearly 100 of the agency's 2,400 jobs. His budget also would have reduced funding for the standards-setting part of the agency by \$1.2 million, or 8 percent. Lawmakers restored the money and the positions.

The next year, the administration succeeded in eliminating 10 jobs out of 95 in the standards area, when Henshaw merged divisions dealing with health and safety. The merger, Henshaw said, eliminated duplicative jobs in middle management. But it angered some current and former OSHA employees, who said it cost the agency some of its expertise.

"I finally couldn't take it anymore," said Peter Infante, who retired after 24 years at OSHA as the senior epidemiologist who helped to develop health standards. He had planned to stay long enough to finish years of work on rules to protect workers from beryllium, a metal that can cause cancer if inhaled in minute amounts. Instead, he left in May 2002, saying that the only U.S. company that mines and processes beryllium ore had gained too much influence inside the agency.

Henshaw said in an interview that the bottom line for OSHA is not how many rules it produces but how many people get hurt, sick or killed at work under its watch. He said trends are improving. Henshaw said he is proud that the agency has increased federal inspections of workplaces.

The overall number of inspections has increased under Bush, but the typical inspection takes less time, and fewer are in response to accidents or complaints. OSHA officials say they are more trusting now of industries with good safety records, while putting greater emphasis on those—such as construction—where workers are most prone to injury. Union leaders said that inflates an appearance of vigilance, because OSHA counts each subcontractor at a construction site as a separate inspection.

With its current staff, Henshaw said, OSHA can visit about 2 percent of the nation's workplaces each year. Given those limits, he said, it has made sense to strengthen the agency's relationships with businesses, encouraging voluntary compliance.

To do so, OSHA has created a new kind of voluntary program, intended to foster "trusting, cooperative relationships" between the government and groups of industries and professional societies, according to an agency fact sheet. These new alliances, as they are known, depart from a central tradition throughout the agency's history: They are allowed to exclude labor unions. Of the 57 national alliances OSHA has formed, with groups ranging from air conditioning contractors to shipyard owners, just one—intended to promote safe work habits in road construction zones—includes a union representative.

Agency officials say that more than 500 other, older voluntary projects run by OSHA still involve unions. As for the new alliances, one OSHA administrator, speaking on the condition of anonymity, said that some employers might be too uncomfortable to participate if unions were there.

In November 2002, OSHA announced an alliance with 13 airlines and the National Safety Council to find better ways to prevent workers who handle baggage from being injured. The OSHA alliance excluded airline unions, which had asked to take part.

"It is simply illogical and insulting," Sonny Hall, president of the AFL-CIO's transportation trades department, said at the time, "when the powers that be in this administration's OSHA sat down to form a private-sector group to reduce injuries to airline workers that they chose to exclude, of all people, airline workers."

At the same time, Henshaw was carrying out Chao's orders. Echoing his superiors at the Labor Department and in the White House, Henshaw said the Clinton administration had left too much unfinished regulatory work at the agency. OSHA, Henshaw repeatedly said, needed to convert its agenda from a "wish list" to a "to-do list."

The data analyzed by The Post show that Clinton left behind 44 incomplete rules at OSHA, just four more than when Bush's father had moved out of the White House eight years earlier. "I don't recall things being added just because somebody

asked for them,” said Katzen, who had been the top official for regulations in the Clinton White House.

Henshaw’s housecleaning produced dramatic effects. By the end of Bush’s first year in office, OSHA had eliminated 18 of the 44 rules. By the end of 2003, six more, including the tuberculosis protections, were gone.

“Every one of the items on there had some merit. Nobody is disputing that,” Henshaw said of the proposals he removed. “But there is only so much you can do.”

Many of the cases involved complex arguments pitting the interests of workers against those of their employers.

In August 2001, the same month Henshaw was confirmed, the agency stopped efforts to regulate chemicals used in making semiconductors and suspected of causing miscarriages in workers. The agency’s written explanation at the time consisted of one sentence: “OSHA is withdrawing this entry from the agenda at this time due to resource constraints and other priorities.”

A month after the semiconductor decision, OSHA eliminated a proposal, dating to the Reagan administration, that would have updated lists of the amounts of industrial chemicals to which workers could be exposed. The new administration said it made more sense to regulate each substance one at a time, a slower process.

That December, the agency killed a proposal on indoor air quality intended to prevent restaurant and other workers from exposure to tobacco smoke or other pollutants. State and local standards, OSHA said, had solved the problem.

Some of the canceled rules will make it more difficult for Bush’s critics to pursue regulations in the future. After Congress and Bush killed the ergonomics rules, OSHA eliminated a proposal to compel employers to break out ergonomic injuries when they report on worker injuries in general.

Henshaw said at the time that such records would not help to reduce such injuries. Seminario of the AFL-CIO said that, without such records, advocates of ergonomic protections have less ability to document that federal safeguards are needed.

With his focus largely on coaching employers to follow existing rules, Henshaw said, “writing another standard is not going to help with that.” Still, he said, the agency has continued to write new rules when they are needed.

At OSHA, The Post’s analysis found, the rules the agency has proposed are narrower than most of those it has eliminated. Thirteen of the 24 proposals it has canceled since Bush took office fall into a category the government classifies as “economically significant,” meaning they would cost or save the economy at least \$100 million. None of the 16 standards OSHA has proposed during that time falls in that group.

Graham said it does not make sense for OSHA to overreach. From his days as a Harvard professor, Graham said, he knew of research suggesting that neither the health nor safety standards created over OSHA’s history had a clear track record of being effective. Besides, he said, OSHA’s procedures have always made it uncommonly sluggish in churning out big rules.

Graham said OSHA has set into motion an ethic of “smart regulation” that the White House has tried to instill across the government: creating new rules only after rigorous scientific and economic analysis proves they are warranted. Under Henshaw, he said, OSHA has shown “an intensely practical, down-to-earth approach to worker health and safety, not inclined toward grandiose, unrealistic ventures.”

In several instances where Bush’s OSHA has moved a rule forward, it has done so in a way that has benefited a specific business interest.

One case concerns the updating of a 25-year-old standard intended to ensure that workers do not inhale hazardous substances. The update said that employers—from factory owners to firehouses—must assess hazards, select appropriate safety masks, train workers to use them and periodically check to see whether they fit.

After the Clinton administration finished the standard in 1998, however, a critical question lingered: What safety rating should the agency assign to the different types of masks? Those ratings, which would tell how effective a given mask was at removing contaminants from the air, would cover everything in the category—elaborate respirators as well as inexpensive paper masks sold at any hardware store.

The stakes were huge for workers and the companies that make the masks: Some type of respiratory protection is used in more than 600,000 workplaces, one in every 10 nationwide, a recent federal survey found. And no corporation had a larger stake in the decision than 3M Co., which pioneered disposable dust masks in the early 1970s and is their largest manufacturer.

3M and other companies said the disposable version deserved the same rating as the more sophisticated respirators, a decision that would increase sales of the disposable masks and provide a buffer against a growing volume of lawsuits over their effectiveness.

Last winter, OSHA held a hearing on this question. An expert witness hired by the government testified that the disposable masks were as effective as the more elaborate ones, as long as they were checked periodically to ensure they fit properly.

The witness, Warren R. Myers, mentioned in explaining his qualifications that he was an associate dean at West Virginia University's college of engineering and mineral resources and that he had worked for a dozen years testing respirators at a branch of the federal Centers for Control and Prevention. He did not mention that he had worked previously as a consultant to 3M.

Another witness took a different view. Richard W. Metzler, who works for the National Institute for Occupational Safety and Health in Pittsburgh, testified that researchers have not evaluated most of the disposable mask models sold today. "There has been a lack of science," Metzler, who directs NIOSH's National Personal Protective Technology Laboratory, said in an interview.

Opposition to 3M's position also came from an industrial scientist named James S. Johnson at the Lawrence Livermore National Laboratory in California. He is the chairman of an American National Standards Institutes (ANSI) committee. His views were particularly important. By law, OSHA is supposed to coordinate its standards with ANSI committees. Johnson testified that the committee had concluded that the dust masks deserved a lower rating—half that of the more elaborate respirators.

Faced with such mixed testimony, 3M took action.

This February, Tyson, the Atlanta lawyer and former OSHA official, filed a motion on behalf of the company with the Labor Department's administrative law judge. The motion asked the agency to disregard the ANSI committee's conclusions on the grounds that they were in draft form and "currently under appeal."

The reason they were under appeal: 3M and two of the company's allies had challenged ANSI's conclusions just a month earlier.

The company "was screaming bloody murder," said Mark Nicas of the University of California at Berkeley, who had been given three contracts by OSHA during the 1990s to advise the government on respiratory issues. "It just doesn't want to upset the market share."

In April, the administrative law judge rejected Tyson's motion, saying that OSHA was free to make its own judgments about the conflicting testimony. Still, when OSHA publicly proposed its rating scale in June, it called for all masks, including disposable ones, to get the same ranking, just as 3M wanted.

The 3M gambit had apparently worked: The OSHA official who spoke on the condition of anonymity said the agency could not take Johnson's testimony or the ANSI committee's conclusions into account because it is allowed to consider only final recommendations.

The agency did not want to wait for the outcome of the ANSI appeal—even though 3M was using it to hold up the process—because, the official said, that dispute may take "forever."

"We can't be hamstrung that way," the official said.

As OSHA has recalibrated worker protections, one word can make a big difference. This summer, OSHA has thrown open the question of what "provide" means.

That question is heir to a dispute that began in 1994, when the agency issued rules on safety equipment in dangerous jobs. The rules say an employer must determine what kind of equipment a worker needs—hard hats, protective gloves and clothing, safety goggles—and provide it to the employee.

The regulation, however, does not specify who pays for the equipment—or whether the employer can, as industry has argued, deduct the cost from the worker's wages. A year later, OSHA said that "provide" means "pay for." Industry groups appealed that definition. Eventually, OSHA's review commission decided employers could not be made to pay without a new rule.

In 1998, a federal study found that workers in low-paying jobs more often were being charged for their safety equipment. The practice was most prevalent in the construction trades, where just slightly more than half of employers were picking up the full expense of hard hats and welding goggles.

The following year, OSHA proposed a rule to make clear that "provide" meant "pay for."

That rule was one of many that were not quite final when Bush took office. Last year, after two years of OSHA inaction, a coalition of nine unions petitioned Chao demanding that the rule be issued within two months.

That did not happen. Instead, Henshaw announced in July that OSHA wanted to rethink part of the issue—particularly for equipment that employees can take from job to job—and asked for new outside comments. And that was how a rule headed for approval under Clinton became open to further delay and uncertainty.

Agency officials speaking on the condition of anonymity said that, in the end, the government might keep the proposed rule—or it might decide that employers do not need to pay for certain kinds of safety equipment. Or for any at all.

Asking for more outside opinions was the same step OSHA officials had taken before they canceled the tuberculosis protections the day before New Year's.

The evidence on the TB standard is mixed.

Government record-keeping is so sketchy it is impossible to tell how many workers are being infected with TB on the job. The two main unions that have lobbied for the protections since the beginning, the American Federation of State, County and Municipal Employees and the American Federation of Teachers, were unable to provide a single example of someone who could talk on the record about having caught TB.

Given the murkiness, the outside opinions that prevailed came from the American Hospital Association and other groups that had long resented the idea of OSHA enforcing safety practices. Opponents said government no longer needs the requirement for tuberculosis tests, patient quarantines and the other protections in the standard.

The disease had waned in most states in the decade since OSHA began developing the TB standard, the critics argued. Besides, they said, the Centers for Disease Control already provided voluntary guidelines for protecting workers.

There was some support for this position in an evaluation of the proposed standard by a respected advisory group, the Institute of Medicine, which had been ordered to conduct the study at the behest of congressional Republicans while Clinton was in office.

But when the study came out the month Bush took office, it concluded that the standard still was worthwhile, even if it might not need to cover as many workers.

In the end, OSHA cited the study in its rationale for eliminating the TB standard.

Unions and public health officials were furious. TB rates continue to increase in many states, they said. Even where the rates have gone down, they said, workers in health clinics or hospitals still run into the disease.

Nicas has conducted research on whether hospitals around San Francisco adhere to the CDC guidelines. Even though the hospitals were doing a better job, he found, all had lapses sometimes. A federal regulation, he said, still is needed.

"The health care industry [does not] like being regulated by OSHA," Nicas said. "But then, that puts them in league with every other industry."

Immediately after winning its long battle to eliminate the TB standard, the nation's hospitals and their allies began a new campaign. They sought to block a rule requiring yearly checks to make sure that the breathing masks of their workers fit correctly.

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Mr. OWENS. Regrettably, today's hearing does not focus on OSHA's failure to issue a final PPE rule or establish standards on such powerful carcinogens as crystalline silica and beryllium.

Fortunately, a witness we requested, Dr. David Michaels, is an esteemed epidemiologist at George Washington University with expert knowledge of beryllium and its association with occupational exposure to it. During the Clinton Administration, Dr. Michaels served as assistant secretary of the Department of Energy and was the chief architect of the bipartisan program designed to compensate nuclear weapons workers who developed cancer and lethal lung disease as a result of exposure to beryllium radiation and other hazards.

We welcome Dr. Michaels, and we look forward to his testimony.

In closing, Mr. Chairman, I know that we have a special opportunity this morning to hear from the new assistant secretary for occupational safety and health, Mr. Foulke. For my part, I want to hear Assistant Secretary Foulke's plans for beefing up enforcement efforts at OSHA in light of the agency's abdication of that responsibility since 2001.

Moreover, I want to hear of his plans for ensuring that even in the event of a future national disaster, OSHA will not abdicate its responsibility for enforcing workplace safety rules. Immediately

after the terrorist bombings of the World Trade Center on 9/11, for example, OSHA stated that it would not enforce safety rules during the rescue, cleanup, and recovery work to be carried out at Ground Zero.

As a result, today hundreds of Ground Zero workers are now gravely ill and more than 30 have died of cancer. I ask unanimous consent that the New York Post article entitled "Cancer Hits 283 Rescuers of 9/11" be included in the record.

Chairman NORWOOD. So ordered.

[The information referred to follows:]

[From the New York Post, June 11, 2006]

### **Cancer Hits 283 Rescuers of 9/11**

By SUSAN EDELMAN

Since 9/11, 283 World Trade Center rescue and recovery workers have been diagnosed with cancer, and 33 of them have died of cancer, says a lawyer for the ailing responders.

David Worby, a lawyer for 8,000 World Trade Center responders, including cops, firefighters, and construction workers, said the cases include several dozen blood-cell cancers such as leukemia, lymphoma, Hodgkin's and myeloma.

Doctors say the cancers can strike three to five years after exposure to toxins such as benzene, a cancer-causing chemical that permeated the WTC site from burning jet fuel.

"One in 150,000 white males under 40 would normally get the type of acute white bloodcell cancer that strikes a healthy detective," said Worby, whose first client was NYPD narcotics cop John Walcott, now 41. Walcott spent months at Ground Zero and the Fresh Kills landfill. The father of three is fighting leukemia.

"We have nearly 35 of these cancers in the family of 50,000 Ground Zero workers. The odds of that occurring are one in hundreds of millions," Worby said.

Others suffer tumors of the tongue, throat, testicles, breast, bladder, kidney, colon, intestines, and lung, said Worby, of Worby, Groner, Edelman, & Napoli, Bern, which filed the class-action suit.

"The incidence of testicular cancer in healthy males is about one in 40,000. We have 14," Worby said.

WTC workers who have died of cancer include paramedic Deborah Reeve, 41 (mesothelioma), NYPD officer Ronald Weintraub, 43 (bile-duct cancer), and Stephen "Rak" Yurek, 46, a Port Authority emergency technician (brain cancer). The families say they were healthy before 9/11.

Dr. Robin Herbert, a director of WTC medical monitoring at Mount Sinai Hospital, said some of the nearly 16,000 responders screened to date are getting cancer.

"We do not know at this point if they are WTC-related, but some are unusual cancers we see as red flags," Herbert said.

Dr. Iris Udasin, principal investigator for the Mount Sinai screening of 500 in New Jersey, said she's following four cancers and a possible pre-cancer. The 9/11 link is "certainly a possibility," she said. "It's what we worry about, and what we fear." Dr. Ben Luft, chief of Mount Sinai monitoring at Stony Brook University, said his cases include a young non-smoker with throat cancer, and one with a pre-cancerous lesion.

"We're concerned about people coming in with problems, and they just don't have any risk factors at all," Luft said.

While tumors normally take 10 to 20 years to develop, Worby contends the asbestos, PCBs, and other cancer-causing chemicals in the WTC rubble created unprecedented dangers. "People are getting sicker faster," he said.

#### *Grim numbers*

- 50,000 WTC rescue and recovery workers
- 8,000 plaintiffs in classaction lawsuit
- 283 reported cancer cases
- 33 cancer deaths
- 100 NYPD cancer patients
- 45 FDNY cancer patients

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Mr. OWENS. I look forward to hearing the testimony of Mr. Foulke and the other witnesses.

Thank you.

Chairman NORWOOD. Thank you, Mr. Owens.

I see we are honored to have Chairman McKeon here. Mr. Chairman, would you care to have some time? Thank you for being here with us.

We have two panels of distinguished witnesses today, and I am eager to hear their testimony. I would like to begin by introducing our first witness. The Honorable Edwin Foulke is the assistant secretary of occupational safety and health at the Department of Labor. Mr. Foulke was sworn in as OSHA's administrator in April 2006. He has been with us just a short time.

Mr. Foulke has previously served on the Occupational Safety and Health Review Commission, most recently serving as its chairman from 1990 to 1994. Prior to joining OSHA, Mr. Foulke was a partner with the law firm of Jackson Lewis, LLP, in Greenville, South Carolina, and Washington, D.C., where he chaired the firm's OSHA practice group. Mr. Foulke holds a law degree from Loyola University and a master of law degree from Georgetown University Law School.

I would like to remind members that we will be asking questions of the witnesses after the testimony. In addition, committee rule two imposes a 5-minute limit on questions.

Mr. Secretary, you are now recognized.

**STATEMENT OF HON. EDWIN FOULKE, JR., ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR**

Mr. FOULKE. Thank you, Mr. Chairman and members of the subcommittee. I would first like to request that a copy of my full testimony be entered into the record.

Chairman NORWOOD. So ordered.

Mr. FOULKE. Thank you.

Thank you for the opportunity to appear before you today. I have enjoyed meeting with you last month, Mr. Chairman, and welcome this further opportunity to continue the dialog exploring ways to improve the process in which the Occupational Safety and Health Administration considers the use of standards set by outside organizations when it promulgates its rules and regulations.

I am aware that you have had a long-term interest in this issue, and I appreciate the work that you are doing. I want you to know that I share your goals of providing parties affected by standards and regulations the opportunity of meaningful input, avoiding conflicts of interest by those writing the rules, and ensuring the quality of the information that OSHA requires manufacturers and employers to disseminate.

You may rest assured that we are interested in finding ways to incorporate the same transparency into the process for determining what information must be included in MSDS's and ensuring that process allows for diverse views to be considered. OSHA shares your interest in encouraging wide public participation from all interested parties in the rulemaking process.

OSHA also offers small businesses a unique opportunity to provide meaningful input through the small business regulatory review panels, as mandated by Congress. OSHA regularly convenes

these panels for major rulemakings, which allows affected small businesses to offer input and make recommendations on regulatory alternatives early in the rulemaking process.

OSHA also is beginning a peer review of the risk assessment and health effects analysis developed for silica rulemaking in accordance with the requirements of OMB's information and quality bulletin for peer review. This peer review process will provide the public an additional comment opportunity, including a public meeting, before a proposed rule is published.

I acknowledge your concern regarding the use of TLVs in OSHA's hazard communications standard, and I have asked my staff to examine options to address the issues you have raised in addition to ways to increase the effectiveness and utility of the standard. Mr. Chairman, I assure you that on this issue and other issues, I favor a transparent process that is based on sound science.

In addition, I fully intend to work with you as we address this issue. OSHA supports your efforts to seek diverse views on information utilizing the rulemaking process, including those of other appropriate Federal agencies as expressed in subpart two and three of the newly proposed section 6(a) of H.R. 5554.

The bill, however, could have the result of prohibiting OSHA from using many important sources of information, including standards, findings, reports, papers, treatises and recommendations issued by industry, trade or employee representative groups and academic institution when drafting rules and issuing voluntary guidance documents.

Specifically, section 2(a) of the proposed bill would prohibit the secretary of labor from promulgating any findings, guidelines, standards, limits, rules or regulations based on the determination reached by any organization unless the secretary finds the organization that issued the determination is a national consensus organization.

In developing guidelines and rules, however, OSHA regularly relies on determinations made by a variety of organizations, including industry and labor organizations, private professional associations, academic institutions, and scientific research groups.

For example, supposedly a study about a safety health issue was conducted by a group of researchers at a university, maybe from the fine University of Georgia, and the results, which contained one or more scientific determinations, were published in the Peer Review Journal.

Even if the study determinations were submitted to OSHA as part of a formal notice and rulemaking comment process, this bill most likely would prohibit OSHA from relying on that information in promulgating that standard.

In conclusion, I would like to reiterate that I share your view on the importance of transparency in the regulatory process. I strongly believe that the notice and comment rulemaking process OSHA utilizes is a model of openness and it includes full public participation.

I also share your goal of ensuring the quality of information that OSHA requires manufacturers and employers to disseminate, and pledge to work diligently to explore options to bring the same transparency to bear on the process by which OSHA determines on

what hazard information must be transmitted to employers and to the American workers.

I appreciate the work that you have done over the many years on this subject, and I look forward to working with you in the future on this issue and on other safety and health issues. I will be happy to answer any questions that the committee has.

[The prepared statement of Mr. Foulke follows:]

**Prepared Statement of Edwin G. Foulke, Jr., Assistant Secretary of Labor  
for Occupational Safety and Health**

Mr. Chairman, Members of the Subcommittee: Thank you for the opportunity to appear before you today. I enjoyed meeting with you last month, Mr. Chairman, and welcome this further opportunity to continue a dialog exploring ways to improve the process by which the Occupational Safety and Health Administration (OSHA) considers the use of standards set by outside organizations when promulgating guidance or rules. In particular, I would like to discuss OSHA's method for determining which information is required to be included in its material safety data sheets (MSDSs), and your interest in making the development of safety and health recommendations more transparent.

I am aware that you have had a long-term interest in this issue and I appreciate the work you are doing. I want you to know that I share your goals of providing parties affected by standards and regulations the opportunity for meaningful input, avoiding conflicts of interest by those writing the rules, and ensuring the quality of information that OSHA requires manufacturers and employers to disseminate. Before addressing the legislation you recently introduced, the Workplace Safety and Health Transparency Act (H.R. 5554), I want to outline the already transparent rulemaking process that OSHA currently employs. You may rest assured that we are interested in finding ways to incorporate that same transparency into the process for determining what information must be included in MSDSs and ensuring that the process allows for diverse views to be considered.

*OSHA has a transparent rulemaking process that seeks diverse views through a variety of means*

OSHA shares your interest in encouraging wide public participation from all interested parties in its rulemaking process. OSHA seeks meaningful input through a variety of means, including written and electronic comments, public hearings—when requested—that allow participants the opportunity to present information and question other participants on the record, and an open public rulemaking record. Any final regulation or standard that OSHA issues at the conclusion of these processes has to be based on substantial evidence in the record. Additionally, the Agency publishes final regulations in the Federal Register with an explanation of its requirements.

OSHA also offers small business a unique opportunity to provide meaningful input through Small Business Regulatory Review Panels, as mandated by Congress. OSHA regularly convenes these Panels for its major rulemakings, which allow affected small businesses to offer input and make recommendations on regulatory alternatives early in the rulemaking process. The Panels conclude with a report on the suggestions offered by the small-entity representatives, which is submitted to the official rulemaking record on which regulations must be based.

OSHA is also beginning a peer review of the risk assessment and health effects analyses developed for the silica rulemaking in accordance with the requirements of OMB's Information Quality Bulletin for Peer Review. The peer review process will provide the public with an additional comment opportunity, including a public meeting, before a proposed rule is published. OSHA seeks input through a variety of means and sources to produce the most effective standards, from both a health and safety and feasibility perspective.

I would also like to point out the great strides OSHA has taken to implement a public-friendly rulemaking docket system, so that the public can access important information from the Web and also submit their own comments 24 hours a day. In addition to the resources on the Web, OSHA also provides docket office staff to aid the public in their search of the docket system.

*OSHA relies upon numerous sources of data to promulgate the most effective standards and guidance possible*

After 35 years of serving the public, OSHA recognizes the unquestioned importance of data, research, and all forms of information to support its congressionally

mandated mission “to assure safe and healthful working conditions for working men and women.” OSHA seeks data, used in its broadest meaning, from all sources, including governmental organizations, academic institutions, associations, employers, and individuals. Accurate information serves as the foundation for the development and issuance of effective occupational safety and health standards and guidance materials. In addition, when promulgating health standards, OSHA is required under the OSH Act to consider the best and latest available scientific data.

Since my arrival at the Agency a little over two months ago, Mr. Chairman, I have come to understand that one source of safety and health information is of particular interest to you—the American Conference of Government Industrial Hygienists’ (ACGIH) Threshold Limit Values (TLVs). I believe you are particularly interested in the way that TLVs are used in OSHA’s Hazard Communication Standard (HCS).

*OSHA’s Hazard Communication Standard and its use of ACGIH’s TLVs*

As you know, OSHA’s Hazard Communication Standard (29 C.F.R. Sec. 1910.1200) sets forth a comprehensive system for the evaluation of chemical hazards and the transmission of information about those hazards to employers and employees. Its intent is two-fold: to give employers, in one document, the information they need to provide appropriate protections to their employees; and to provide workers with information about the identities and hazards of the chemicals in their workplaces. The provisions referring to the TLVs govern hazard determination and material safety data sheets (MSDSs). Briefly, the Standard requires chemical manufacturers and importers to evaluate the scientific evidence relating to the hazards of each chemical they manufacture or import. If sufficient scientific evidence exists to establish that the chemical is a hazard under the Standard, the manufacturer or importer must, among other things, prepare an MSDS containing information about the chemical and its hazards, and provide the MSDS to employers who purchase the chemical. Employers use the MSDSs in designing their own hazard communications programs to ensure that employees receive information about the chemical hazards to which they are exposed, as well as in developing ways to protect their employees from such hazards. The Hazard Communication Standard, however, does not establish exposure limits, nor are any limits enforced by the Agency as a result of the standard.

A chemical is a health hazard by definition under the Hazard Communication Standard if there is “statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees.” The Standard as currently written states that the existence of an OSHA Permissible Exposure Limit (PEL) or an ACGIH TLV for a chemical establishes that the chemical is “hazardous.” A determination that a chemical is hazardous triggers the other provisions of the Standard, including labels, MSDSs, and provision of information to employees. In addition, an MSDS must list any TLV, as well as any OSHA PEL “and any other exposure limit used or recommended by the chemical manufacturer, importer, or employer preparing the [MSDS].” Nothing in the regulation requires employers to comply with the exposure levels noted in the MSDS. OSHA believes it more efficient to have the preparer of the MSDS provide complete information about the chemical and precautionary measures than to have to independently research and seek out disparate sources of information to determine how to manage exposures appropriately.

In response to several issues raised in your past letters, I assure you that OSHA does not enforce TLVs developed by ACGIH under the General Duty Clause of the OSH Act or under any individual standard that provides generally worded safety and health mandates. In January 2003, the Agency issued a memorandum clarifying that occupational exposure recommendations such as ACGIH’s TLVs are not to be treated as OSHA-mandated Permissible Exposure Limits for enforcement purposes. TLVs and other non-mandatory exposure recommendations are not to be enforced, in and of themselves, by government action. We are reviewing options to take further steps in this regard including the possibility of reissuing the 2003 memorandum.

*OSHA is working to address congressional concerns*

I acknowledge your concerns regarding the use of ACGIH TLVs in the Hazard Communication Standard and have asked my staff to examine options to address the issues you have raised, in addition to ways to increase the effectiveness and utility of the Standard. For instance, we are examining whether it is appropriate to accord any specific organizations, such as ACGIH, a preeminent position in the hazard determination provisions of the Standard. We are also evaluating ways to ensure that information that is required to be included in MSDSs is developed through a

transparent process that allows for the consideration of diverse views and ensures the quality of the information produced. Mr. Chairman, I assure you that on this issue and other issues, I favor a transparent process that is based on sound science. Additionally, I fully intend to work with you as we address this issue.

*OSHA's comments on H.R. 5554*

OSHA supports your efforts to seek diverse views on the information utilized in the rulemaking process, including those of other appropriate federal agencies, as expressed in Subparts 2 and 3 of the newly proposed Section 6A(a) included in Section 2(a) of H.R. 5554. The bill, however, could have the result of prohibiting OSHA from using many important sources of information—including standards, findings, reports, papers, treaties and recommendations, issued by industry, trade, or employee representative groups, and academic institutions—when drafting rules and issuing voluntary guidance documents. Specifically, section 2(a) of the proposed bill would prohibit the Secretary of Labor from promulgating “any finding, guideline, standard, limit, rule, or regulation based on a determination reached by any organization,” unless the Secretary finds that the organization that issued the determination is a national consensus organization. In developing guidelines and rules, however, OSHA regularly relies on determinations made by a variety of organizations, including industry and labor organizations, private professional associations, academic institutions, and scientific research groups.

In addition, as I previously mentioned, under the OSH Act, OSHA is required to consider the best and latest available scientific data when promulgating health standards. Limiting OSHA's consideration of information to only consensus group material would inhibit the agency's consideration of meaningful and relevant information from stakeholders, experts, and informed parties that contributes to informed rulemaking. Scientific studies, manufacturers' guidelines, and trade association best practices are all important sources of information for OSHA—information we use to improve employee safety and health. Critically important and useful information would be unusable to OSHA if the bill was passed in its present form.

For example, suppose a study about a safety or health issue was conducted by a group of researchers at a university, such as the University of Georgia, and the results, which contained one or more scientific determinations, were published in a peer-reviewed journal. Even if the study's determinations were submitted to OSHA as part of a formal notice-and-comment rulemaking process, this bill would likely prohibit OSHA from relying on that information in promulgating a standard. The bill's provisions might also jeopardize the collaborative efforts of OSHA's successful cooperative programs, such as Alliances, where employers and OSHA work together to produce industry-specific guidance and compliance assistance materials.

Another Subpart of Section 2(a) of the proposed bill would add additional requirements for “rulemaking proceedings initiated by the Secretary of Labor but not finalized prior to enactment of this section.” This section requires the Secretary to “investigate and identify the use of, influence of or reliance upon” findings or recommendations by organizations that do not operate on a consensus basis. Under this legislation, the Secretary would have to publish the results of the investigation in the Federal Register and not incorporate or rely on non-consensus based organization findings or recommendations produced by such an organization in publishing any final standard or official recommendation.

This section seems to raise all of the same concerns as Section 2(a), potentially prohibiting OSHA from utilizing useful information available to it, but applies those limitations to all of OSHA's ongoing rulemakings as well. To operate effectively to protect the safety and health of employees, OSHA needs to be able to consider all sources of information in the early stages of rulemaking. Since the rulemaking process is intended to attract recommendations and submissions of information from a variety of organizations, parties, and stakeholders, excluding the work of all non-consensus organizations would be inconsistent with established administrative law practices and would greatly diminish the information that OSHA is able to use. It would also curtail the Agency's ability to hear and consider as wide a variety of viewpoints as possible.

The bill's requirement to investigate the influence of and reliance on information provided to OSHA by non-consensus organizations and to publish a report in the Federal Register explaining the findings of the investigation before it can issue final rules also raises concerns for OSHA. Such an investigation would needlessly consume the Agency's precious resources and substantially delay the issuance of important rules, but would yield little information of value since OSHA is already required to explain the nature of the information that it relies on at the time the final standard is published. In most cases, the final rule must also be defended in court based on the record as a whole. With all of these checks already in place, it is not

clear what purposes would be served by such a costly and time-intensive investigation.

Finally, the section that deals with the approval of State Plans could very well create tensions between federal OSHA and states wishing to adopt an occupational safety and health program. It would forbid the agency from approving any new state plans unless OSHA determines that any outside standards adopted by the plan were promulgated by a nationally recognized standards-producing organization under procedures wherein it can be determined that persons interested and affected by the rule reached substantial agreement on adoption. This provision establishes a criterion that varies from the criterion in section 18(c) of the OSH Act, which directs OSHA to approve state plans that have standards that are or will be "as least as effective as" the federal rules. New state plans could be precluded from adopting some of the same protective regulations that OSHA adopted at its inception in 1971, because some of the rules were likely based upon information produced by non-federal entities that may not have been substantially agreed upon at the time by all affected parties. Although not clear, presumably this Section would also apply to the adoption of future standards by the 26 currently approved State Plans. The provision may limit the States' ability to adopt federal standards by reference. Certainly, this provision could preclude a State Plan from adopting a more protective regulatory regime than federal law or standards—something the OSH Act clearly contemplated permitting the states to do.

#### *Conclusion*

In conclusion, I would like to reiterate that I share your views on the importance of transparency in the regulatory process. I strongly believe that the notice and comment rulemaking process OSHA utilizes is a model of openness that includes full public participation. I also share your goal of ensuring the quality of information that OSHA requires manufacturers and employers to disseminate, and pledge to work diligently to explore options to bring that same transparency to bear on the process by which OSHA determines what hazard information must be transmitted to employers and to America's workers. I appreciate the work you have done over many years on this subject and look forward to working with you in the future on this and other safety and health issues.

I will be happy to answer any questions that you may have.

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Chairman NORWOOD. Thank you very much, Mr. Secretary.

I will yield myself 5 minutes for questioning to start with.

I am not sure I agree right off the bat with your premise that under the legislation that we are discussing today, OSHA would be unable to rely on established best practices or academic studies. Wouldn't these be referred to in any proposed regulation such that stakeholders could provide feedback on these during the comment period? That is the whole purpose, really, of all of this.

If that is not the case, as you folks are suggesting, do you have a suggestion on how to modify the proposed legislative language to allow OSHA to promulgate a regulation using best practices and academic studies, and ensure interested parties can still review the information and comment on it during the regulatory process?

Mr. FOULKE. Mr. Chairman, I believe that our rulemaking process allows all parties to comment on information that is provided as a general rule during the rulemaking process. Also, the Congress has set forth a number of different procedures that we must follow.

The act itself actually has standard-making procedures that we need to follow, but also the Administrative Procedures Act, the requirements that Congress added on with SBRPA, all those things I think were intended, and I think rightly so, by Congress to try to make the process transparent and make sure that all views are heard and made part of the determination, and considered in the determination to making a rule or standard.

Chairman NORWOOD. Well, thank you. I think you have it exactly right. How does that work when you incorporate a rule into the process? How does anybody have anything to say about that? How does anybody have any input into that, that was established in the middle of the night in secrecy?

Mr. FOULKE. I understand the concern you have. I would say with respect to the TLVs particularly, first of all we as an agency do not cite employers for TLVs. We have actually promulgated a memorandum to the regional administrators to put out to all our area offices and all the investigators that a violation of a TLV would not be the basis of a citation.

Chairman NORWOOD. With all due respect, Mr. Secretary, that is not the problem. There are lawyers right here in this room who use that every time to sue somebody. That is the problem. When you incorporate by reference, nobody gets any input; nobody gets to say anything. All of a sudden now that is in effect the law of the land. You may not fine anybody, but believe you me, there are people on the next panel who will take them to court.

Mr. FOULKE. I understand, Mr. Chairman, because I know we have a number of lawsuits that we have been involved with on this specific issue. I guess our position, OSHA's position has always been that we included the TLVs in the hazard communication standards strictly for informational purposes only, and that there is no requirement that any employer meet those TLV requirements.

Chairman NORWOOD. If, Mr. Secretary, you are concerned that this legislation actually does what you say it will do, I strongly recommend you make some suggestions on change, or otherwise we are going to go forward with this legislation.

Mr. FOULKE. As I mentioned in my opening statement, I am here to work with you, Mr. Chairman. I also mentioned the fact that we are looking at options at the Department of Labor, at OSHA, on how we can address this issue internally.

Chairman NORWOOD. Senator Enzi has in his health committee come up with some similar language addressing this problem, too. So it is sort of a concern on both sides of the House. Have you folks looked at his language, and do you have any thoughts about that one way or the other, the Senate language versus our language?

Mr. FOULKE. To be truthful, Mr. Chairman, I have not seen that language.

Chairman NORWOOD. I see my time is about up, but I really would appreciate it if you all would look at that and take a position—

Mr. FOULKE. OK.

Chairman NORWOOD [continuing]. On Senator Enzi's approach in trying to correct this problem. Everybody knows the problem is when you incorporate by reference, it doesn't have any sunshine on it. It is as simple as that, and that has got to stop.

I see my time is up. I would like to recognize Major Owens now for questioning.

Mr. OWENS. Thank you, Mr. Chairman.

Mr. Secretary, we welcome your fresh insights and your energy. I was wondering if you will be able to deal with the fact that certain standards have been killed by OSHA and certain other stand-

ards have been withdrawn, and certain standards have been delayed.

I would like to submit for the record that standards that have been killed, withdrawn or delayed.\* Have you addressed some commentary? We get no commentary at all from OSHA as to the why, when, or what.

There is one, ergonomics, which the administration and the Congress combined to wipe out shortly after the president was inaugurated. Ergonomics is like pornography, so you don't have to address that one, but the rest of them.

Mr. FOULKE. Thank you, Congressman. I appreciate that.

[Laughter.]

Mr. OWENS. The rest of them maybe you can address. Are you agreeing with the chairman, who says that in America, which is unique for the role it allows nongovernmental organizations to have, we have numerous nongovernmental organizations that assume great responsibilities for accrediting institutions. The motion pictures that our kids see are rated by some group that is not governmental. I don't know, I think I can name many.

Are you agreeing that organizations with expertise should not be utilized in situations where there is a vacuum? We could keep fiddling forever and allow people to die while expertise exists which tells us that if they follow a certain course and don't protect themselves properly, they will surely die.

I just wondered, are we saying that those organizations have to be characterized, as the chairman characterized them a minute ago, as organizations operating in the dead of night? Is there something diabolical about expertise that can be used to save lives?

Mr. FOULKE. Well, Congressman, I would say that we do favor as much transparency, and I think that is what our government has been founded on, and I think the particular rulemaking procedures that we have to go through in promulgating a standard were put there through Congress in order to be able to achieve the goal of making sure that as many diverse types of views could be heard in formulating the rule.

I mean, that is the purpose of rulemaking, I believe, is to get as much information from as many diverse sources as possible in order that we may, OSHA or any agency of the government, will come out and have the best standard possible to, in our particular case, protect the safety and health of the working man and woman.

Mr. OWENS. So you would agree that these organizations have not operated in secrecy. They just have not had the formal process that the government goes through in terms of rulemaking?

Mr. FOULKE. I am not overly familiar with respect to the ACGIH's procedures, though I understand that with respect to outside groups having input and information into the process, that is not normally the case. Also, ACGIH admits that it is not a consensus standard organization. They are not making consensus standards.

They are basically reviewing the information and coming up with what they call the threshold limit values, TLVs. But they say that

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\*Submitted and placed in permanent archive file, "Bush Record at OSHA: Undermining Workplace Safety and Health." (Submitted for the record by Mr. Owens).

this is not a consensus standard. They are not a consensus standard organization. I think that is the question that the issue is how much weight, what type of weight should they be entitled to when we are promulgating a standard and reviewing the whole process.

The idea really is that we want to make sure that we have as much diverse information as possible, and then for us under the rulemaking procedures, we have to review that. We have to do the analysis, the feasibility analysis, the technical and economic feasibility on those issues in order to be able to determine what is the best standard to come out.

Mr. OWENS. Mr. Secretary, the casualty toll at the World Trade at 9/11 is around 3,000 people who were immediately killed and incinerated on that day. However, we have a burgeoning situation taking place now where thousands of workers who worked on that site, including policemen and firemen, are now being afflicted with certain ailments which trace back to their work on that site. I mentioned in my opening statement some cases of cancer that have been clearly documented and related to their work on that site.

There are some other cases that have happened that are in dispute. A certain policeman, 40-year-old policeman, died of a heart attack suddenly. The autopsy showed that in his lungs, there was the stew of 9/11, asbestos and glass and a whole mixture of dust that was unprecedented as a result of high temperatures for new kinds of material used in buildings, that occurred that day.

Now, OSHA sort of, and I can't find the document which says it in writing, but said that they were not enforcing rules in the rescue operations at 9/11. Now, be that as it may, I am not going to question that judgment in view of the fact that it was unprecedented, but at this point, will there be some kind of review of the situation by OSHA?

Informally, I know from talking to some of your employees, there is protective gear that should have been worn that day that would have protected them, the rescue workers, from all of that stew. But officially, are we going to ignore the situation that is evolving in terms of large numbers of workers who are becoming ill? The first reaction of New York City government is no; it didn't cause it. Any government, any corporation would react by saying no. You prove that it happened. Eventually, it is going to be proven, it seems to me.

Are the lives of the people who are dying as a result of their participation in the rescue any less sacred than the lives of people who died on that day? Our government made the great attempt to try to compensate the families of the people who died on that day. More than \$1 billion was appropriated and utilized to compensate families with all kinds of formulas.

Are we going to just ignore the fact that those heroes who helped with the rescue and survived, but are now dying, should not have any help from the government, or any official review by your agency to determine what is the likelihood that there is some truth in the statement that their illnesses are caused by exposure on that day?

Mr. FOULKE. Well, Congressman, I will say this, that in every talk that I give, one of the points I always make is that one workplace fatality is one too many. Under my watch and I think under

all the previous assistant secretary watches, we have been very much committed to protecting worker safety and health.

What I would say is we have had post-9/11 reviews. We have done post-Katrina reviews where we try to make the process better than what it was before. Whenever you deal with a tragedy on that scope, we try to also always improve.

Mr. OWENS. You are having post-9/11 reviews? Or you have had them already?

Mr. FOULKE. I think the White House had a whole series of them that we were a part of. Also, I would say that we were actively involved at the 9/11 site. We have onsite, our regional administrator was there and actually had their office there.

Unfortunately, our Manhattan office was in the north World Trade Tower, so we are very much familiar with the whole incident. I was up there last week and actually met with the Manhattan office and talked about it. But they were there full-time, 24 hours, 7 days a week, trying to protect the safety and health of the workers that were working at the Ground Zero.

One thing I would say is, we are proud of the fact that there were no workplace fatalities at the time during the cleanup. On a site that large, it would never have been under a normal situation would we have expected that.

Mr. OWENS. Thank you.

Mr. Chairman, I assume I will be able to submit additional questions to Mr. Foulke in the record?

Chairman NORWOOD. You can go ahead now if you want to.

Mr. OWENS. No, I will just submit them.

Chairman NORWOOD. Of course you can submit it for the record.

Mr. OWENS. I have additional questions, and I also have some groups that would like to also submit statements for the record. And it will be open?

Chairman NORWOOD. Yes.

Mr. OWENS. Thank you.

Chairman NORWOOD. It will be.

Mr. Secretary, your testimony states that—and, Mr. Kline, you are to be recognized. Do you decline?

Mr. KLINE. I decline.

Chairman NORWOOD. Your testimony states that a permissible exposure limit, what all of us refer to as PELs, the threshold limit values, TLVs, can determine if a chemical is hazardous. I don't misread that, do I?

Mr. FOULKE. I am sorry, Congressman?

Chairman NORWOOD. Your testimony is implying that PELs or TLVs can in and of itself determine if a chemical is hazardous. I don't misread that in your testimony, do I?

Mr. FOULKE. Yes, the hazard communications standard basically states that if there has been one scientific study that indicates that a chemical is hazardous, that that would make the chemical be considered hazardous and thus included under the standard.

Chairman NORWOOD. We have had other hearings on other days in this committee where other witnesses have pointed out that the scientific validity of the TLVs are questionable. Now, I am not sure I know who is right or wrong, and I am certainly not taking a point

of view either way, but it does worry me when other people make that point of view.

What safeguards, therefore, do you have at OSHA that are in place to make sure that these TLVs are valid? How do we know this?

Mr. FOULKE. Mr. Chairman, with respect to the standard, the standard when it was promulgated back in the early 1980's, or mid-1980's, I guess it was, included as part of the requirements for the information to be included on the material safety data sheets that it would be the OSHA PEL, the TLVs, and any other additional information that the manufacturer of the chemical or the importer of the chemical thought was appropriate.

And basically, the information data of the TLVs and any additional information really clearly was intended to be for informational purposes only. We are not stating, and the fact that we don't require any enforcement of the TLV, so I can't say that we have ever done anything with respect to reviewing the process of it. I was not there when the standard was promulgated that included that. I am assuming that some of that issue was looked at at that particular time.

Chairman NORWOOD. You, however, have been in a law firm and when you issue these TLVs, what basically happens out in the real world? What happens to businesses or companies or anybody who is dealing with a particular chemical?

Mr. FOULKE. I can just give you my personal experience.

Chairman NORWOOD. That would be good.

Mr. FOULKE. Because I dealt a great deal with the hazard communications standard, because it is one of OSHA's more frequently cited standards. To tell you the truth, when I would come into a situation where OSHA was investigating overexposure, my main concern, when I reviewed the material safety data sheets, was to actually just look at what PELs were there.

I knew that under my requirements for my clients, they would have to be in compliance with the PELs. So I would say, I would ask them, let me see your material safety data sheets. I would look at the PELs, and then I would request them, and say what is the exposure level; have you done air monitoring on those particular chemicals that had PELs.

TLVs, to tell you, it was not something that I personally had to look at because I knew from my client's standpoint, my liability for my client was at the PEL level.

Chairman NORWOOD. And in conclusion, let me just again reiterate what this is all about. You have a job. We have a job. We are trying to make sure that our workplaces are healthy and safe as they possibly can be. I know how seriously you take that, and I do, too.

There are also other considerations here. What this specific hearing and this specific legislation is about is the fact that you are omnipotent when you issue rules and regulations. They affect the world. They affect the country. When you issue them, it is only right and fair.

We have many, many laws on the books. This is just a few of them: the Native Quality Act, Small Business Regulatory Enforcement Act, Regulatory Flexibility Act. These laws are there for the

simple purpose of when the Federal Government regulates, it has to do so in an open atmosphere and fairly so that all sides, when you are going to do it to somebody, at least they have the opportunity to defend themselves.

Mr. FOULKE. I think that is the strength of our country.

Chairman NORWOOD. It is the strength of our country, and it is the weakness of incorporating rules by reference, particularly when you incorporate rules by reference. This thing is very interesting to me in that the people who work for you during the day are the same people who are writing these rules, or at least reviewing the literature.

From what we have been told, they take about 7 minutes coming to a conclusion once they review the literature. When they do that at night, off-campus so to speak, and then go back to work the next day and then sit around and make a recommendation, we really ought to accept this rule by reference, and put it in there and go ahead, because that is the easy way. That is the fast way.

You know, nobody knows what they reviewed, what their biases may or may not be. Nobody knows if it has been fair. Nobody knows if they have reviewed scientific material that is accurate. Nobody knows, including you, actually.

Mr. Owens implied, well, they aren't secretive. Well, of course they are secretive. They won't tell you what they have done, what they reviewed, what any of it is about. You can't go to the meeting. You can't have any input into what they are doing. It is totally secretive.

These are government employees who can't do it legally on their day job, and they are doing it illegally at night. And it is affecting people. Now, having said that, I want us to have good TLVs, good PELs, too. I am most anxious in updating our PELs, but it has to be done in the right way.

What can you do to help me?

Mr. FOULKE. Well, as I mentioned to you in my testimony, Mr. Chairman, I have asked my staff to look at different options that we can look at. One of the things we are also looking potentially to do is to make sure about reviewing the documents we have sent out with respect to participation in outside nongovernmental organizations, and also making sure or reaffirming the fact that we are not enforcing TLVs; that they are strictly for informational purposes; and that any type of citation would be based on an actual violation.

So we are moving that, and I am hoping, like I say, that we will have some additional options that I am going to be able to move forward from a regulatory prospect or a nonregulatory prospect. I am not sure yet, but we are going to move forward and address the issue that you have clearly identified.

Chairman NORWOOD. Can't the secretary of labor simply say we are going to stop doing this because it is not right, without us having to pass legislation?

Mr. FOULKE. I would hope that what we are working on, the options, are something that once we complete them and decide how we are going to move forward with whatever options, and maybe discuss them with you, you might see that once they are implemented that there may be no need for regulation.

Chairman NORWOOD. I would be happy to, no need for the new law.

Mr. FOULKE. The new law, right.

Chairman NORWOOD. Yes. I would be happy to work with you, and want to work with you on that. It is going to be a matter of who gets there first.

[Laughter.]

Mr. FOULKE. I know you are a hard-charging person, but then again I am right behind you.

Chairman NORWOOD. Well, I am counting on you. I actually hope you win, but I will tell you right now, we are not going to slow down. I can tell you that.

Mr. Owens, would you care to have anything else?

Mr. OWENS. Thank you, Mr. Chairman.

I just wanted to briefly comment that we will be happy to work with you, Mr. Foulke. We understand the chairman is hard on lawyers.

[Laughter.]

Chairman NORWOOD. You are hard on dentists. So what?

[Laughter.]

Mr. Kucinich, would you like to be recognized? You are recognized for 5 minutes.

Mr. KUCINICH. Thank you, Mr. Chairman.

Mr. Foulke, what is a reasonable amount of time for all workplaces in a state to be inspected?

Mr. FOULKE. What is a reasonable time? All workplaces in the country or just in a state?

I don't know if I really have an answer for that. I mean, clearly what we have tried to do at OSHA is set up a priority system to identify those employers that have the highest injury and illness rates, those that we consider to be the most dangerous operations that have potentials for injuries, illnesses and fatalities.

So we actually, we are very focused on that thing. As a time period, I don't believe I could give you an answer on that.

Mr. KUCINICH. Based on OSHA records, my home state of Ohio is assigned 60 OSHA inspectors. With these 60 inspectors, it would take approximately 97 years to inspect each workplace once. Is it acceptable to have insufficient number of inspectors to inspect every workplace in a reasonable amount of time?

Mr. FOULKE. Well, I guess I would say, Congressman, there are a lot of employers that have very safe worksites that probably don't need inspection. What we have tried to do—

Mr. KUCINICH. How would you know if you never looked?

Mr. FOULKE. Well, how we do it is we do get data on the particular worksites. As I indicated previously, the fact that we are focused in on, we have what we call site-specific targeting for our inspections. We go after the employers that have the worst injury and illness rates.

We also have an enhanced enforcement program where we find that where employers who have not been inspected previously, that have not seemed to have improved like they should, we actually expand the inspection to their other facilities around the country.

So we have a very targeted program. Our program I think has yielded very significant results. We have been able to reduce work-

place fatalities from 1971 to the present by 60 percent, and we have reduced injuries and illnesses since 1971 by 40 percent. At the same time, the workplace has doubled.

Mr. KUCINICH. Thank you.

I am going to ask you some questions, and I appreciate your answers, but I am going to ask you to be a little bit more efficient so I can get my questions in.

It is interesting to see you assert basically that you have enough inspectors based on reporting, but I think it is important, Mr. Chairman and Mr. Owens, to look at the relationship between the number of inspectors you have and the number of OSHA safety regulations that have been withdrawn by the administration, because if you have safety regulations that are withdrawn, you are not looking that way.

So it is possible, for example, that in metalworking, in oil and gas well drilling, in occupational risk in the manufacture and assembly of semiconductors and processing management of highly hazardous chemicals, and with respect to permissible exposure levels for air contaminants, with work on flammable and combustible liquids, wherever, and on and on and on, and a list that I want to submit for the record here.

But since you are not looking in that direction, because you have essentially withdrawn safety regulations, you don't feel you need inspectors in that area. So it may be that you are actually undermining the very spirit of the OSHA law, which was passed in 1970, and I might add, signed into law by Richard Nixon, that states that Congress finds that personal injuries and illnesses arising out of work situations imposes a substantial burden upon and are a hindrance to interstate commerce, in terms of lost production, wage loss, medical expenses and disability compensation payments.

OSHA was passed not only for workers, but for business as well. So I have another question that I want to ask. Do you believe that appropriate deterrence in a criminal system helps prevent crimes from occurring?

Mr. FOULKE. I am sorry. Could you repeat the question?

Mr. KUCINICH. Do you believe that appropriate deterrence in the criminal system helps prevent crimes from occurring, like penalties, for example, or sentences?

Mr. FOULKE. I would say that that may be a partial impact on activity. Yes, I would say that in part would be true.

Mr. KUCINICH. Are OSHA's penalties for violations serious enough to deter an employer from violating workplace safety rules?

Mr. FOULKE. I would say the act sets the civil penalties and also the criminal penalties. Obviously, that is the purview of the Congress if they wanted to change that. I would say that if you look at what we have done in the penalty situation, last year we had double the number, I won't say egregious, the enhanced enforcement actions that we have had, where the penalties were over \$100,000, than the year before. In 2005, we actually doubled the number of company's inspections where the penalty was over \$100,000. So we are really focusing on that.

We also have our egregious policy, which allows us to do sites item by item. So we have a lot of tools in the OSHA tool box that deal with penalties to be a deterrent. So I would say that is correct.

Mr. KUCINICH. Mr. Chairman, I see my time has expired. What I would like to do is submit for the record that the average OSHA penalty for a violation by an employer deemed serious in 2005 was \$873, and the average OSHA penalty for a repeat violation by an employer in 2005 was \$3,635.

I would like to submit for the record the list of safety regulations that have been withdrawn by the administration; a copy of the bill that was the purpose of our subcommittee, the OSHA bill; and also a report, a state-by-state profile of worker safety and health in the United States. It is an up-to-date report called "Death on the Job."

I appreciate it, Mr. Chairman.

Chairman NORWOOD. So ordered.\*

Mr. KUCINICH. Thank you.

Chairman NORWOOD. Mr. Secretary, thank you very much for your time and cooperation. I look forward to working with you. You may now step down, and the second panel please move forward.

Mr. FOULKE. Thank you, Mr. Chairman. I thank the committee.

Chairman NORWOOD. Gentlemen, welcome. I appreciate your time and effort to be here.

I will start and introduce all three of you, and then we will go back to Mr. Casper and start with you, sir.

Joseph Casper is vice president for environment, health and safety at the Brick Industry Association in Washington, D.C. Mr. Casper previously served in both the Reagan and the George H.W. Bush administrations, including working on Vice President Bush's domestic policy staff at the White House and serving as the Commerce Department's director of legislative affairs for the U.S. Travel and Tourism Administration. Mr. Casper earned a degree in psychology from Georgetown University and a master's degree from Johns Hopkins University.

Dr. David Michaels is a research professor and associate chairman of the Department of Environmental and Occupational Health at George Washington University. Much of Dr. Michaels' work has focused on the use of science in public policy. From 1998 through January 2001, Dr. Michaels served as the Department of Energy's assistant secretary for environment, safety and health. Dr. Michaels holds a master's of public health and a doctorate degree from Columbia University.

Mr. David Sarvadi is a partner at Keller and Heckman here in Washington, D.C. Mr. Sarvadi is an attorney working with clients in the area of occupational health and safety, toxic substance management, employment law, and product safety. He represents clients before a variety of Federal and state agencies in legal proceedings involving OSHA citations, the Environmental Protection Agency, and other Federal entities.

In addition, Mr. Sarvadi is a certified industrial hygienist. He holds an undergraduate degree from Pennsylvania State University, a master's degree from the University of Pittsburgh Graduate

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\*Submitted and placed in permanent archive file, "OSHA Standards Killed, Withdrawn Or Delayed Under Bush Administration," also appear on p. 38 of this document. "Death on the Job: The Toll of Neglect. A National and State-by-State Profile of Worker Safety and Health in the United States," 15th Edition. April 2006, <http://www.aflcio.org/mediacenter/resources/reports.cfm>. (Submitted for the record by Rep. Kucinich).

School of Public Health, and a law degree from George Mason University.

I would like to remind the members that we will be asking questions of the witnesses after testimony. In addition, committee rule two imposes a 5-minute limit on all questions.

Mr. Casper, you are now recognized.

**STATEMENT OF JOSEPH S. CASPER, VICE PRESIDENT OF ENVIRONMENTAL HEALTH AND SAFETY, THE BRICK INDUSTRY ASSOCIATION**

Mr. CASPER. Thank you, Mr. Chairman and members of the subcommittee.

My name is Joseph Casper of the Brick Industry Association, the national trade association for the brick industry, consisting of companies that manufacture and distribute quality clay brick products across the United States.

BIA is committed to efforts to protect the health and safety of our industry's workforce. In fact, this past March BIA formally signed an alliance agreement with OSHA pledging to collaborate with the agency on worker health and safety issues. We very much appreciate today's opportunity to testify before you because BIA strongly supports H.R. 5554.

I wish to speak particularly about silica and silicosis in brick manufacturing. We believe that nonconsensus standards regarding crystalline silica developed by the American Conference of Governmental Hygienists, or ACGIH, threshold limit values or TLV committee, utterly failed to take into account the particular conditions of our industry.

To begin, it is good news indeed that mortality and morbidity from silicosis has declined significantly over the past several decades, but we want the subcommittee to know that while cases of silicosis continue to occur in other industries, the experience with silicosis among brick workers is in sharp contrast.

My prepared testimony contains information on six peer-reviewed studies of brick workers from 1941 to 1999. Of these, five showed no evidence of silicosis. The sixth study found some changes consistent with silicosis, changes in the lung, but those were exceedingly low and below the background expected of a normal population not exposed to silica dust.

Indeed, the lack of silicosis in the brick industry has perplexed scientists and caused them to look carefully at what is unique about the silica in brick manufacturing, as contrasted with other industries, in an attempt to disentangle why exposures above safe levels are not resulting in cases of silicosis.

While not yet definitive, the answer appears to be found in the composition of the raw materials used to manufacture brick. To develop a better understanding of silicosis in the brick industry, our association sponsored a just-conducted study that determined the prevalence of radiographic signs of silicosis among current workers.

We chose as the study leader Dr. Patrick Hessel, an epidemiologist with great experience in occupational and environmental lung diseases, who has conducted extensive research on silicosis, asbestosis and lung cancer. Dr. Hessel and his colleagues studied workers at 13 plants producing clay brick from 94 facilities operated by

members of the BIA. These workers were selected through a random process, taking account of company size, geographic location and employee age. Radiographs from 701 workers were read by two NIOSH-certified B-readers.

Very importantly, none of the chest X-rays of the 701 workers was consistent with silicosis. These results are consistent with the studies that I mentioned earlier of brick workers from around the world, including the United States, and provide additional evidence that for the brick industry, the ACGIH TLVs are overly restrictive and inappropriate.

While BIA supports the intent of the OSHA hazcom standard, there are provisions of it with which we disagree. One of the most disturbing is the recognition by OSHA of the latest addition of the TLVs of the ACGIH as a source showing that the listed chemicals are hazardous for purposes of hazard communication. Even more problematic is the requirement that material safety data sheets must include the current ACGIH TLV for each chemical.

We do not wish to denigrate the ACGIH or its TLV committee, both of which have through the years made significant contributions to the fields of industrial hygiene and occupational health. However, times have changed and we believe the TLV committee has failed to keep pace.

For example, when a Medline search of the medical literature for the term "asbestos" returns over 9,000 citations, and for the term "silicosis" returns almost 7,000 citations, gone are the days when a volunteer committee of some 24 scientists could devote their spare time to do a credible job in collecting, organizing, reading, evaluating and writing scientific justification for the more than 600 substances for which a TLV has been established.

Very specifically, the recent changes in the TLV for quartz, a form of crystalline silica that is the second most common mineral in the Earth's crust, illustrates the problem. In 2000, the TLV committee reduced by half the TLV for quartz that had been accepted for 28 years.

On the other hand, in 2006, just 6 years later, the ACGIH concluded that the science had changed again to the point that another new TLV for quartz was recommended and adopted, with another reduction by half of the value, down to .25 milligrams per cubic meter.

The documentation justifying lowering of the 2006 TLV included only 96 scientific references, even though a Medline search conducted online from the National Library of Medicine Web site captures almost 7,000 citations for the term "silicosis." Among those 96 citations, not one of the papers I discussed earlier of studies of silicosis in the brick industry was referenced by the TLV committee.

In conclusion, without considering any of the scientific literature referenced earlier concerning brick workers, the TLV committee concluded that there is scientific justification for further lowering of the quartz TLV. What this means is that under existing provisions of the hazcom standard, our member companies were given only 3 months to update their MSDS's with a value that is not scientifically defensible for distribution to customers, or face being in violation of the act.

Something is fundamentally wrong with such a regulatory burden being placed on industry without any means of being able to involve itself through any meaningful input or administrative recourse. Therefore, for the reasons just stated, Mr. Chairman, BIA strongly supports your favorable consideration of H.R. 5554, the Workplace Safety and Health Transparency Act.

Thank you.

[The prepared statement of Mr. Casper follows:]

**Prepared Statement of Joseph S. Casper, Vice President, Environment,  
Health & Safety, the Brick Industry Association**

Mr. Chairman and Members of the Subcommittee, my name is Joseph S. Casper and I am vice president for Environment, Health, and Safety for the Brick Industry Association, headquartered in Reston, Virginia.

The Brick Industry Association (“BIA”) is the national trade association representing the brick industry, consisting of companies that manufacture and distribute quality clay brick products (both face and paver brick) across the United States. Thirty-five manufacturer members of the BIA produce between 80 to 85 percent of all 10 billion bricks produced annually. Most of these manufacturers are small businesses. The approximate number of workers employed in our industry (production, distribution, professional services, masons, etc.) is 215,000. All told, the brick industry contributes more than \$20 billion annually to the U.S. economy.

Brick continues to be a highly desirable form of wall cladding because of its durability and energy efficiency, as well as its ability to safeguard against both fire and high winds. Brick is available in many different textures, and in an almost limitless number of colors.

BIA’s organization has departments devoted to marketing, engineering services, and safeguarding the environment, as well as employee health and safety.

The BIA is committed to efforts to protect the health and safety of our industry’s workforce. In 2004, BIA hosted OSHA Administrator John Henshaw for a keynote address at our annual trade show and convention. Also, this past March BIA formally signed an Alliance agreement with OSHA, pledging to collaborate with the Agency on efforts to improve the provision of practical guidance on worker health and safety issues.

On behalf the brick industry, we very much appreciate the opportunity to testify before you today on the important topic of the U.S. Department of Labor’s use of non-consensus standards in workplace health and safety. In that regard, for the reasons set forth below, the BIA strongly supports H.R. 5554, the Workplace Safety and Health Transparency Act of 2006.

*Silica and Silicosis in Brick Manufacturing*

We wish to speak particularly about silica and silicosis in brick manufacturing. As you will hear, we believe the non-consensus standards regarding crystalline silica, developed by the American Conference of Governmental Hygienists’ Threshold Limits Committee utterly fail to take into account the particular conditions of our industry.

To begin, it is good news, indeed, that mortality and morbidity from silicosis across industry, in general, has declined significantly over the past several decades (in 1968—1168 silicosis-related deaths were reported; in 2002—148 silicosis-related deaths were reported). Nevertheless, cases of silicosis continue to occur in the quarrying and cutting of stone, in mining of metallic and nonmetallic ores, in iron and steel foundries, and in construction.<sup>1,2</sup> However, we want the Subcommittee to know that the experience with cases of silicosis among brick workers in the United States, and elsewhere, is in sharp contrast to the experiences with silicosis in the other industries mentioned above.

Thus, in this country, an early study (1941) in North Carolina examined 1555 workers clinically and by chest x-ray in 48 brick plants and collected 183 dust samples in 28 of those same plants.<sup>3</sup> These chest x-rays were read independently by two physicians who were experienced film readers with the North Carolina Dusty Trades Program, an early prevention program that conducted routine medical examinations of workers in asbestos textile plants, quarries, sand plants, and clay operations in the state. Both of the physicians reported no evidence of silicosis in any of the workers. Average dust exposures ranged from 2 to 138 million particles per cubic foot (“mppcf”) and 11 of the 31 jobs had average exposures above 20 mppcf.

The current OSHA silica Permissible Exposure Limit (“PEL”) for the dust in this study would have been 12.5 mppcf

Similarly, a 1972 study in Canada of workers manufacturing structural clay bricks in Ontario documented extremely high dust levels, some more than 100 times the prevailing occupational limits.<sup>4</sup> Despite these high levels, no cases of silicosis were found. A more recent study (1998) from Croatia found no evidence of pneumoconiosis among 233 workers.<sup>5</sup> Likewise, a 1983 study in Poland by Wiecek and colleagues found no pneumoconiosis among workers making structural clay brick.<sup>6</sup> Lastly, and most recently a 1999 study of more than 1,900 workers in the brick industry in England and Scotland found that x-ray evidence of small rounded nodules consistent with silicosis were exceedingly low and below the background expected in a normal population not exposed to silica dust.<sup>7</sup> This finding was surprising to the authors in that most jobs in the brick plants studied had average exposures to respirable quartz greater than the current OSHA PEL of 0.1 milligrams per cubic meter of air (mg/m<sup>3</sup>).

Indeed, the lack of silicosis in the brick industry has perplexed scientists and caused them to look carefully at what is unique about the silica in brick manufacturing, as contrasted with other industries, in an attempt to disentangle why exposures above “safe” levels are not resulting in cases of silicosis. While not yet definitive, the answer appears to be found in the composition of the raw materials used to manufacture bricks. The principal raw materials used in the manufacture of structural clay brick include clays and shales having a composition of 35 to 50 percent sedimentary clays, but in addition, commonly containing 40 to 50 percent crystalline silica as quartz.<sup>8</sup>

The authors of the 1972 Canadian brick study<sup>4</sup> addressed this issue. In their study of over 1,000 brick workers in Ontario they were surprised that they did not find signs of silicosis in brick workers despite finding that workers were exposed to dust levels eight to 111 times the existing American Conference of Governmental Industrial Hygienists (“ACGIH”) Threshold Limit Value (“TLV”). They hypothesized that the aluminum contained in the clays and shales that coated the silica particles may have reduced their ability to produce silicosis. And, indeed, recent laboratory studies by other scientists suggest that the coating of silica particles by aluminum in these clay and shale minerals does indeed reduce its biological activity.<sup>9,10,11</sup> Thus, for example, the researchers in the United Kingdom noted the potential impact of aluminum as well as other metal ions on the surface of quartz particles in heavy clay industry, and pointed specifically to the mineral illite as being effective in reducing the toxicity of inhaled quartz.<sup>7</sup> While the exact mechanism whereby the clays and shales used in brick manufacturing modify the toxicity of silica is a scientific uncertainty, it is evident that a modification takes place, and that brick workers do not have the same risk of developing silicosis as other workers such as granite carvers, foundry workers and metal miners.

To develop a better understanding of silicosis in the brick industry, our Association has sponsored a just-concluded Study, entitled “The Prevalence of Silicosis in the Brick Industry,” to determine the prevalence of radiographic signs of silicosis among current workers in the U.S. brick industry. We chose as the Study leader Dr. Patrick Hessel, an epidemiologist with great experience in occupational and environmental lung diseases, who has conducted extensive research on silicosis, and lung cancer. Dr. Hessel and his colleagues studied workers at thirteen plants producing structural clay brick from 94 facilities operated by members of the Brick Industry Association. These workers were selected through a random process, which took account of company size, geographic location, and employee age. Radiographs from 701 workers were read by two NIOSH-certified B-readers. When the two primary readers disagreed on the interpretation of a film, the chest x-ray was read by a third B-reader. Very importantly, one of the chest x-rays of the 701 workers was consistent with silicosis. These results are consistent with the previous studies mentioned of brickworkers from the United States, the United Kingdom, Canada, Croatia and Poland, and provide additional evidence that the ACGIH TLVs, as well as other occupational exposure limits for silica, are overly restrictive and inappropriate for the brick industry.

We were pleased that Dr. Hessel’s research shows brick workers appear not to be at risk for silicosis at today’s exposure levels. Our industry will continue to look for opportunities to sponsor research to fill the critical knowledge gaps regarding the uniqueness of the silica particles found in the brick industry.

#### *Hazard Communication for Silica in Structural Brick*

The Brick Industry Association supports the intent of the OSHA Hazard Communication Standard (the “HAZCOM” Standard) that the hazards associated with the use of chemicals should be evaluated, and that information concerning the potential

hazards and means of protecting workers should be transmitted to both employers and employees. Indeed, our Association has worked with our member companies on evaluating the hazards from exposure to brick dusts and the means of communicating such information. However, there are provisions of the HAZCOM Standard with which we disagree. One of the most disturbing is the recognition by OSHA of the latest edition of the TLVs of the ACGIH as a source showing that the listed chemicals are hazardous for purposes of hazard communication. Even more problematic is the requirement that Material Safety Data Sheets must include the current ACGIH TLV for each chemical.

*The ACGIH and Its TLV Committee*

We do not wish to denigrate the ACGIH or its TLV Committee, both of which have made significant contributions to the fields of industrial hygiene and occupational health. Over the life of the organization, the TLV process has been one of the better known activities of the ACGIH. However, times have changed and we believe the TLV Committee has failed to keep pace. In 1941, when the TLV Committee was established, and through the next several decades, the TLV Committee process seemed to work well. Committee members, mostly toxicologists and industrial hygienists, met to evaluate the published scientific literature (albeit generally scanty), unpublished industry studies, and often anecdotal accounts of health effects of exposures. These evaluations were then followed by a recommendation to the ACGIH's membership for the adoption of threshold limit values that were then to be used as guidelines by trained industrial hygienists.

The most significant factor in outdated the TLV process was the passage of the 1970 Occupational Safety and Health Act ("OSH Act") which established OSHA, as a new and critically important player in the national arena of occupational safety and health. OSHA was mandated, by statute, to carry out development of mandatory safety and health standards—and enforcement of those standards to ensure employers provided safe and healthful workplaces for employees. The OSH Act created enormous interest in employee safety and health that led to an explosion of quantitative and qualitative information. This information overload was perhaps the single most important factor causing the unraveling of the TLV model.

Thus, for example, when a Medline search of the medical literature for the term "asbestos" returns over 9,000 citations and a search for the term "silicosis" returns almost 7,000 citations, gone are the days when a volunteer committee of some 24 scientists could devote the spare time to do a credible job in collecting, organizing, reading, evaluating and writing scientific justification for the more than 600 substances for which a TLV has been established.

Other flaws of the ACGIH TLV process, which I only have time to briefly mention, include lack of any meaningful involvement in the Committee's work by other "stakeholders," particularly industry; no real feed-back to stakeholders' legitimate scientific comments (even though such comments are solicited by the Committee), or even any assurances that they were read. In addition, potential conflicts of interest arise from the involvement of government officials on the Committee who are responsible for developing federal safety and health standards. Furthermore, the potential for a conflict exists when federal scientists engaged in research on a substance are asked to prepare scientific justification for a TLV for that substance without rigorous peer review.

Very specifically, from our perspective, the recent changes in the TLV for quartz, a form of crystalline silica that is the second most common mineral in the earth's crust, is illustrative of the problem. In 2000, the TLV Committee reduced by half the TLV for quartz to 0.05 mg/m<sup>3</sup> from its value of 0.1 mg/m<sup>3</sup> adopted during the 1986-1987 period. Coincidentally, the 0.1 mg/m<sup>3</sup> is essentially equivalent to the TLV that was calculated from the formula for quartz adopted by the TLV Committee in 1972. What this means is that, for all practical purposes, the TLV did not change for 28 years from 1972 until the abovementioned 2000 reduction. On the other hand, in 2006, just six years later, the ACGIH concluded that the science had changed again, to the point that another new TLV and adopted with another halving of the value to 0.025 mg/m<sup>3</sup>:

The documentation validating the lowering of the 2006 TLV included only 96 scientific references, even though, as I mentioned previously, a Medline search conducted online from the National Library of Medicine website captures almost 7,000 citations for the term "silicosis". Among those 96 citations, not one of the papers I discussed earlier of studies of silicosis in the brick industry was referenced by the TLV Committee. Those studies indicate that even the earlier TLV of 0.1 mg/m<sup>3</sup> is probably not appropriate or necessary for silica exposures among brick workers.

Without considering any of the scientific literature I have cited that relates to studies of silicosis among brick workers, the TLV Committee concluded that there

is scientific justification for further lowering of the quartz TLV. What this means for the brick industry is that, under existing provisions of the HAZCOM Standard, our member companies were given only three months to update their Material Data Safety Sheets (“MSDS”) materials with a value that is not scientifically defensible for distribution to customers—or face being in violation of the Act. Something is fundamentally wrong with such a regulatory burden being placed on industry, without any means of being able to involve itself through any meaningful input or administrative recourse.

#### Conclusion

The relevant issue harming our industry is that, for purposes of its HAZCOM Standard, OSHA has recognized the ACGIH TLV list of chemicals as denoting that a substance is a hazard, irrespective of its conditions of use; and that the TLV must be communicated to downstream users regardless of whether it is justifiable scientifically. This naturally can and does cause unnecessary apprehension about the use of our product by our customers, and can adversely affect our ability to sell in a very competitive marketplace.

Therefore, it is for the reasons briefly outlined above, Mr. Chairman and Members of the Subcommittee, that the BIA strongly supports your favorable consideration of H.R. 5554, the Workplace Safety and Health Transparency Act of 2006. If enacted, the Bill will prohibit OSHA from blithely and indiscriminately requiring changes to MSDSs every time the ACGIH changes a TLV. Just as importantly, the Bill will not prevent OSHA from adopting true consensus standards in a timely fashion.

Again the brick industry appreciates the opportunity to share our view with on this important legislation and urges the Subcommittee’s rapid approval of H.R. 5554.

#### ENDNOTES

<sup>1</sup>NIOSH, Work-Related Lung Disease Surveillance Report 2002, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, DHHS (NIOSH) Number 2003-111, May 2003. (Available at: <http://www.cdc.gov/niosh/docs/2003-111/2003-111.html>)

<sup>2</sup>Bang KM, Mazurek JM and Attfield MD. Silicosis mortality, prevention, and Control—United States, 1968-2002, MMWR 54(16); 401-405, 2005. (Available at: <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5416a2.htm>)

<sup>3</sup>Trice MF. Health of brick and tile workers in North Carolina. Bulletin of the American Ceramic Society. 20(4); 130-134, 1941.

<sup>4</sup>Rajhans & Buldovsky J. Dust conditions in brick plants of Ontario. Am Ind Hyg Assoc J, 33: 258-268, 1972.

<sup>5</sup>Zuskin E, Mustajbegovic J, Schachter EN, Kern J, Doko-Jelinic J, Godnic-Cvar J. Respiratory findings in workers employed in the brick-manufacturing industry. J Occup Environ Med. Sep; 40(9):814-20, 1998.

<sup>6</sup>Wiecek E, Goscicki J, Indulski J, & Stroszejn-Mrowea G. [Dust and occupational diseases in brick yards.] Med Pr, 34: 34-45, 1983 (in Polish).

<sup>7</sup>Love RG, Waclawski ER, Maclaren WM, Wetherill GZ, Groat SK, Porteous RH, & Soutar CA. Risks of respiratory disease in the heavy clay industry. Occup Environ Med, 56: 124-133, 1999.

<sup>8</sup>Brownell WE (1976): Structural clay products. In: Frechette VD, Kirsch H, Sand LB, and Trijer F (eds). Applied Mineralogy. New York: Springer-Verlag. Pp. 24-42.

<sup>9</sup>Harrison J, Chen JQ, Miller W, Chen W, Hnizdo E, Lu J, Chisholm W, Keane M, Gao P, Wallace W (2005): Risk of silicosis in cohorts of Chinese tin and tungsten miners and pottery workers (II): Workplace-specific silica particle surface composition. Am J Ind Med 48:10-5.

<sup>10</sup>Fubini B, Fenoglio I, Ceschino R, Ghiazza M, Mrtra G, Tomatis M, Borm P, Schins R, Bruch J (2004): Relationship between the state of the surface of four commercial quartz flours and their biological activity in vitro and in vivo. Int J Hyg Environ Health 207:89-104.

<sup>11</sup>Clouter A, Brown D, Hohn D, Borm P, Donaldson K (2001): Inflammatory effects of respirable quartz collected in workplaces versus standard DQ 12 Quartz: Particle surface correlates. Toxicological Sciences 63: 20-98.

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Chairman NORWOOD. Thank you very much, Mr. Casper.  
Dr. Michaels, you are now recognized for 5 minutes.

**STATEMENT OF DAVID MICHAELS, PH.D., MPH, RESEARCH PROFESSOR AND ASSOCIATE CHAIRMAN, DEPARTMENT OF ENVIRONMENTAL AND OCCUPATIONAL HEALTH, GEORGE WASHINGTON UNIVERSITY**

Dr. MICHAELS. Good morning. My name is David Michaels, research professor in environmental and occupational health at George Washington University's School of Public Health. I would like to request that my entire written statement, along with accompanying papers, be entered into the record of this hearing.

This legislation, Mr. Chairman and members of the committee, is not what it appears to be. Its objective is not to improve the administrative process, and it certainly makes no attempt to ensure that good science is used to protect the public's health. In fact, it does the opposite. It ensures that the newest best science will not be used to protect workers from toxic exposures.

I have first-hand experience as a regulator. I served as the Department of Energy's assistant secretary for environment, safety and health, responsible for safety and health at the nation's nuclear weapons facilities.

I agree with Assistant Secretary Foulke's assessment of this bill. It would significantly obstruct OSHA's and MSHA's work. But that is its objective. The proposed legislation is part of a campaign spearheaded by the well-paid lobbyists at the firm of Patton Boggs being waged on behalf of a small group of companies for the right to—

Chairman NORWOOD. Sir, I object. Patton Boggs didn't write that legislation. I did. Don't be telling me why I wrote it.

Dr. MICHAELS. With due respect, sir, I didn't say that they wrote the bill. I said they are spearheading the campaign to do this work.

After losing in Federal court not once but twice, these parties now seek special favors from Congress. Under this bill, OSHA and MSHA could not use—

Chairman NORWOOD. I object to that, too. What are you implying there, Dr. Michaels?

Dr. MICHAELS. I am saying these companies did not succeed in court in shutting down the ACGIH, so they come to Congress—

Chairman NORWOOD. This law firm you refer to I have no interest in. You are impugning my reputation right here, and I want it stopped. Am I clear?

Dr. MICHAELS. I understand what you are saying, sir.

Chairman NORWOOD. I hope you do.

Dr. MICHAELS. Under this bill, OSHA and MSHA could not use recommendations from expert organizations unless the agency determines that the recommendations were reached using a process that ensured that impacted industries agree with the recommendations. Protecting workers from chemical hazards should be based on science, not on gaining the agreement of industries responsible for the hazard.

The proposed legislation is written so broadly that it would even stop the agencies from using the recommendations of highly regarded government panels such as the National Toxicology Program. In 1971, OSHA adopted about 400 ACGIH TLVs, which used the science of the 1950's and the 1960's.

Since then, OSHA has updated only a handful of them. The rest have been unchanged in more than 35 years. The OSHA standard-setting process is cumbersome and easily derailed by those intent on slowing action. The political appointees who run the agency at the present time have no desire to strengthen these inadequate standards.

Instead, the American public must rely on organizations like the ACGIH and IARC, the International Agency for Research on Cancer. When the IARC expert panel concludes that a substance like silica or beryllium or hexavalent chromium causes cancer in humans, shouldn't this information be provided to exposed workers? Wouldn't you want to know if the chemicals you work with cause cancer?

The outside proponents of this legislation have labeled any recommendations they don't like as junk science. In doing so, they have taken a page from the tobacco industry's playbook. With all due respect, the attorneys and trade associations who are pushing this line are as wrong as the tobacco executives who testified in this very building that smoking does not cause cancer.

We all agree that OSHA should issue more standards and that the agency has abdicated its responsibility to do so, I believe. The effects of this OSHA failure are real and they are tragic and they are happening right before our eyes. Scores of workers have been diagnosed with what has been called popcorn worker's lung from a widely used chemical that provides butter flavoring for popcorn, but OSHA has no plans for a standard to protect food industry workers from this debilitating lung disease.

I ask, can't we do a better job to protect American workers?

Thank you very much.

[The prepared statement of Dr. Michaels follows:]

**Prepared Statement of David Michaels, Ph.D., MPH, Director, the Project on Scientific Knowledge and Public Policy; Research Professor and Associate Chairman, Department of Environmental and Occupational Health, George Washington University**

Good morning Mr. Chairman and members of the Committee. My name is David Michaels. I am a Research Professor in Environmental and Occupational Health at the George Washington School of Public Health and Director of the Project on Scientific Knowledge and Public Policy, known as SKAPP.<sup>1</sup> SKAPP was created five years ago by a group of public health scientists to enhance the public's understanding of how scientific evidence is used in the regulatory and legal arenas. From 1998 to 2001, I served as the Department of Energy's Assistant Secretary for Environment, Safety and Health from 1998 through January 2001. I had primary responsibility for protecting the health and safety of workers, the neighboring communities and the environment surrounding the nation's nuclear weapons facilities.

This legislation, Mr. Chairman, is not what it appears to be. Its objective is not to improve the administrative process and it certainly makes no attempt to ensure that good science is used to protect the health of workers, or the public. In fact, it does the opposite. It ensures that the newest, best science will not be used to protect workers from hazardous chemicals.

The purpose of the OSHA and MSHA "HazCom" standard is ensure that employers and workers receive information about the risks associated with exposure to a product—information that product's manufacturer is required to provide on Material Safety Data Sheets, known as MSDSs. The current OSHA and MSHA rules require the MSDS for any product to include, among other things, any recommended exposure limits to the product from certain professional organizations which have expertise in occupational safety and health.

Under the proposed legislation, OSHA and MSHA could not require such recommended exposure limits be included on an MSDS unless the agency determines that the recommendation was reached using a process that ensures that the im-

pacted industries are in substantial agreement with the recommendation. And, Mr. Chairman, that simply is not going to happen. Protecting workers from chemical hazards should not depend on what everyone can agree.

*Manufactured Uncertainty*

The sad truth is that industries responsible for hazards generally prefer to manufacture uncertainty in order to avoid the costs associated with reducing toxic exposures.<sup>2,3</sup>

This bill would directly bar OSHA and MSHA from complying with their statutory mandates to take into account the best scientific evidence in developing rules currently in process. The proposed legislation is written so broadly, Mr. Chairman, that it would even stop the Department of Labor from using the recommendations of highly regarded government panels, such as those of the National Toxicology Program.

The reality is that this legislation is part of a campaign, spearheaded by the well-paid lobbyists at the firm of Patton, Boggs, being waged on behalf of a small group of companies and trade associations. After losing in federal court, not once, but twice, these parties now seek special favors from Congress in the form of this anti-public health legislation. Proponents of this bill want to make sure they can continue to expose workers and the public to deadly hazards, and do so without interference by public health authorities and without the threat of legal action by those injured by their negligence. Attorneys from Patton Boggs, for example, represent a group of mining companies who have fought for at least a decade for the right to expose underground miners to diesel particulate matter, a hazard that increases their risk of cardiovascular and cardiopulmonary disease and lung cancer.<sup>4</sup> The EPA and this Congress have made important strides to limit the public's exposure to such dangerous particulates, but Patton Boggs continues to challenge the Department of Labor's efforts to protect underground miners through sustained procedural attacks, and sadly, have succeeded in delaying the rule. The unceasing efforts of these lobbyists have genuine health consequences for exposed workers.

You recently heard testimony from a witness representing the American Bakers Association complaining about the ACGIH threshold limit value (TLV) for flour dust. What the witness failed to mention is that respiratory disease among bakery workers is a serious matter, and the scientific literature contains significant evidence that workers with excessive exposure to flour dust are at increase risk of debilitating respiratory disease. I commend the ACGIH for examining this hazard and other health risks that OSHA failed to address.

Today, Mr. Chairman, the work of organizations like IARC and the ACGIH are more important than ever. That is because the regulatory agencies are simply unable to keep up. In 1971, OSHA adopted en masse, about 400 ACGIH TLVs, reached using the science of the 1950's and 1960's, before we knew as nearly as much as we know today about the long-term effects of many hazardous chemicals.

Since then, OSHA has updated only a handful of them. The rest have been unchanged in more than 35 years. The OSHA standard setting process is cumbersome and easily delayed by those intent on slowing action. The political appointees who run the agency at the present time have no desire to strengthen weak standards; except when under a court order. Workers cannot rely on OSHA to issue new regulations on chemical hazards. OSHA is paralyzed and has abdicated its responsibility to issue health standards that protect workers. The situation at MSHA is no better, as their exposure limits date back to 1973.

While OSHA and MSHA are frozen in time, IARC and the ACGIH have moved forward. The organizations recognize that our scientific methodologies are much improved since the 1960s and we are always learning more about chemical hazards and therefore how to prevent occupational disease and death.

Since the early 1970's the monograph program of IARC, a branch of the World Health Organization, has convened interdisciplinary panels of scientific experts to identify substances that pose a carcinogenic risk to humans. These include some of the best scientists in the world, and the program is supported with US funding.

These expert panels conduct public meetings in which representatives of the affected industries and their lobbyists are allowed to participate and comment. The scientists review the published literature and evaluating the full range of evidence.<sup>5</sup> It has been nearly 10 years since IARC designated crystalline silica as a human carcinogen. Washington trade groups, like the Brick Industry Association, may object to IARC's designation, but representatives of the producers and users of silica were present at the IARC meeting and their input was heard.<sup>6</sup> In the time since the IARC designation, the evidence of the carcinogenicity of crystalline silica continues to grow, while OSHA's standard, based on 1968 science, remains unchanged and hopelessly outdated.

The IARC monograph series provides a great service, offering the public health community a comprehensive assessment of the current scientific information, at times when our own public health agencies are under-resourced and unable to do so. When an IARC expert panel concludes that a substance like silica, or beryllium, or hexavalent chromium are carcinogenic to humans, shouldn't this information be provided to workers through a MSDS and the right-to-know protections afforded by the Hazard Communication standard?

Similarly, the ACGIH has developed TLV recommendations that are stronger than OSHA's standards for a small but important group of hazards. Hazards such as welding fumes, particulate matter and silica. None of these are trivial—each is responsible for death and disability among exposed workers.

In addition, the ACGIH has produced recommendations for many chemicals for which no OSHA PEL currently exists. Since OSHA has essentially stopped issuing new chemical standards, these recommended TLVs serve as the basis for disease prevention programs by responsible employers and public health professionals. And that, Mr. Chairman, is a key purpose of OSHA and MSHA's Hazard Communication standards—giving workers and employers the health effects information they need to be proactive and take measures to prevent workplace injuries and illnesses.

#### *Taking the Tobacco Road*

The proponents of this legislation have taken a page from the Tobacco Industry's playbook. With no scientific support, except from their own mercenary consultants, they've labeled any recommendations they don't like as "junk science". With all due respect, the attorneys and trade associations who are pushing this line are as wrong as those tobacco executives who testified under oath in front of a House Energy and Commerce committee hearing that tobacco didn't cause cancer.

The secret agenda of Patton Boggs aside, you and I evidently agree that OSHA should be issuing more standards, and that they have abdicated their responsibility to do so.<sup>7</sup> I have attached a list of 31 OSHA standards killed, withdrawn or delayed by the Bush Administration.

The effects of this OSHA failure are real and they are tragic and they are happening right before our eyes. Nearly 200 workers have been diagnosed with what has been called "popcorn workers lung" from a widely used chemical that provides butter flavoring for popcorn, but OSHA has no plans for a standard to protect food industry workers from having their lungs destroyed. (See attached article on popcorn workers lung and OSHA's abdication.)<sup>8</sup> OSHA's current beryllium exposure standard dates to 1949. Fifty years later, when I was Assistant Secretary of Energy, we issued a workplace exposure standard for beryllium that is ten times stronger than OSHA's. After much initial opposition, even the beryllium industry now acknowledges the current OSHA standard is inadequate. The bill being considered today would prohibit OSHA from referencing the ACGIH's recommendations on beryllium, or IARC's findings that beryllium is a human carcinogen. There are no comprehensive standards to protect workers from ergonomic hazards, or from noise in the construction industry. I could go on and on. This is a public health crisis.

I hope that Members of Congress will reject claims made by proponents of this bill, and instead take the positive step of passing legislation to incorporate the most current ACGIH TLVs into OSHA and MSHA regulations. Worker health is not served by enforcing 40 year old exposure limits. Workers in the United States deserve 21st century protections.

I want to close by saying that I am saddened and a little embarrassed to read in a press release on the Patton Boggs website that the chairman of this subcommittee said "The ACGIH is going to stop writing the laws of this land, if it's the last thing I do on this earth."<sup>9</sup> Mr. Chairman, I ask you, do you want to be remembered in the history books as someone who saved lives, who promoted the use of good science to protect workers from developing cancer or lung disease, so they could live long enough to play with their grandchildren, or as someone who was instrumental in blocking public health agencies, employers and endangered workers from using important scientific information to prevent disease?

Thank you very much.

#### *OSHA Standards Killed, Withdrawn or Delayed by the Bush Administration<sup>10</sup>*

##### *Standards Killed*

Ergonomics Standard (Killed by Congress under the Congressional Review Act in March 2001)

##### *Standards Withdrawn*

PELs for Air Contaminants (Dec. 2001)  
Metalworking Fluids (Dec. 2001)

Update and Revision of Flammable and Combustible Liquids Std. (Dec. 2001)  
 Process Safety Management of Highly Hazardous Chemicals (Dec. 2001)  
 Revision/Update of Mechanical Power Transmission Apparatus Std. (Dec. 2001)  
 Safety Standards for Scaffolds in Construction—Part II (Dec. 2001)  
 Safety and Health Programs for Construction (Dec. 2001)  
 Control of Hazardous Energy in Construction (Dec. 2001)  
 Consolidation of Records Maintenance Requirements in OSHA Stds. (Dec. 2001)  
 Oil and Gas Well Drilling and Servicing (Dec. 2001)  
 Update and Revision of Spray Applications (Dec. 2001)  
 Occupational Exposure to Perchloroethylene (Dec. 2001)  
 Sanitation in the Construction Industry (Dec. 2001)  
 Update and Revision of Woodworking Machinery Standard (Dec. 2001)  
 Ergonomics Programs in Construction (Dec. 2001)  
 Occupational Health Risks in the Manufacture/Assembly of Semiconductors (Dec. 2001)  
 Indoor Air Quality (May 2002)  
 Scaffolds in Shipyards (May 2002)  
 Access and Egress in Shipyards (June 2002)  
 Accreditation of Training Programs for HAZWOPER (August 2002)  
 Safety and Health Programs for General Industry (August 2002)  
 Fall Protection in Construction (August 2002)  
 Glycol Ethers (Dec. 2003)  
 Occupational Exposure to Tuberculosis (Dec. 2003)

#### *Standards Delayed*

Payment for Personal Protective Equipment (Notice of proposed rulemaking March 1999. Public hearing August 1999. Still in final rule stage)  
 Assigned Protection Factors for Respirators (Notice of proposed rulemaking June 2003. Public hearing January 2004. Post hearing briefs end May 2004. Still in final rule stage)  
 Occupational Exposure to Crystalline Silica (On regulatory agenda since 1997. Now at prerule stage)  
 Occupational Exposure to Beryllium (On regulatory agenda since at least 2000. Now at prerule stage)  
 Hearing Conservation in Construction (On regulatory agenda since at least 2002. Currently listed as long-term action)  
 Confined Spaces in Construction (On regulatory agenda since at least 2000. Remains at proposed rule stage since 2004)

#### ENDNOTES

<sup>1</sup>I am testifying today on my own behalf, and am not representing George Washington University or any other organization.

<sup>2</sup>Michaels D, Monforton C. Manufacturing Uncertainty: Contested Science and the Protection of the Public's Health and Environment. *Am J Pub Health* 2005;95:Suppl1:S39-48. Available at <http://www.defendingscience.org/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=2406>

<sup>3</sup>Michaels D. Doubt is their Product. *Scientific American*, June 2005; 292:74-80. Available at <http://www.defendingscience.org/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=2372&CFID=8884749&CFTOKEN=35991257>

<sup>4</sup>Monforton C. Weight of the Evidence or Wait for the Evidence? Protecting Underground Miners from Diesel Particulate Matter. *Am J Pub Health* 2006; 96: 271-276. Available at: <http://www.defendingscience.org/case-studies/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=2631>

<sup>5</sup>International Agency for Research on Cancer (IARC). 2006. "IARC Monographs on the Evaluation of Carcinogenic Risks to Humans: Preamble." Lyon, France. Available at: <http://monographs.iarc.fr/ENG/Preamble/CurrentPreamble.pdf>

<sup>6</sup>Wilbourn JD, McGregor DB, Partensky C, Rice JM. 1997. "Meeting Report: IARC Reevaluates Silica and Related Substances." International Agency for Research on Cancer; Lyon, France. Printed in: *Environ Health Perspect* 105(7):756-759. Available at: <http://www.ehponline.org/members/1997/105-7/wilbourn-full.html>

<sup>7</sup>Norwood C. Opening statement before Subcommittee on Workforce Protections of the U.S. House of Representatives' Committee on Education and the Workforce. Hearing: "Examining the Use of Non-Consensus Standards in Workplace Health and Safety." 27 April 2006. Available at <http://edworkforce.house.gov/hearings/109th/wp/acgih042706/osnorwood.htm>

<sup>8</sup>Michaels D, Monforton C. Scientific Evidence in the Regulatory System: Manufacturing Uncertainty and the Demise of the Formal Regulatory System. *J Law Policy* 2005;13(1): 17-41. Available at: <http://www.defendingscience.org/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=1709&CFID=8885296&CFTOKEN=44529282>

<sup>9</sup>Patton Boggs LLP. "Alert: Congress Investigates Backdoor Rulemaking." April 2006. Available at <http://www.pattonboggs.com/news/detail.aspx?news=245>

<sup>10</sup>Source: AFL-CIO Death on the Job: The Toll of Neglect. 15th edition, April 2006. Available online at <http://www.aflcio.org/issues/safety/memorial/doj-2006.cfm>

Chairman NORWOOD. Mr. Sarvadi, you are recognized now for 5 minutes.

**STATEMENT OF DAVID SARVADI, ESQ., KELLER AND  
HECKMAN, LLP**

Mr. SARVADI. Thank you, Mr. Chairman, and thank you and the committee for the opportunity to participate in this process. I would ask that my written statement be entered into the record. I wanted to just share with you some thoughts I had and reactions to some of the testimony I have heard.

I think it is important to understand that the standards that we are talking about that are set by national consensus organizations are a very important part of American commerce and a great contribution of our American history to the world. All you have to do is remember what happened, all the confusion that occurred back in the 1860's as the railroads were getting started and people couldn't depend on what time the train would come because there weren't uniform standards for the time that was involved.

Similarly, not having uniform standards for the width of the rails, there were problems in interchanging the railroads. So we need to remember that standards that are generated by consensus really facilitate our environment, our world, our government, and our society. I think they are very important.

I disagree, though, with people who say that organizations that meet in private should somehow be given the imprimatur of government authority by the recognition through the rulemaking that we have seen here, simply because they happen to be scientists who meet and talk about these things.

The problem with the TLV committee today is that in fact it is a secret process. You are not permitted to participate, and you don't even know if the commentary that you provide to them, which you are permitted to do, you don't even know if that commentary is considered in any way.

I have personal experience with this organization. I started out my career as an industrial hygienist more than 30 years ago. In that responsibility, I had a job where we had chemicals that we manufactured where we took the information that we paid to develop and gave it to the committee and asked them to evaluate it and let us know what they thought the standard should be.

I will admit that, at that time, we had great respect for the committee and their deliberations, but we also knew that our views would be considered and that we would have an opportunity if we so desired to talk to the committee directly as they were considering it.

More recently in the late 1990's, I represented a group that wanted to do the same thing. Unfortunately, the committee by that time had decided to close its doors. The committee today operates without any input from outside parties. It doesn't tell you whether or not they follow standard procedures using the scientific method to develop the standards that they have.

On that basis alone, the TLVs could not be admitted into court under the Supreme Court's Daubert rule. You simply cannot adopt and offer as evidence, as scientific evidence, information where you

cannot demonstrate it has been developed using the scientific method, using recognized scientific procedures and so on.

So we have a problem with the TLV committee as it is presently operated. I understand very, very well what the volunteers on this committee do. I applaud their willingness to participate. One of my prior jobs, I worked as a researcher under contract with the National Institute for Occupational Safety and Health, and I was responsible for developing the information and reviewing the literature on a group of chemicals known as secondary and tertiary amines.

There were 9,000 references, a large number of which, more than several hundred, were from the Russian literature, which we had translated. I read every one. I had to summarize every one. And I had to incorporate those summaries into a document that was then reviewed by other scientists, both at the company I work for and at NIOSH.

It is a time-consuming and difficult and nerve-wracking at times job, but it is one that should be done. It cannot be done solely by one individual or by a small group of individuals. It has to be done by all parties who are interested and who have important things to offer.

One of the difficulties with the way the TLV committee is set up right now is if you happen to work in that industry, you are essentially prohibited from participating in any significant way in what is going on and in evaluating the literature. And yet you may be the person who knows the most about the chemical, about its impact on people, about the difficulties associated with controlling exposures or the unique characteristics of the chemical that make it important to industry. So we end up eliminating the very people who have the most knowledge about a subject from those deliberations.

I personally believe that is not the right way to go. I think we ought to control bias by having opposing views on either side. I think we ought to incorporate submissions by agencies like the ACGIH, when we do it in a rulemaking. The problem with the existing standard is that it incorporates updates to the rule, to the TLVs, not the ones that were adopted in 1983, and thus those of us who are really interested and who may have specialized knowledge about it are precluded from participating and validating the work that the TLV committee does.

So with that, Mr. Chairman, I will stop and be happy to take any questions.

[The prepared statement of Mr. Sarvadi follows:]

**Prepared Statement of David G. Sarvadi, Esq., Keller and Heckman LLP**

Good morning. Mr. Chairman, Members of the Committee, and invited guests, thank you for the opportunity to participate in this important proceeding.

My name is David Sarvadi. I am an attorney with the Washington, D.C., law firm of Keller and Heckman LLP, and I am here to express support for H.R. 5554, the Workplace Safety and Health Transparency Act. I also have some suggestions to improve the bill. At Keller and Heckman LLP, we represent and assist employers in meeting their obligations under a variety of federal and state laws, as well as international treaties and the laws of Canada, Europe, and many countries of the Far East. In particular, we help clients maintain progressive health and safety programs intended to protect their employees in their workplaces, as well as to comply with national and international health and safety laws and standards. The Occupational

Safety and Health Act is the primary focus of our compliance assistance here in the U.S.

I am appearing in this hearing on my own behalf, and any views expressed herein should not be attributed to my firm, my partners, or any other entities, including any of our clients. I am here solely as a person with a keen interest in the topic of occupational safety and health.

First and foremost, this bill is important because it affirms an important fundamental characteristic of modern American government: that citizens affected by OSHA's regulations have the opportunity to participate in the process that will determine the standard to which they will be held. All of us benefit by such participation, and in my experience, people all over the world admire and envy our open system.

The problem the bill seeks to correct is the result of an acrimonious debate over alleged industry bias and influence in science that has been going on for more than 25 years. Some see the solution in attempting to completely eliminate bias by prohibiting participation by individuals with certain characteristics, most notably an alleged financial interest by being affiliated with an affected party, either as an employee or as a consultant. The presumption is that people whose financial support comes from public sources are free from undue influence, an egregiously erroneous assumption.

Bias is a fact of life for all human beings. We all bring individual experiences and prejudices, learning and judgments, to a decision-making process, and while it is important to know about the various interests that motivate participants, the best way to offset bias is to have a transparent process where bias can be exposed and attacked, and its influence can be limited. That means an open, transparent, and inclusive process must be the touchstone of public policy, especially when it comes to science-based decisions.

Our judicial system, and to a certain extent, our legislative system, seeks to obtain the best and most likely true result through the competition of advocacy in an open forum. It is unclear to me why some scientists think that such a process is inapt for applying scientific judgment to public policy. Indeed, even ostensibly objective scientists have their own biases, driven in part by the need to find positive results so they can be published and funded in the future.

Worse, by excluding from the discussion people who have direct experience in a particular area, we reduce the ability to understand complex yet solvable problems. If we were to apply the current approach to selecting people for various public policy scientific panels to our personal lives, we would not, for example, ask a surgeon to advise on the need for the surgery. Yet it is obvious that the surgeon has been trained and has the specific experience we need to inform the judgment inherent in all decisions that involve extrapolation and inference.

In the public policy realm, some scientists have even claimed to find it necessary to be disingenuous to achieve their "better" objective. One such scientist was quoted as having to choose between being honest and being effective!<sup>1</sup> I do not believe that our public policy is better because one group is more effective if their efficacy is based on fundamental dishonesty. And who is to say that such a scientist's view results in better public policy?

We need to be vigilant about scientific misrepresentation. Dr. James L. Mills, a researcher with the National Institute for Child Health and Human Development, described the techniques as "Data Torturing" and classified it as two types: Opportunistic, wherein scientists manipulate standards of statistical significance in order to create apparently valid results, and Procrustean, wherein the scientist generates positive results by redefining exposure or other aspects of a study to again create artificial results.

My own training and education includes a Master's of Science Degree in Hygiene from the department of Occupational Health at the University of Pittsburgh's Graduate School of Public Health, so I started life as a budding scientist. Among my pro-

<sup>1</sup>"[A]s scientists, we are ethically bound to the scientific method, in effect promising to tell the truth. The whole truth, and nothing but—which means that we must include all the doubts, caveats, the ifs, ands, and buts. On the other hand we are not just scientists, but human beings as well. And like most people we'd like to see the world a better place, which in this context translates into our working to reduce the risk of climate change. To do that, we need to get some broad-based support, to capture the public's imagination. That, of course, entails getting loads of media coverage. So we have to offer up scary scenarios, make simplified, dramatic statements, and make little mention of any doubts we have. This "double ethical bind" we frequently find ourselves in cannot be solved by any formula. Each of us has to decide what the right balance is between being effective and being honest. I hope that it means both." But apparently honesty is not an essential ingredient. *Discover Magazine*, October 1989, page 47. Copy attached.

fessors at Pittsburgh was Henry Smyth, a world-renowned toxicologist and one of the founding members of the American Conference of Governmental Industrial Hygienists (ACGIH) and the Threshold Limit Value (TLV) Committee on Chemical Substances. I received a law degree from George Mason University in 1986, and have been a certified industrial hygienist since 1978. I joined Keller and Heckman LLP in 1990. Since about the mid-1990s, I have been an associate member of the ACGIH, and as such, have never had the opportunity to vote on the adoption or creation of the TLVs.

My professional experience includes having worked as the Director of Industrial Hygiene for a large company in the chemicals and allied products industry, as well as a consultant while in law school. Early in my career, I became familiar with the then current members of the TLV Committee, including among them Herbert Stokinger, who was the chairman and another giant of the profession to whom I looked for guidance. The Committee's operation today bears little resemblance to the collegial process and symbiotic relationship between industry, academia, and government scientists that existed in the 1970s.

Indeed, at one point during that time, I initiated in my company the petition to the TLV Committee to establish a standard for a chemical that we manufactured, providing the Committee with all that we knew about the chemical at the time. The information included, if memory serves, information from animal studies that others in the company had contracted with a testing laboratory to conduct. We communicated with the Committee, and answered their questions and gave our opinions. This was all done on an entirely voluntary basis, knowing that the level established would be low, and that it would be a challenge to meet the standard. But we felt we needed the assistance of the Committee's expertise to validate our internal assessment through the eyes of a group of experienced toxicologists.

In contrast to that experience, a few years ago, I represented a trade association of industrial manufacturers who were directly affected by several proposals that had been initiated by the TLV Committee. We were more than a little surprised to find that the draft documentation of the TLV proposed was literally awash with errors, which we identified and brought to the attention of the full committee. I personally read both the draft documentation of the proposed TLV and all of the cited papers, with which I was very intimately familiar. The errors were fundamental, including misrepresentations of what the authors of the cited papers actually said, omitting relevant and much more recent papers, and simply getting the entire subject wrong. We prepared a reply to the Committee, pointing out the errors, directing their attention to the more recent papers, which we had previously submitted to the Committee, and asked for an opportunity to present our views. We received an acknowledgement that our submission had been received, but every attempt to seek an audience with the committee to present our views, and to discuss the issues, was rejected, and we never received a response to the specific criticisms we made. This is not the kind of process designed to instill confidence that a fair hearing of one's views will result.

I believe that this experience, and that of others with which I am familiar, along with the avowed position of the ACGIH that it is not a consensus organization and does not purport to conduct its TLV reviews in compliance with the fundamentals of due process, means that neither OSHA nor any other government agency or organization, including the courts, should any longer rely in any way on the recommendations of the Committee. I in no way want to comment on the integrity of the individual Committee members, as I know what it means to be a committed volunteer in an effort like this. But long experience in many other fields has shown that open, transparent processes uniformly produce better and more acceptable results than private negotiations among insiders in the back room. Trust is a fleeting commodity, and its loss imposes long term costs. Renewing it requires a willingness to let all of one's actions and decisions to be examined in excruciating detail, and ACGIH has been unwilling to pay the price for renewed confidence in their procedures and practices.

Note that the TLVs are not subject to any kind of peer review process. If the TLV Committee decided to submit the Documentation as a paper to a peer-reviewed journal, at least the patina of third party review and objectivity would exist. In the present system, we simply do not know whether the person or persons who prepared the papers have any relevant qualifications, whether they actually read the papers they summarized and cited, or had inherent bias that was not countered by controls or systems in the Committee process. My more recent experience, and that, I understand, of others, is that the current situation at the Committee is unreliable, and in the absence of transparency and openness, cannot be repaired. The attitude is simply one of "trust us, we're scientists." This is not sufficient.

I know what an effort it is to perform the kind of literature review that the development of an occupational health standard entails. In one of my former positions, I was the principal author under a contract with the National Institute for Occupational Safety and Health (NIOSH) working on a criteria document on a group of chemicals called secondary and tertiary amines. There were over 9000 published scientific papers, including a large number from the Russian literature that we had translated, and I read every one. My job was to prepare the summaries of the papers, and to synthesize, under the supervision of Ph.D.s and NIOSH scientists, the summary of the toxicity of those chemicals. The objective of the criteria document was to establish safe levels of exposure, along with information on methods of control and other technical issues. So I feel that I understand, perhaps better than other witnesses, both the scope of the task and its difficulty. I also understand how important it is to get it right.

There is an equally important aspect that OSHA recognition of the TLVs and other similarly developed positions creates. The imprimatur of governmental recognition and sanction via recognition in OSHA standards and in its rulemaking processes gives undue authority to the pronouncements of essentially private individuals, possibly far above what the scholarship that goes into preparing such documents would otherwise warrant. For example, in part because of OSHA's sanction of the TLVs as potentially authoritative, experts can rely on those standards in testifying in court. If the reliance on these standards is misplaced because they are based on biased, factually wrong, and inherently unreliable analyses, how can a fair result obtain? These standards find themselves in wide use in just this way in proceedings in court, at the state level in setting air quality standards, and so on, in spite of the ACGIH disclaimer that they are not to be used as legal standards denoting safe from unsafe environments.

It is not that there are not viable alternatives. Several organizations, including the American Society for Testing and Materials (ASTM), American Industrial Hygiene Association Workplace Environmental Exposure Limits Committee, and several American National Standards Institute (ANSI) committees purport to adopt standards in an open, consensus-based process. Yes, it is expensive and takes time. But good work always does. Coupled with the nature of the ACGIH and other like organizations' penchant for secrecy, we can no longer afford the luxury of allowing OSHA to rely on non-consensus organizations. Thus, I strongly support the proposed statutory change, with some suggestions for improvement.

I believe that this proposal would allow OSHA to rely on consensus standards more fully, so long as it follows its normal rulemaking procedures under section 6 of the OSH Act. The statute already requires OSHA to justify deviating from consensus standards when it adopts standards on the same topic. This language would complement section 6(b)(8) by requiring OSHA to acknowledge and identify true consensus standards organizations and bodies, so that both OSHA and the regulated community can have faith in the standards OSHA adopts. Essentially, this bill merely says that Congress was serious when it spelled out which groups can wear the label of a "consensus" organization.

Note that OSHA is not permitted under current regulations governing the Federal Register to incorporate by reference updated versions of standards from third parties. Were OSHA to update the incorporated standards, it would need to do so in a rulemaking. Provided that the standards setting organization maintained its commitment to due process, a presumption in favor of the standard might be warranted, and the rulemaking could be abbreviated. I can provide specific language at a later date if the Subcommittee so desires.

I have reviewed the specific language of the bill, and find that the proposal is essentially sound. The one potential pitfall that needs to be addressed is to prevent OSHA from allowing superficial conformance with consensus procedures, when in fact the effort was anything but a good faith effort to involve all who might have an interest in participating. There are examples of such failures.

A good example was the unfortunate effort by the American National Standards Institute (ANSI)-sanctioned Z-365 Committee on Upper Extremity Disorders. After more than ten years of activity, the failures of the Committee and the secretariat to meet rudimentary consensus standards—publication of minutes of the meetings, inappropriate classification of members as to representation, inadequate representation of interests on subcommittees and review panels, among others—the ANSI Executive Standards Council ordered the secretariat to review the record for compliance with ANSI policies and procedures on representation, participation, appeals of committee decisions, and other procedural irregularities. Those failures led the Executive Standards Council to require that the first standard submitted by the Committee be subject to an audit by ANSI, according to the procedures outlined in the letter to the secretariat.

This points up the need for OSHA to be sure that any finding it makes be based not on a superficial review of nominal procedures, but a finding that in fact the procedures protecting due process have been followed, and that all interested parties have, in fact, been heard. People who have been excluded from such processes need to be able to raise their objections to OSHA to assure more than nominal compliance.

It is good that the language of the bill in section 6(a) makes the action of the Secretary final agency action, the basis of which would be published in the Federal Register. This is a necessary and proper step to assure that the Agency has made a good faith effort to assure compliance with consensus procedures and concepts. I would suggest some relatively important but in my view minor revisions to the language.

In section 6(a), I would add the words, "rely on," between "promulgate or incorporate" in the first sentence. Standards or other scientific documents prepared by private organizations should have no more standing than their inherent persuasiveness warrants.

The language in the bill that would apply these same standards to state plans under section 18 of the OSH Act is equally important, but perhaps it should be clarified that it would apply similarly only to standards the states adopt that are developed by third parties. Many states now adopt the TLVs as update Permissible Exposure Limits (PELs) by rulemaking, without understanding or investigating the underlying rationale for the standard.

Employers are not simply seeking standards that are lenient. As I mentioned above, many employers for many years have sought to "do the right thing" by participating in the process of developing consensus standards and then adopting them. Indeed, nearly all of OSHA's early standards were derived from consensus standards that had been adopted by progressive employers over the previous 50 years. But if OSHA and MSHA or other agencies are going to rely on those standards as a substitute for rulemaking, then there needs to be real openness, transparency, and opportunity for real an effective participation by all affected parties.

No one can force ACGIH to conduct its Committee work in an open process, nor should we attempt to do so, so long as the Committee's work product is not used to establish legal limits on behavior. Likewise, other organizations, such as the International Agency for Research on Cancer (IARC), whose proceedings are closed, must have their work product subjected to the test of public review and comment before government agencies use them to impose sanctions and standards of care.

Thank you for the opportunity to make my views part of the record. I look forward to taking any questions you might have.

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Chairman NORWOOD. Thank you very much.

Tell me, following up on exactly what you said, because I totally agreed with what you said, there is nothing wrong with having the opinion, for example, and this is Charlie's view, of the American governmental hygienists. There is nothing wrong with that.

What is wrong with it, it seems to me, is that is the only opinion that OSHA takes in. Why couldn't OSHA listen to what they have to say? Don't question it; maybe it is valid; maybe it's not, but nobody knows other than some people over at OSHA.

What is wrong with everybody having input into this rulemaking process?

Mr. SARVADI. Actually, Mr. Chairman, I think that is what we are required to do under the law in the United States.

Chairman NORWOOD. Thank you. I do, too.

Mr. SARVADI. I agree with you that the people at the ACGIH as a group, as a committee, have every right to participate in the rulemakings and make their views known, present their views, and defend their views.

Chairman NORWOOD. Yes.

Mr. SARVADI. And they should. At the same time, we should not give their views undue influence or undue deference because of the fact that they are not telling us how they go about it.

Chairman NORWOOD. When OSHA incorporates their views, they are the only ones that have an opinion. Aren't they?

Mr. SARVADI. Absolutely. You have no opportunity to question the conclusions that the committee reaches, and worse, OSHA's imprimatur gives the committee a patina of believability and credibility.

Chairman NORWOOD. Yes, it does.

Mr. SARVADI. It is undeserved at this time. Unless they are able to defend their views in the open debate on the science that is involved, I don't believe that they should be given any credibility whatsoever, just as I should not be given any credibility if I am not willing to make my views known publicly and to defend them in an open forum.

Chairman NORWOOD. Well, two of you, I think, are attorneys. Is that correct? You are not, Mr. Casper?

Mr. SARVADI. I am, Mr. Chairman.

Chairman NORWOOD. What actually happens when you go into court as a defendant on this kind of thing? What does the plaintiff do, having considered that you have a rule that has been incorporated by reference, and you are going into court over that subject?

Mr. SARVADI. In most states, Mr. Chairman, there is not an absolute recognition of an OSHA standard as a per se rule of negligence. Typically, most states allow introduction of standards like OSHA standards as evidence that can be considered by the trier of fact as to whether or not there has been negligence of the duty that the defendant would owe to the plaintiff.

More importantly, though, in the context of the rulemakings and court proceedings is the fact that the TLVs are given credibility so that expert witnesses who are testifying can point to the TLVs as evidence of safe or unsafe circumstances without having to demonstrate that in fact the TLVs are based on accurate and reliable information.

Consequently, we end up, for example, in my experience with one group of clients that I had that were affected by a TLV, I asked the engineers how that would affect the decisions that they made going forward in designing the equipment and the facilities and making changes in work practices for their employees as a result of the change in the TLV.

The answer was the change in the TLV would result in setting a new lower standard that they would follow because of the potential use of the TLV in litigation in the future. Rather than simply setting it at the TLV, the engineer uses a fraction of the TLV, either a quarter or half of the TLV, as the design standard because if you don't design to a lower level, the normal variation that occurs in equipment and operations can result in a higher exposure.

The downside risk of having any exposure above the TLV or the PEL, whatever the standard may be, is so great that the engineers will in fact design to a lower standard so as to be sure not to exceed that level.

Chairman NORWOOD. So these TLVs are used time and time again in the courtroom by expert witnesses?

Mr. SARVADI. Yes, sir, they are.

Chairman NORWOOD. Just real quickly—and last question, Mr. Casper—to what extent does the fear of private litigation impact your members' decisions to go beyond updating MSDS sheets to reflect updated TLVs? Does the fear of private action drive your members to adjust their operations even when there may be no concrete scientific basis for action? Can you describe that?

Mr. CASPER. Mr. Chairman, I cannot describe what our members consider as far as fears of litigation are concerned. What I can say is the fears that we all have when we look at the possibility of tightening of the permissible exposure limit for silica, for instance. In the event that it is not called for that by OSHA, presumably, it would not be rooted in good science.

What we anticipated would happen when we looked at this in 2003 when OSHA floated its ideas on a possible new silica rule, was that we would see a number of plants probably having to be shut down because of anticipated costs to comply with the new rule that would perhaps reduce the silica PEL down perhaps to .05 milligrams per cubic meter squared.

The prospect of shut-down plants would mean not only more layoffs in the industry, more workers losing their jobs, but also a further tightening in consumer access to brick products to put on their new homes.

Chairman NORWOOD. Why would you shut down? What were you scared of?

Mr. CASPER. Because of the incredible costs; because of what we foresaw would be very significant costs from a very bad, aggressive OSHA rulemaking that would include a reduced PEL, perhaps down to .05.

Chairman NORWOOD. Would it be cost of litigation or is it cost of changing your operation?

Mr. CASPER. Operations changes. I can't speak to the litigation side.

Chairman NORWOOD. OK.

Mr. CASPER. But as far as operations are concerned, for instance, very expensive engineering controls, the utility of which in terms of being able to get the exposure limit down to .05 is not necessarily even certain. The costs of that would be significant, and in some cases we anticipated, given how little information OSHA shared with us when they came out with that draft rule in the fall of 2003, would have resulted probably in the shutdown of a number of our plants.

Chairman NORWOOD. Mr. Owens, you are now recognized for questions.

Mr. OWENS. Dr. Michaels, you described the situation as a possible public health crisis. I alluded to Nero and fiddling in Rome before. Is our government in the position of Nero fiddling while the water and the equipment to put out the fire is there, but we are not willing to use it; the apparatus of government is not in place to take advantage of the science that exists.

That is a gap which is a moral issue, it seems to me. People will be dying in larger numbers if we don't use some kind of standard, and the knowledge exists. The implication is that only after OSHA has gone through its proper procedures should we use standards.

Are we willing to beef up the staff of OSHA with the expertise that is needed, no matter what it costs, in order to facilitate the rapid utilization of new knowledge to protect people from death and injury?

Dr. MICHAELS. Mr. Owens, you raise a good concern. I am not an attorney, but my reading of this law is not that it merely stops OSHA from referring to recommendations made by organizations where there is a decision made without the input of impacted industries, but it actually says that unless the impacted industry agrees, essentially comes to a consensus, you can't use it, which means the national toxicology program, for example, which is a very important program run by the National Institute for Environmental Health Sciences, which has public hearings to designate carcinogens.

It has designated, for example, beryllium as a carcinogen. The beryllium industry doesn't agree. Well, shouldn't that information be given to workers and to the public? I think it is very important. If there is a concern here about organizations that don't accept the input of impacted industries, that is worth discussing, but this is written so broadly that we essentially bar OSHA from using information from a wide range of scientific organizations that are bringing the newest science out. I think that really is problematic.

Mr. OWENS. Dr. Sarvadi, you seem to be the voice of reasonable compromise here. Would you be willing to give us an estimate as to what H.R. 5554 needs in order to carry out the appropriate merger of private science with governmental oversight in hearings and regulation? H.R. 5554 does not provide any appropriation that would facilitate new staffing. Would they be able to do the kind of thing that you think should be done?

Mr. SARVADI. Actually, Mr. Owens, I do think that they could do it with the present system. There is an example.

Mr. OWENS. Present staff?

Mr. SARVADI. Yes, with the present staffing. There is an example already in place at OSHA called the Nationally Recognized Testing Laboratory System. Under that regulation, organizations apply to OSHA to become recognized as a laboratory for purposes of testing for compliance with in fact third-party standards like ANSI standards on electrical safety. That is just one example. There are many others.

In that process, OSHA actually goes through a rulemaking to determine whether or not the organization has the resources and the procedures in place in order to be qualified as a testing laboratory. I could see a similar parallel system set up where OSHA would vet organizations who purport to put forward consensus standards and qualify them in one way or another as consensus organizations.

And then subsequently in a rulemaking, if OSHA wanted to rely on that standard, they would be able to point to the fact that they have qualified this organization in advance, and then subject that organization to objections by interested parties if the organization had deviated from those procedures in the past.

Mr. OWENS. So that OSHA has no excuse for the great delay in facilitating rulemaking on many of these issues?

Mr. SARVADI. I am sorry. I didn't quite catch that.

Mr. OWENS. The number of standards that are left hanging out there, they have not been dealt with. Rulemaking is not taking place, and yet dangers have been certainly highlighted by scientists. There is a great delay. Are you saying that there is no excuse for that? That OSHA has the resources and the staff to move?

Mr. SARVADI. I would take issue with the suggestion that somehow OSHA has not adopted a great number of standards that are somehow missing in the workplace. Mr. Kucinich read a list of standards that have been removed from OSHA's agenda a few minutes ago.

One important thing to remember about the list that he read is that there are in fact standards in place right now that OSHA does enforce on a daily basis that affect nearly all of those subjects that he referenced. So the question isn't whether we have standards. It is whether the standards that we have in place are sufficient and whether we need to enhance those.

Mr. OWENS. I already submitted a list for the record, which is quite long, which I won't go into at this point. Mr. Kucinich just touched the surface, really.

I would like to know from you, Dr. Michaels, what are cases that you cite. You said there were two cases lost in court. Can you explain the facts of that?

Dr. MICHAELS. The various industries, and I will have to provide this to the record, but various industries have sued the ACGIH, the American Conference of Government Industrial Hygienists, because essentially it claimed to act like a governmental body without having their governmental function.

My understanding is both those cases were lost in the court, and the ACGIH continues to be able to put out recommendations, because all they do is put out recommendations. How OSHA or others use those recommendations is up to OSHA and those organizations.

The ACGIH is an organization, as Mr. Sarvadi said, of volunteer scientists who work very hard and do the best job they can and make a tremendous contribution. It is a shame that there is an effort to essentially both put them out of the business and to make sure that OSHA doesn't use them.

Mr. OWENS. For the record, you don't know what those cases are?

Dr. MICHAELS. I didn't bring the information with me, but I could certainly provide that for the record.

[The information referred to follows:]

SCHOOL OF PUBLIC HEALTH AND HEALTH SCIENCES,  
THE GEORGE WASHINGTON UNIVERSITY,  
Washington, DC, July 10, 2006.

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, Rayburn House Office Building, Washington, DC.*

DEAR CHAIRMAN NORWOOD: Thank you for your request to provide supplemental testimony for inclusion in the record for the June 14, 2006 legislative hearing on "Addressing the Concerns about the U.S. Department of Labor's Use of Non-Consensus Standards in Workplace Health and Safety."

You have requested information regarding lawsuits involving the American Conference of Governmental Industrial Hygienists (ACGIH). I have attached two documents that contain information on litigation pursued by the Patton Boggs law firm against the ACGIH:

1. A page from the July 22, 2004 issue of "Brick News Online," a publication of the Brick Industry Association (BIA). The article states that "BIA has been asked to help fund litigation to stop a non-profit group [the ACGIH] from establishing a

new, unsupportable limit on employee exposure to respirable silica” and notes that a BIA subcommittee asks “member companies to consider becoming a plaintiff in the litigation. The article goes on to assert that the “effort is being led by Henry Chajet, an attorney at Patton-Boggs (sic), who is soliciting interested companies and industries. Estimated costs for 2004 are \$570,000.”

2. Information I have compiled on two lawsuits pursued by clients of the Patton Boggs law firm against the ACGIH.

Thank you for the opportunity to add these materials to the legislative record.

Yours very truly,

DAVID MICHAELS, PH.D., MPH,  
*Director, the Project on Scientific Knowledge and Public Policy, and Research  
Professor and Acting Chairman.*

### **BIA Members Can Participate in Lawsuit to Bring Some Common Sense to Federal Rulemaking**

*For those interested, here's an opportunity for boosting fairness in OSHA rulemaking*

BIA has been asked to help fund litigation to stop a non-profit group from establishing a new, unsupportable limit on employee exposure to respirable silica. The EH&S health and safety subcommittee discussed this, and asks BIA member companies to consider becoming a plaintiff in legal action seeking to force an injunction against the American Conference of Government Industrial Hygienists (ACGIH) over its substantial role in issuing a new threshold limit value for silica.

ACGIH is a non-government entity heavily relied upon by agencies such as the U.S. Occupational Safety & Health Administration (OSHA) in making critical scientific determinations underlying comprehensive new rules for issues such as silica exposure. ACGIH refuses to abide by standard practices such as adherence to Federal data quality mandates, employ risk assessment, or submit its work to independent peer review. This failure risks putting regulated industries at a substantial disadvantage when new Federal rules are developed.

Nevertheless, ACGIH findings are typically incorporated into regulations issued by OSHA and other agencies. Several years ago ACGIH determined that the permissible exposure limit (PEL) for silica should be cut from the current level of 100 micrograms per cubic meter of air down to 50. More recently, ACGIH expressed interest in further slashing that level to 25 micrograms per cubic meter of air. In all likelihood, implementation of these new levels would have an adverse impact on the brick manufacturing industry. At a time at which many observers believe that ACGIH's practices need to be reigned in, it appears that this litigation effort is a suitable place to start.

The possible next step in this important effort would be the filing of a temporary restraining order against ACGIH.

This effort is being led by Henry Chajet, an attorney at Patton-Boggs, who is soliciting interested companies and industries. Estimated costs for 2004 are \$570,000. Several BIA member companies voiced interest in contributing to the effort. BIA is not in a position to make a financial contribution at this time.

BIA is requesting you consider contributing to this ambitious undertaking at bringing some common sense reform to the development of Federal rules that dramatically impact the costs of manufacturing brick. Companies interested in participating should contact Joseph Casper at (703) 674-1545 / jcasper@bia.org

*Additional information about litigation filed against the American Conference of Governmental Industrial Hygienists (ACGIH) by clients represented by the law firm Patton Boggs*

I am aware of at least two lawsuits filed against the American Conference of Governmental Industrial Hygienists (ACGIH) by clients represented by the law firm Patton Boggs. The following information about these cases was obtained using the Federal Administrative Office of the Courts PACER system.

1. Anchor Glass, et al v. ACGIH; Case No. 5:00-cv-00563-DF; Filed: December 1, 2000 in US District Court Middle District of Georgia.

Plaintiffs: Anchor Glass Container Corporation; FMC Corporation; Solvay Minerals; The General Chemical Group, Inc.; Wyoming Mining Association; OCI Chemical Corporation. Plaintiffs' Counsel: Patton Boggs LLP Harris and James, LLP.

Defendants: American Conference of Governmental Industrial Hygienists; Elaine Chao, Secretary of Labor; Tommy Thompson, Secretary of Health and Human Services (HHS); Alexis Herman, Secretary of Labor (applicable when case was filed in December 2000); Donna Shalala, Secretary of HHS (applicable when case was filed in December 2000).

Defendants' Counsel: US Department of Justice; Hall, Bloch, Garland & Meyer, LLP Jones, Cork & Miller, LLP.

Description of the Case: The records for this case were "sealed" as part of a confidentiality agreement. This makes it particularly difficult for the public to investigate independently the specific claims made against the ACGIH by the Plaintiffs. I have been able to learn the history of the case, including the Plaintiffs' request for a temporary restraining order against the ACGIH, the US Department of Labor (DOL) and the US Department of Health and Human Services (HHS) with respect to a proposed threshold limit value (TLV) for sodium sesquicarbonate (also known as trona.) When the ACGIH (Defendant) agreed not to publish (prior to October 27, 2001) a new TLV for trona, the Plaintiffs withdrew their motion for a temporary restraining order from US District Judge Duross Fitzpatrick's order, dated April 4, 2001.

Less than one month later, the Plaintiffs went back to federal court to file additional complaints against ACGIH, DOL and HHS, including a request for "declaratory and injunctive relief to prevent Defendants from promulgating, adopting, using, publishing, relying upon, or enforcing a TLV for trona \* \* \*" The Plaintiffs made a number of claims against the ACGIH, DOL and HHS; some were dismissed by the Court (e.g., unconstitutional delegation of authority, failure to follow statutory rulemaking procedures) others were allowed (e.g., demonstrating standing, stating a claim.) While discovery was ongoing, the parties decided to settle the case.

2. International Brominated Solvents Assoc, et al v. ACGIH; Case No. 5:04-cv-00394-DF; Filed: November 17, 2004 in US District Court Middle District of Georgia.

Plaintiffs: International Brominated Solvents Association Aerosafe Products, Inc. Plaintiffs' Counsel: Patton Boggs LLP Harris and James, LLP.

Defendants: American Conference of Governmental Industrial Hygienists Elaine Chao, Secretary of Labor; Tommy Thompson, Secretary of Health and Human Services (HHS).

Defendants' Counsel: US Department of Justice; Galland, Kharasch, Greenberg, Fellman & Swirsky Greenberg Traurig; Jones, Cork & Miller, LLP.

Description of the Case: The Plaintiffs filed their original complaint in November 2004, seeking "declaratory and injunctive relief to prohibit the ACGIH \* \* \* from considering, creating, publishing, promulgating, adopting, using, or recommending TLVs" for n-propyl bromide (nPB), copper, silica and diesel particulate matter" and prohibiting DOL and HHS from "allowing their officials and employees to seek, suggest, use, adopt, rely upon, promulgate, or enforce TLVs" for these same substances. The Plaintiffs claimed, among other things, that ACGIH, DOL and HHS violate the Administrative Procedure Act (APA) and the Federal Advisory Committee Act (FACA), do not disclose TLV authors, credentials or conflicts of interest, and act in secret. The Plaintiffs filed a motion for a temporary restraining order to prevent ACGIH from "considering, creating, publishing, promulgating, adopting, using, or recommending a TLV" for these substances. On November 26, 2004, federal district judge Hugh Lawson denied their request.

As the case continued, the Plaintiffs continued to assert that ACGIH, DOL and HHS violated FACA. In March 2005, federal judge Duross Fitzpatrick again dismissed these claims, along with the Plaintiffs' assertion that ACGIH is an agency subject to the Administrative Procedure Act. The Court ruled, however, to allow the Plaintiffs' case to move ahead, with respect to DOL's reference to ACGIH's TLVs and the Plaintiffs' assertion that these remains subject to judicial review under the APA. The judge noted, this ruling "says nothing about whether the federal defendants have acted unlawfully, nor does it otherwise speak to the merits of the APA claim. Rather, it merely constitutes a threshold finding by the Court that Plaintiffs may proceed to discovery on this claim."

Mr. OWENS. We would appreciate that, so provide it for the record. We have a number of cases, and we don't know which one you are referring to. You were referring to factual information, though.

Dr. MICHAELS. Yes.

Mr. OWENS. It was not something that was conjured up for some partisan reason.

I have no further questions at this time, Mr. Chairman.

Chairman NORWOOD. Thank you, Mr. Owens.

Mr. Sarvadi, can you talk about those two cases?

Mr. SARVADI. I can talk about the first of the two cases as having been settled. That was a case that involved the refractory ceramic fibers industry and a couple of other industries. The case in fact was settled by agreement in which the committee, the TLV committee, withdrew, if I remember correctly, the TLVs that were affected on the grounds that they had not done an adequate job of substantiating the positions that they had taken.

The current case, there is one other case that is currently underway. I believe discovery is nearly completed. There have been some preliminary rulings in the case involving ACGIH that have gone in favor of the organization. The case is still very much alive, and turns on the question of whether or not these opinions which in some sense may be seen to disparage products manufactured by various interests, are in fact protected in some way or in fact open the committee and the ACGIH up to legal liability for not having done an adequate job on the science.

So that case still is proceeding. The stage it is at is that I believe they have finished discovery and are in the process right now of deciding what the next step will be.

Chairman NORWOOD. Are those the same two cases that Dr. Michaels just said were lost?

Mr. SARVADI. I believe they are. Those are the only two cases that I know of where the ACGIH was sued by private organizations over the quality of the work or the nature of the TLV.

Chairman NORWOOD. Well, let the record show that, that those cases are not lost.

Dr. MICHAELS. Can you cite the cases? Do you have a citation for the cases?

Mr. SARVADI. No, but I can certainly provide it for the record.

Chairman NORWOOD. Mr. Sarvadi, would you provide us information regarding those two cases for the record?

Mr. SARVADI. Yes, sir. I will.

[The information referred to follows:]

KELLER AND HECKMAN LLP,  
1001 G St. NW,  
Washington, DC, July 12, 2006.

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, Rayburn House Office Building, Washington, DC.*

DEAR CHAIRMAN NORWOOD: Thank you for your letter and kind words. As you requested, I am providing you with information regarding the two lawsuits referenced during the June 14 legislative hearing that concern the standard setting procedures of the American Conference of Governmental Industrial Hygienists ("ACGIH"). In fact, there have been three lawsuits, beginning with the case of Refractory Ceramic Fibers Coalition, et al., v. American Conference of Governmental Industrial Hygienists, Inc., from the United States District Court for the Northern District of Georgia. The other two are Anchor Glass, et al. v. American Conference of Governmental Industrial Hygienists, et al. and International Brominated Solvents Association, et al. v. American Conference of Governmental Industrial Hygienists, et al. The last is still in litigation.

The Refractory Ceramic Fibers Coalition ("RCFC") filed suit against ACGIH in December 2000 based on its concerns about the TLV for refractory ceramic fibers, which suit was settled after a ruling by the judge that the TLVs were an exercise of free speech by the Committee and could not be made subject to prior restraint. However, the judge had not dismissed the underlying claim, based on defamation, against ACGIH, and that led to the settlement. As part of the settlement, ACGIH released a statement to clarify the meaning of its Threshold Limit Value ("TLV")

for refractory ceramic fibers (“RCF”), which speaks to the meaning of its TLVs in general.

A copy of the statement from the ACGIH can be found at <http://www.acgih.org/Resources/press/rcfcrelease.htm>. Overall, the statement emphasizes that ACGIH’s TLVs are not intended for use as legal standards, as relative indices of toxicity, and that they should only be applied by persons trained in the discipline of industrial hygiene. ACGIH also agreed to review new data being prepared by the RCFC. The TLV was withdrawn. The RCFC has a website, [www.rcfc.net](http://www.rcfc.net), but no particular information about the suit was apparent when I checked it out.

The other two cases are also from the United States District Court for the Middle District of Georgia, and are very similar in nature and are being heard by the same judge. The first case, *Anchor Glass, et al. v. American Conference of Governmental Industrial Hygienists, et al.*, was settled between ACGIH when it ceased to be a party to the case on September 21, 2001. The case was dismissed with prejudice on February 7, 2002.

There was significant discovery in the case that supported the conclusion that ACGIH’s TLVs in question were not adequately grounded in the underlying science and were not reviewed. Significantly, ACGIH withdrew the TLV at issue and published a notice stating that there were no health effects to support the TLV. Because the plaintiffs claimed that they had been promised a chance to submit data that were in development before the TLV was to be finalized, but which promise was not fulfilled, ACGIH also stated that its Subcommittee chair for the substance in question had acted improperly. Other provisions of the settlement cannot be disclosed.

The other case, *International Brominated Solvents Association, et al. v. American Conference of Governmental Industrial Hygienists, et al.*, is still active. Discovery was to be completed by June 30, 2006 and dispositive motions are due on July 17. The Plaintiffs filed suit against the Defendants (ACGIH and federal defendants) in November 2004 to prevent the adoption and enforcement of TLVs for four chemical substances: silica, copper, n-propyl bromide, and diesel particulate matter. In essence, the Plaintiffs challenge the way ACGIH adopts TLVs, and further challenge the acts of federal defendants who rely on those TLVs.

The Plaintiffs are seeking declaratory and injunctive relief, as well as damages for anticipated reductions in profits, increased regulatory costs, and increased litigation exposure. They moved for a temporary restraining order to prevent ACGIH from approving the TLVs in question, but that motion was denied. ACGIH filed a motion to dismiss in response to each complaint, which was granted in part and denied in part. The Defendants then filed a Motion for Reconsideration, which was denied. As a result of the Court’s rulings, the Plaintiffs are entitled to proceed with their APA claim against the federal defendants (Elaine Chao, Secretary of the U.S. Department of Labor, and Michael O. Leavitt, Secretary of the U.S. Department of Health and Human Services) and their claim against ACGIH for violations of the Uniform Deceptive Trade Practices Act (“UDTPA”).

The Plaintiffs state four claims: (1) the TLVs in question were adopted by ACGIH and enforced by the federal defendants in violation of federal and state law, so the lawsuit seeks to enjoin their adoption and enforcement; (2) none of the information provided by the public is considered in the decision to adopt a final TLV, even though the ACGIH invites public comment; (3) the TLVs are false and deceptive because they are not supported by credible science; (4) and that undisclosed ACGIH members draft the TLVs in secrecy.

The Plaintiffs’ claim against ACGIH for violations of Georgia’s UDTPA is that ACGIH, by adopting TLVs that were not scientifically justified, engaged in deceptive trade practices. The Plaintiffs’ APA claim against the federal defendants is that they wrongfully relied on and enforced ACGIH’s TLVs because they were a “tainted work product.” It will be interesting to see how this case turns out.

I hope this information answers your questions and provides background on the continuing controversy over the role of the ACGIH in our public regulatory process. As always, should you have any further questions, please do not hesitate to contact me.

Respectfully submitted,

DAVID G. SARVADI,  
*Keller and Heckman LLP.*

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Chairman NORWOOD. Mr. Sarvadi, ACGIH has a disclaimer saying, you know, we have put these out, but don’t worry, we are not responsible or we are not going to take responsibility for them. How can we reconcile that disclaimer with the fact that these

standards are becoming Federal law or Federal regulation? I don't understand that.

Mr. SARVADI. I think that the actual result of the disclaimer was an attempt by the organization to distance itself from the regulatory process. That disclaimer has been around for a long time. Prior to the adoption of the Occupational Safety and Health Act, the TLVs were in fact adopted as legal limits under the Walsh-Healey Public Contracts Act. There were some state organizations that did the same thing.

I think it is important to recognize that the committee did not view and does not view the TLVs as arbitrary safe/unsafe limits; that there is a considerable amount of judgment involved in deciding how to apply the TLVs in the occupational setting. The rest of the disclaimer is that that should be done by professional industrial hygienists who understand the way in which they are derived and the basis.

The problem we have today is not that the TLVs could not be used effectively. The problem is that we don't understand how the TLVs are developed. There are too many examples anymore of TLVs where the underlying scientific work, to just be blunt about it, was shoddy. I have personal experience with one case involving that.

Chairman NORWOOD. Tell me how that affects clients when that happens?

Mr. SARVADI. Well, it affects the clients directly because they have to change their operations. They have to communicate to their customers about the TLV through the MSDS. And they have to encourage their customers to try to comply with the TLV. Now, some will argue that the TLV being out there, even if it is wrong, if it is low, it is not going to cause anybody any harm because employees will be protected.

I think it is important to understand that in any situation where we impose a standard on an employer or a company, it is the employees and the employer who have to pay for those changes that are to come about, and employees get less in the way of wages or benefits or other compensation as a result of having to make that kind of investment.

So we should always make sure in my view that whatever standards we impose are well worth the effort because we are actually making decisions for other people about how they should spend their livelihood and their time. I think that is a decision that they should make, and not us.

Chairman NORWOOD. Well, I agree with you that there have to be standards. There is no question about that. That is not part of what this is all about. However, the standards that we set that affect people's lives positively and negatively, by the way, really need to be done out in the open. That is really all we are talking about here.

We are not even talking about not hearing from the governmental hygienists. We are happy to have their thoughts on the matter, but there is no reason that should become law made by people that are not elected officials and are actually bureaucrats in the Federal Government, without everybody else having an opportunity to have input. My guess is the reason they want to do it in

secret is they think they actually can't get their way in the sunshine. That is my guess.

Are you a member or associate member?

Mr. SARVADI. I am an associate member of the ACGIH, yes. I am not permitted to be a full member because I work for the private sector.

Chairman NORWOOD. But you are an associate member?

Mr. SARVADI. I am.

Chairman NORWOOD. Well, you know, it is hard to hear all of it, but I have heard some really wild stories about how this committee comes together and they take about 7 minutes, "Old Don over here wrote a new standard and he is a good guy, we have known him a long time, he was right on something 2 or 3 years ago, let's just pass it on out." And OSHA picks it up, and all of a sudden we have a new law.

Mr. OWENS. Would the chairman yield?

Chairman NORWOOD. Yes, sir.

Mr. OWENS. Mr. Sarvadi, is there a secret knock and a code word that you have to use to get in?

[Laughter.]

Mr. SARVADI. Being an associate member, Mr. Owens, I am not privy to any of those secrets.

[Laughter.]

Chairman NORWOOD. Dr. Michaels, I read in your testimony that you were saddened and a little embarrassed by a statement I made during our earlier hearing in April. For the benefit of those not in the room that day—and I want to be sure I get it in this record, too—I said that the ACGIH is going to stop writing the laws of this land, and I am going to help them stop doing that if it is the last thing I do on this earth.

I am sort of sorry you feel that way. That is the wrong emphasis, in my view. What you should be embarrassed about is the quality of the science that forms the basis of the ACGIH TLVs. Now, I say that assuming—and I don't want to assume this, but if you in fact are an expert witness, do you actually do the science when you promote a TLV? Or do you just simply take the work of the American governmental hygienists?

Dr. MICHAELS. I don't follow your question. I am not promoting a particular TLV.

Chairman NORWOOD. Well, when you go into court on the side of a plaintiff, you are saying to the judge, "I am the expert." That is what an expert witness is. And when you do that, where do you get your information, to be an expert?

Dr. MICHAELS. If I were to do that, I would actually go back and review the literature.

Chairman NORWOOD. Oh, you go back and review it yourself?

Dr. MICHAELS. Yes.

Chairman NORWOOD. Are you a member of the governmental hygienists?

Dr. MICHAELS. No.

Chairman NORWOOD. But you do buy their books, these things that they put out?

Dr. MICHAELS. Actually, no, and I am not here testifying on their behalf at all. I am testifying on essentially how the regulatory system can use this information.

Chairman NORWOOD. I understand you are not here testifying on their behalf. You are testifying for money. I understand why you are there.

Dr. MICHAELS. I am testifying here.

Chairman NORWOOD. I am sorry?

Dr. MICHAELS. I was referring to testifying here.

Chairman NORWOOD. I am referring to testifying in court as an expert witness. When you go in there and you say, I know for sure this TLV should be whatever, or I am certain that is what it should be, where do you get that information?

Dr. MICHAELS. I review the literature.

Chairman NORWOOD. OK, so you review it yourself. You don't depend on the industrial hygienists' information in these books.

Dr. MICHAELS. I wouldn't, if that is the question. But if I were an industrial hygienist at a workplace, I certainly would rely on them, as a recommendation. I would say, well, this is interesting information and they have reviewed the literature.

I have a suggestion.

Chairman NORWOOD. Yes, go ahead.

Dr. MICHAELS. I have a thought, though, if the question is, "Is the ACGIH good science," why not ask the National Academy of Sciences to review them?

Chairman NORWOOD. If they are finding good science, why don't they put it out in the open?

Dr. MICHAELS. They have a process. What this legislation talks about is—

Chairman NORWOOD. Now, tell me how you know about their process? You have to have a secret knock to get in.

[Laughter.]

Dr. MICHAELS. They are a group that says, we are going to put out a proposal; it will be a proposed. Again I am not an expert in the ACGIH process, but for several years they have sort of a provisional recommendation that they take comments, people send in comments, they meet, and they discuss it.

Chairman NORWOOD. And about 7 minutes per regulation.

Dr. MICHAELS. I have no idea if that is true, but this is not just about ACGIH. It is about the National Toxicology Program. The International Agency for Research on Cancer has totally open meetings. Representatives of the industries involved send people. They discuss it all. The meetings are in public and the vote is taken.

The problem is that if you don't like the ACGIH's science, why not get an independent group to review it? I think that would—should the National Academy of Sciences look at the science?

Chairman NORWOOD. Thank you. Leave the questions up to the chairman, please, sir.

Dr. MICHAELS. OK. What do you think about—

Chairman NORWOOD. Why don't you respond to that, because we have had to correct some of this before.

Mr. SARVADI. Let me clarify one thing about the International Agency for Research on Cancer. In fact, they don't have open meet-

ings. You have to be invited as an observer, if you are allowed into the room when they have the conversations. The process is just as closed and just as dark as the TLV process.

In regard to the TLV process, I can tell you from personal experience, having reviewed a draft documentation, and Dr. Michaels is right about one thing: There is a proposal put out; they develop a draft documentation; and then they ask for comments. We reviewed a draft documentation.

I personally reviewed every reference in the draft, the draft itself, and numerous other references that were related to the chemical in question. The draft documentation that I reviewed had so many factual errors and misrepresentations that it could only have been done by somebody who intended not to tell the whole story.

And so when we filed our comments on the draft documentation, and criticized point by point the deficiencies in the draft, we were not told what happened. We were not congratulated on or thanked for the effort that we put forward. We only found out that the committee had acted on the submission when they withdrew the proposal. That is not the characteristic of an open dialog and debate that allows people with opposing views to come to agreement on what the actual answer is.

I would suggest to you, Mr. Chairman, it is very important for scientists who at least ostensibly in the scientific method, agree to tell the truth, the whole truth, and nothing but the truth, to do it in an open fashion so all of us have the opportunity to see what they are doing. The reason I think that is important, and I am a little bit like Ronald Reagan when it comes to this, the scientists are telling us "trust us." I will trust them, but I want to verify that trust.

Chairman NORWOOD. I have only been up here in this town 12 years, but I know darn well you can buy a study up here saying anything you want it to say. I am positive of that fact.

I yield to Mr. Owens.

Mr. SARVADI. Mr. Chairman, there is one other thing I would like to clarify here.

Chairman NORWOOD. Let me yield to Mr. Owens, and then you follow up.

Mr. OWENS. During your testimony, Mr. Sarvadi, you mention a situation where you read. Do you read Russian?

Mr. SARVADI. No, sir. I indicated that we had had the Russian articles translated by professional translators.

Mr. OWENS. You read a large number of articles.

Mr. SARVADI. I read over 9,000 articles, yes.

Mr. OWENS. And you talked about what kind of time and energy that it took.

Mr. SARVADI. Yes.

Mr. OWENS. Are you saying that that was the personal approach that you took and others scientists don't, are not as thorough?

Mr. SARVADI. No. What I was relating to you was my experience working as a researcher for a company that was under contract with the National Institute for Occupational Safety and Health to produce a review of the open literature on a very large topic. And that was in 1981.

Mr. OWENS. Do your colleagues do the same kind of thorough work, though?

Mr. SARVADI. I am sorry. I didn't catch that.

Mr. OWENS. Are you saying you don't think your colleagues do the same kind of work, as thorough a work?

Mr. SARVADI. No, what I am saying is I have seen specific examples in the ACGIH committee where they have not done that kind of detailed review, where the review has been superficial and inaccurate.

Chairman NORWOOD. I don't have a problem with that. If that is how they want to run their outfit, that is none of my business. My problem with that is that none of us get to look inside of there and what they are doing, and the next thing I know is the law of the land. That is the problem.

I don't understand why anybody here objects to OSHA following, first, the OSH Act, and second, other laws of this country regarding rules and regulations. It has to be an open process. Ever since the last 12 years, it has simply gone away. It is not an open process. It is people seeing how many they can slip in according to what their agenda is.

I see no reason for us to not continue to move forward with this legislation. I look forward to working with anybody who wants to work on it. But this is going to be an open process, so we can have standards that everybody can say, yes, that science is right; most of us agree it is true.

It may cost you some more money, but it is going to save lives. But at least when you spend your money, you know for a fact, I am doing the right thing. Rather than, did somebody with a hood on that I have to have a secret code to get into their room, write that standard that is going to cost us millions and millions. That is what is going on. I fail to see why that is so hard to understand.

At this time, I would like to enter into the record statements from the Independent Lubricant Manufacturers Association and the Association of Builders and Contractors.

Without objection, so ordered.

[The information referred to follows:]

INDEPENDENT LUBRICANT MANUFACTURERS ASSOCIATION,  
400 N. COLUMBUS ST.,  
Alexandria, VA, June 13, 2006.

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, Rayburn House Office Building, Washington, DC.*

DEAR CHAIRMAN NORWOOD: The Independent Lubricant Manufacturers Association ("ILMA") would like to express its appreciation for your introduction last week of H.R. 5554, the "Workplace Safety and Health Transparency Act of 2006." The Association believes that the enactment of your bill is good for both manufacturers and for workers. Accordingly, ILMA is asking its membership to contact their Members of Congress to urge them to co-sponsor H.R. 5554.

ILMA submitted a written statement for the record of the April 27, 2006 hearing before your Subcommittee on Workforce Protections on "Examining the Use of Non-Consensus Standards in Workplace Health and Safety." In our statement, the Association expressed its specific concerns with the Occupational Safety and Health Administration ("OSHA") incorporating by reference into its Hazard Communication Standard (29 CFR 1910.1200) new Threshold Limit Values ("TLVs") adopted in a non-consensus process by the American Conference of Governmental Industrial Hygienists ("ACGIH"). A pending, proposed TLV for mineral oil, if adopted by ACGIH and incorporated by reference by OSHA, would impose significant costs on ILMA members, most of whom are small businesses, and their customers without any in-

creased benefit to workers. As a result, H.R. 5554 is an important step in the right direction.

ILMA appreciates your leadership on this issue, and we look forward to working with you and your staff on H.R. 5554.

CELESTE M. POWERS,  
*CAE Executive Director.*

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### **Prepared Statement of Associated Builders and Contractors**

Associated Builders and Contractors (ABC) appreciates the opportunity to submit the following statement for the official record. We would like to thank Chairman Norwood, Ranking Member Owens and members of the Subcommittee on Workforce Protections for holding today's hearing on "Addressing Concerns about the U.S. Department of Labor's Use of Non-Consensus Standards in Workplace Health and Safety."

ABC is a national trade association representing more than 23,000 merit shop contractors, subcontractors, materials suppliers and construction-related firms within a network of 80 chapters throughout the United States and Guam. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. This philosophy is based on the principles of full and open competition unfettered by the government, nondiscrimination based on labor affiliation, and the award of construction contracts to the lowest responsible bidder through open and competitive bidding. This process assures that taxpayers and consumers will receive the most for their construction dollar.

Jobsite safety and health have long been a top priority for ABC. In order to improve safety in construction, it is imperative that that process be a team effort. Both employer and employee share the responsibility for workplace safety. Today's hearing offers a unique opportunity to examine concerns that have been raised that regulations written without wide participation from the public may not be as effective as ones which seek broader input. In other words, it lacks the critical team effort component.

Because of Occupational Safety and Health Administration's (OSHA) adoption of non-compliance standards, member firms of ABC's are subjected to standards for hazardous material exposure where they have had no opportunity to review its validity, feasibility or cost in the normal rulemaking process. Increased paperwork is only one part of the new rule. Instead, heightened liability for alleged harms based on exposure limits set without a scientific or administrative process hurts the American employer, workplace and employee. Resources are being diverted from workplace safety and health by increased burdens without substantial benefits developed through a rulemaking process.

As you are well aware, your Subcommittee held a hearing in April 2006, which examined the Department of Labor's (DOL), incorporation, by reference to non-compliance standards set by outside standard-setting organizations. During that hearing, a lawsuit which involves the American Conference of Government Industrial Hygienists (ACGIH) was discussed and since that time another action has been brought in Federal Court.

ABC and others filed a petition with the United States Court of Appeals for the District of Columbia Circuit on March 31, 2006, which questioned the final rule promulgated by OSHA, which, through incorporation by reference, amended OSHA's Hazard Communication Standard, upon adoption and publication of the 2006 Threshold Limit Values (TLVs) by the ACGIH.

ACGIH, a non-governmental body, is not bound by, nor does it comply with the Administrative Procedure Act. The TLVs are developed by the standing committee of ACGIH known as the Threshold Limit Values for Chemical Substances Committee. ACGIH explicitly disclaims any intent to be a consensus standards organization that attempts to work through a balancing of bias and interests.

While OSHA may retain the right to adopt industry standards set by consensus, ACGIH's closed process does not meet the requirement for consensus. As stated in the OSH Act, the definition of a national consensus standard is:

"The term national consensus standard means any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provision of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded for diverse views to be considered...."

ABC commends you for holding such hearings to ensure that there is transparency in the rulemaking process with opportunity for public input. We look forward to working with you and this subcommittee as this issue moves forward.

Again, ABC thanks the Chairman, Ranking Member and members of the Subcommittee for the opportunity to present the views of our membership on this important issue.

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Chairman NORWOOD. I want to thank each of the panelists here today for their insightful testimony. We will certainly use what we have learned here today as we work on this issue further. And trust me, we are going to work on this issue further.

If there is no further business, this subcommittee now stands adjourned.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned.]

[Additional materials supplied for the record follow:]

BRICK INDUSTRY ASSOCIATION,  
11490 COMMERCE PARK DRIVE,  
Reston, VA, July 17, 2006.

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, Rayburn House Office Building, Washington, DC.*

DEAR CHAIRMAN NORWOOD: On June 14, 2006, the Brick Industry Association ("BIA") had the privilege of testifying before the Workforce Protections Subcommittee on the impact on our industry of OSHA's use of non-consensus standards in developing workplace health and safety regulations. We are grateful for your leadership on this important issue, and we thank you for providing us with the opportunity to testify.

Our written statement focused on the 2006 non-consensus standard for crystalline silica developed by the American Conference of Governmental Industrial Hygienists' ("ACGIH") Threshold Limits Value ("TLV") Committee—a standard that "utterly fails to take into account the particular conditions of our industry." Statement of Joseph S. Casper, BIA's Vice President, Environment, Health & Safety, at 2. We cited nine peer-reviewed studies, published over the years, which have shown the virtual non-existence of silicosis in brick industry workers. *Id.* at 3. None of these studies appear to have ever been considered by the TLV Committee or the ACGIH in establishing its new non-consensus standard.

The BIA's statement also discussed our newly completed sponsored Study, "The Prevalence of Silicosis in the Brick Industry," which found no x-ray evidence consistent with silicosis in the over 700 brick industry workers studied. *Id.* at 5. We respectfully request that a copy of this important Study (attached) be made a part of the record of the June 14 hearing, along with the curriculum vitae (also attached) of the Study's Principal Investigator, Patrick A. Hessel, Ph.D., an epidemiologist with great experience in occupational and environmental lung diseases, especially silicosis, asbestosis, and lung cancer. Dr. Hessel is in the process of seeking peer review and publication of the Study.

Dr. Hessel's Study is wholly in accord with the nine studies cited in our Statement. Because of the BIA's commitment to the protection of the health and safety of our industry's workforce, however, we are in the process of preparing a best practices silicosis prevention program for the voluntary use of our membership. We expect to launch that program in 2007, and would appreciate the opportunity to discuss it further with you at that time.

Since the June 14 hearing, we have had the opportunity to carefully review the statements of the other witnesses who appeared before the Subcommittee, all of whom offered important perspectives for the consideration of you and your colleagues. We do wish to correct one particular comment in the statement of Professor David Michaels bearing directly on the BIA. Dr. Michaels, in his observations about the work of the International Agency for Research on Cancer ("IARC") in designating crystalline silica as a human carcinogen, stated: "Washington trade groups, like the [BIA], may object to IARC's designation, but representatives of the producers and users of silica were present at the IARC [1997] meeting and their input was heard." First, we wish to note, for the record, that our statement made no mention of IARC. Second, the BIA was not involved with any U.S. industry effort connected with the 1997 IARC meeting. And third, while we have learned that a U.S.

industry representative attended the 1997 IARC meeting as a “scientifically qualified observer,” the role of such observers is quite limited.

Finally, in addition to the comments about OSHA’s “HAZCOM” Standard in Mr. Casper’s statement, we wish to note our concern about the possible misuse of non-consensus standards, like the ACGIH crystalline silica TLV, in OSHA health standard rulemakings. Specifically, BIA is concerned that OSHA may rely too heavily on this TLV in its pending rulemaking considering revision of the permissible exposure limit (“PEL”) for crystalline silica. We think it entirely appropriate, as Assistant Secretary of Labor for Occupational Safety and Health Edwin G. Foulke, Jr. said in his June 14 statement to the Subcommittee, that OSHA should consider “input through a variety of means and sources to produce the most effective standards,” (Foulke Statement at 2) and nothing in H. R. 5554 precludes OSHA from doing so, in our view. We do expect, however, that OSHA will “consider the best and latest available scientific data,” (id.) in its development of any new crystalline silica PEL, including the scientific literature specifically focused on our workforce.

To conclude, Mr. Chairman, for all the reasons addressed in our June 14 Statement, as supplemented and augmented herein, the BIA strongly supports H.R. 5554, the Workplace Safety and Health Transparency Act, because of our concerns about the Department of Labor’s HAZCOM Standard rule automatically incorporating such non-consensus standards as the ACGIH crystalline silica TLV.

While BIA supports the intent of the OSHA HAZCOM Standard, BIA does not agree with OSHA’s treatment of the latest edition of the ACGIH’s TLVs as a source showing that the listed chemicals are hazardous for purposes of hazard communication. Further, BIA finds problematic the requirement that Material Safety Data Sheets must include the current ACGIH TLV for each chemical.

Again, thank you for your leadership on this important issue. Of course, I hope that if your staff has any questions they will not hesitate to contact Mr. Casper at (703) 674-1545 / jcasper@bia.org.

Sincerely,

RICHARD A. JENNISON,  
*President & CEO.*

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[Additional BIA material submitted and placed in permanent archive file, “The Prevalence of Scoliosis in the Brick Industry,” Committee on Education and the Workforce, Patrick A. Hessel, Ph.D., EpiLung Consulting, Inc., Palatine, IL (May 30, 2006).]

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CHAMBER OF COMMERCE OF THE UNITED STATES,  
1615 H ST., NW,  
Washington, DC, June 29, 2006.

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, Rayburn House Office Building, Washington, DC.*

DEAR CHAIRMAN NORWOOD: The U.S. Chamber of Commerce commends you for introducing the Workplace Safety and Health Transparency Act (H.R. 5554) that would insure OSHA can only incorporate by reference, or otherwise rely upon, standards produced by an organization meeting all the requirements of a consensus organization as specified in the OSH Act.<sup>1</sup> This correction is long overdue.

The U.S. Chamber of Commerce represents over three million members in every sector of the economy and in all sizes. Our members are directly impacted by OSHA’s regulations and are concerned about OSHA’s incorporating by reference standards produced by organizations that claim to use a consensus process, or are deemed to be consensus organizations.<sup>2</sup> The heart of our democratic process and the American government system is transparency and an open process where those affected by the government action have an opportunity to participate and shape the outcome. When OSHA incorporates a standard by reference, or otherwise relies on standards that were produced without adequate input from those affected by them, this fundamental right to a transparent and participatory process is lost.

<sup>1</sup> See 29 U.S.C. 652(9), definition of “national consensus standard.”

<sup>2</sup> See 29 CFR 1910.1200(d)(3)(i), describing the American Conference of Governmental Industrial Hygienists’ list of Threshold Limit Values (TLVs) as evidence that a chemical substance is hazardous.

The Workplace Safety and Health Transparency Act would go a long way towards arresting OSHA's ability to incorporate standards produced without an adequate consensus process by reference. The bil requires the Secretary of Labor to make an affirmative finding that the organization producing the standard has met the definition of a consensus organization already established at section 3(9) of the OSH Act. Your bil would then make this finding a final agency action and thus subject to judicial review under the Administrative Procedure Act. Essentially, this act merely says that Congress was serious when it enacted the definition for a consensus organization and limited

OSHA's use of consensus standards to those produced by organizations that met this definition.

Equally important, your bil does not in any way alter or disturb current rule-making requirements. This means that OSHA will not be able to revert to the provisions of section 6(a)<sup>3</sup> to issue consensus standards as regulations. Only if they provide the protections of full notice and comment rulemaking, as specified in the OSH Act and the Administrative Procedure Act (as amended by the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act) would OSHA be able to use a consensus standard as the basis for a rulemaking.

While Senator Enzi has introduced similar language in his bil, the Occupational Safety Fairness Act, S. 2066, your bil would go farther by applying the same standard to state plans under review by OSHA. We believe this is an important step as some states have been known to adopt consensus standards without any opportunity for public comments. Similarly, applying this standard to the Mine Safety and Health Administration is entirely appropriate and insures that there is consistency between these two safety agencies.

Finally, we want to be clear that our support for this bil is not a matter of employers seeking de-regulation of workplace safety. Employers fully appreciate the need to provide adequate protection and remedial measures. Regulations specifying these measures must be subject to public scrutiny and rigorous examination, and the regulations must meet the requirements of being technologically and economically feasible. We object to safety regulations that are supported by data and science which have not been tested by exposure to the public and subject to comments by those affected by the standard or regulation. This also means that trying to pass off collective group think-where colleagues share the same view-as peer review is not an acceptable safeguard. Only the transparency of an open rulemaking, with the protections of judicial review for inadequate support of a regulatory action will suffice.

We look forward to working with you to advance this important piece of legislation.

Sincerely,

RANDEL K. JOHNSON,  
*Vice President, Labor, Immigration & Employee Benefits.*  
MARC FREEDMAN,  
*Director, Labor Law Policy.*

PATTON BOGGS LLP,  
2550 M ST., NW,  
*Washington, DC, June 20, 2006.*

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, Rayburn House Office Building, Washington, DC.*

DEAR CHAIRMAN NORWOOD: We respectfully submit this letter for the record of the recent legislative hearing on HR 5554 on behalf of The Mining Awareness Resource Group (MARG). MARG strongly supports HR 5554 and extends its thanks and gratitude to you for your leadership in this important public policy matter.

MARG is an informal coalition of mining companies in the United States that receives support from time to time from major trade associations and other interested companies. MARG members operate metal and mineral (non coal) mines and/or related facilities in Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, New Mexico, Ohio, Pennsylvania, Texas, and other states. MARG members support sound standards that protect the environment and employees; but MARG opposes scientifically invalid, non-consensus standards, supported and used by the U.S. Department of Labor (OSHA and MSHA) and the Department of Health and Human Services (NIOSH and ME).

<sup>3</sup> See 29 U.S.C. 655(a) allowing OSHA to adopt national consensus standards within a two year period of the date of enactment of the OSH Act.

As you correctly pointed out, non-consensus standards are developed in closed meetings, by unknown authors (including agency employees and their academic grant recipients) and become the basis of OSHA and MSHA regulations (e.g. MSHA and OSHA's current silica rulemaking and MSHA's diesel exhaust standard). The OSHA Hazard Communication Rule mandates that the latest edition of the ACGIH TLVs—a non-consensus group by their own admission—be listed on Material Safety Data Sheets. Similarly, the MSHA Haz Com Rule mandates that the 2001 ACGIH TLVs define whether a chemical is hazardous.

These hundreds of recent ACGIH MV were adopted by reference by OSHA and MSHA, without mandated rulemaking proceedings to examine their validity. Moreover, a number of DOL and I II IS agency personnel served on the ACGIH Board of Directors or Committees and adopted or authored the recent TLVs, permitting conflicts of interest and bias to impact government rules without public disclosure.

Non-consensus standards, like the ACGIH TLV, are scientifically suspect since the qualifications of their authors, and even their identity is kept secret, and they are not subjected to independent, outside expert peer review, like true scientific work products. These non-consensus standards not only cause harm to impacted industries through agency actions, but they also are used in tort litigation as alleged standards of care that have government support.

MARG members were vindicated when a non-consensus standard (the ACGIH TLV(r) for trona) was withdrawn by ACGIH in a public apology, following the favorable settlement of a lawsuit against ACGIH and DOL, in 2001 whereby ACGIH admitted that there were no health effects supporting the TLV, and that misconduct by its agent had occurred. Yet, adversely impacted parties should not be forced to litigate against these government supported and sanctioned non-consensus standard setting groups, and we believe that HR 5554 provides the needed sunshine on government actions to prevent future abuses.

We urge passage of HR 5554, and again thank you for your leadership. Sincerely,  
HENRY CHAJET,  
*Counsel to MARG.*

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NATIONAL MINING ASSOCIATION,  
101 CONSTITUTION AVE., NW,  
Washington, DC, June 21, 2006.

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, Rayburn House Office Building, Washington, DC.*

DEAR CHAIRMAN NORWOOD: On behalf of the members of the National Mining Association (NMA), I am writing to express our strong support for the Workplace Safety and Health Transparency Act (H.R. 5554) which you recently introduced.

This legislation will address inequities in the standard setting process used by the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) which result in the implementation of occupational exposure limits that have not been subjected to the normal notice and comment provisions required by law. Moreover, it will prevent those charged with implementing our nation's safety and health laws from delegating their regulatory responsibilities to non-governmental standard setting organizations that are not subject to Congressional oversight and accountability.

NMA has a long and tortuous history with one such organization, the American Conference of Governmental Industrial Hygienists (ACGIH). The ACGIH, whose voting members are government officials and representatives of academia, has adopted occupational exposure limits recommended and drafted by agency regulatory officials who use the ACGIH as a back-door regulatory forum devoid of notice and comment protection. This practice cannot be permitted to continue and we are pleased to voice our support for your bill that, among other things, will end this abusive practice.

Sincerely yours,

KRAIG R. NAASZ,  
*President & CEO.*

NATIONAL STONE, SAND & GRAVEL ASSOCIATION,  
1605 KING ST.,  
Alexandria, VA, June 30, 2006.

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the  
Workforce, Rayburn House Office Building, Washington, DC.*

DEAR CHAIRMAN NORWOOD: Worker safety is a top priority of the National Stone, Sand and Gravel Association (NSSGA), as evidenced by the association's formal alliance with the Mine Safety Health Administration to further extend its commitment to preventing fatalities, injuries and illnesses in America's mines. To this end, NSSGA endorses the Workplace Safety and Health Transparency Act (H.R. 5554), and welcomes your effort to promote worker safety in an open and formal process. NSSGA believes that this important legislation will help ensure all relevant opinions and data are openly considered when worker safety measures are promulgated.

At the April 27, 2006, hearing in the Workforce Protections Subcommittee titled "Examining the Use of Non-Consensus Standards in Workplace Health and Safety," an NSSGA member company testified about the concerns of the industry with the Occupational Safety and Health Administration and Mine Safety and Health Administration incorporating non-consensus standard Threshold Limit Values (TLVs) by reference, completely bypassing the normal regulatory process. The fact that the American Conference of Governmental Industrial Hygienists (ACGIH) develops TLVs outside of the normal regulatory process, leads to questions of fairness and whether or not all relevant data and opinions are considered when these important worker safety measures are composed. For all its faults at least the normal regulatory process solicits input both written and oral from the regulated community, academia and any other interested parties; requires government commentary on significant comments/data in rulemaking decisions; and operates more openly in the sunshine, is the better method to guarantee all points of view and all relevant data are incorporated in the effort to ensure that final regulations are based on sound science and are technically and economically feasible.

As the largest mining association by product volume in the world, NSSGA's member companies produce 90 percent of the crushed stone and more than 70 percent of the sand and gravel consumed annually in the U.S. Aggregates are the largest component of asphalt and concrete. Nearly three billion metric tons of aggregates valued at over \$17.4 billion are estimated by the U.S Geological Survey to have been sold in the U.S. in 2005. Without these important natural products, the nation's infrastructure could not be built or maintained, and commerce and quality of life would be severely reduced.

NSSGA supports voluntary consensus standards and the openness provided by the regulatory process. H.R. 5554 will ensure worker safety regulations are promulgated in an open and transparent process. For this reason NSSGA and its members proudly endorse the Workplace Safety and Health Transparency Act and thank you for your efforts to improve the process—to the benefit of employees and employers alike.

Sincerely,

JENNIFER JOY WILSON,  
*President & CEO.*

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THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,  
2300 WILSON BOULEVARD,  
Arlington, VA, June 21, 2006.

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the  
Workforce, Rayburn House Office Building, Washington, DC.*

DEAR CHAIRMAN NORWOOD: On behalf of the Associated General Contractors of America (AGC), I would like to express our appreciation for the introduction of H.R. 5554, the Workplace Safety and Health Transparency Act. This legislation and the hearings you have held on this subject matter are bringing much needed attention to this important issue.

The safety and health of workers across the nation on construction worksites is an AGC priority. The importance of educating the industry and public on safety and health issues within the construction industry has been a staple of AGC. Open discussion and debate of various topics is part of this educational process. The American Conference of Government Industrial Hygienists (ACGIH) does not facilitate the openness and transparency in their development of Threshold Limit Values

(TLVs). The Occupational Safety and Health Administration's (OSHA) adoption of such TLVs poses great concern among AGC members as these TLVs are not developed in an unbiased process and does not take into consideration all interested parties. Many small businesses are severely affected by the adoption of extreme non-consensus standards. The significant cost associated with implementing such TLVs creates hardship on AGC members with little consensus on the impact of TLVs on construction worker safety and health.

OSHA's adoption of standards developed by consensus groups are acceptable and appropriate for the industry, if standards are developed by groups with open communication with the public and with transparency in compliance with the Administrative Procedure Act. The definition of a national consensus standard under the Occupational Safety and Health Act, says that any occupational safety and health standard or modification thereof was formulated in a manner which affords for diverse views and that interested persons affected by the standard have reached agreement on its adoption. ACGIH does not meet the terms of this definition and OSHA needs to address the inconsistency they have caused by incorporating by reference ACGIH standards and other non-consensus standards.

It should be noted that AGC fully supports the inclusion of consensus standards from consensus groups such as the American National Standards Institute (ANSI) where there is open communication and discussion of various topics and issues.

AGC represents more than 32,000 firms, including 7,000 of America's leading general contractors, and over 11,000 specialty-contracting firms. More than 13,000 service providers and suppliers are associated with AGC through a nationwide network of chapters.

We appreciate your leadership on this and other OSHA issues. We look forward to working with you and your staff on the Workplace Safety and Transparency Act.

Sincerely,

KELLY KRAUSER KNOTT,  
*Director, Government Relations.*

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MASONRY CONTRACTORS ASSOCIATION OF AMERICA,  
33 S. ROSELLE ROAD,  
*Schaumburg, IL, June 19, 2006.*

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, Rayburn House Office Building, Washington, DC.*

DEAR CHAIRMAN NORWOOD: On behalf of the members of the Mason Contractors Association of America (MCAA) we would like to express our sincere appreciation for the introduction of H.R. 5554, the "Workplace Safety and Health Transparency Act of 2006." MCAA strongly believes that enactment of your bill would benefit our member companies as well as the individuals they employ.

MCAA is extremely concerned that the Occupational Safety and Health Administration (OSHA) incorporates, by reference, into regulations, standards which have been adopted by the American Conference of Governmental Industrial Hygienists (ACGIH), which are non-consensus standards. As you well know our members are subjected to standards for hazardous material exposure where they have had no opportunity to review the validity of the standard or its feasibility and cost, which would be part of the normal rulemaking process.

Jobsite safety and health have long been and remain a top priority for MCAA. We commend you for your efforts to address the concerns regarding the "Department of Labor's Use of Non-Consensus Standards in Workplace Health and Safety." In addition, we again express our support for your efforts to insure that policy is based on sound science and a transparent process.

Thank you for your time and consideration in this matter of mutual interest and we look forward to our continued work together.

Sincerely,

JESSICA JOHNSON BENNETT,  
*Director of Government Affairs.*

ASSOCIATION OF OCCUPATIONAL AND ENVIRONMENTAL CLINICS,  
1010 VERMONT AVE., NW,  
Washington, DC.

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the  
Workforce, Rayburn House Office Building, Washington, DC.*

*RE: Bill to amend the Occupational Safety and Health Act of 1970 and the Federal  
Mine Safety and Health Act of 1977 to prohibit the promulgation of safety and  
health standards that do not meet certain requirements for national consensus  
standards.*

The Association of Occupational and Environmental Clinics is a non-profit membership organization established in 1987. We represent over 60 occupational medicine clinics including more than 80% of the occupational medicine training programs for physicians. Our members are a multidisciplinary group of physicians, nurses, industrial hygienists and other occupations concerned with occupational and environmental health. Our focus in occupational and environmental health is on the prevention of illness and injuries.

We are concerned about the potential for unintended consequences of the Bill referenced above, which we understand has been introduced by Representative Norwood. While we agree that workplace health and safety standards should be "formulated in a manner which has afforded an opportunity for diverse views to be considered;" we are concerned that OSHA and MSHA will be prohibited from even referencing "any finding, guideline, standard, limit, ..." unless it meets all of the requirements outlined in the draft legislation. We are particularly concerned over requirement 1 which requires "that persons interested and affected by the scope or provisions of the standard have reached a substantial agreement on its adoption." This effectively precludes OSHA or MSHA from referencing any information that does not have 100% agreement amongst all stakeholders, which would allow any small entity to exercise veto power over health and safety standards through claims of a "lack of consensus."

While we understand the rationale for complete open review of exposure levels for enforcement purposes, not allowing OSHA or MSHA to include information from well established, peer-reviewed sources, such as the threshold limit values (TLV) from the American Conference of Governmental Industrial Hygienists, has the potential to harm many workers. The TLVs provide a science-based benchmark for clinicians to assess the association between exposure levels and hazards to workers' health. The TLVs are widely accepted in the medical and public health community as guidance for clinical evaluation. While occupational physicians will continue to have ready access to this information, most ill and injured workers are seen by their primary care physicians. Many times primary care physicians evaluating a potentially hazardous exposure must use material safety data sheets (MSDS) as their only source of information about possible health effects of exposures. These sheets are required to include recommended exposure limits and potential health hazards provided not only from ACGIH but also the National Toxicology Program (NTP) and the International Agency for Research on Cancer (IARC). Information on the MSDS is not only used for worker exposures but also for exposures to community members including children.

OSHA already has a standard-setting procedure that takes into account the nature and weight of evidence for health hazards as well as the feasibility and burden-to-benefit ratio of implementation. While the ideal situation would be for OSHA to establish safe exposure levels for all potentially harmful workplace exposures, the reality is that OSHA has issued fewer than thirty such standards in the past thirty years. Given the thousands of potentially harmful exposures in the workplace, it is neither practical nor advantageous to worker health and safety to wait for 100% consensus.

Most importantly to clinicians, this amendment would curtail information on the MSDS regarding potential health effects. This information is important to accurate clinical diagnosis and patient care. We appreciate your attention to this matter and strongly urge you to re-evaluate the potential consequences of this bill.

KATHERINE H. KIRKLAND, MPH,  
*Executive Director.*

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**Prepared Statement of Brush Wellman Inc.**

Brush Wellman appreciates the opportunity to submit comments and information pertinent to the deliberations of the Subcommittee on Workforce Protections regard-

ing its concerns about the U.S. Department of Labor's use of non-consensus standards in workplace health and safety. Brush Wellman is the leading international supplier of high performance engineered materials containing beryllium and is headquartered in Cleveland, Ohio. It is the only fully integrated supplier of beryllium, beryllium alloys and beryllia ceramic in the world.

Since its founding in 1931, Brush Wellman has concentrated its operations and skills on advancing the unique performance capabilities and applications of beryllium-based materials. As a world leader in beryllium production and technology, Brush Wellman strives to remain a leader in medical knowledge of beryllium and in the environmental, health and safety aspects of using beryllium-containing materials.

We wish to commend the Subcommittee for its work in investigating how select non-governmental organizations and internal government agency scientific committees may directly or indirectly influence legislation and regulations in a manner which does not allow all scientific findings or expert opinions to be fairly considered and heard on a level field of play. Brush Wellman has first hand experience in submitting credible scientific research to such groups. Sometimes we get a fair hearing with our comments being considered and incorporated based on their technical merits. Unfortunately, our comments are often viewed simply as an industry submission not worthy of consideration. Quite frankly, such responses are unfair with industry being held to a different level of scientific scrutiny than those from academia or government agencies who tend to get a free pass on their research motivations regardless of the size of their financial grants or their personal or professional gains.

As a result, Brush Wellman strives to meet a higher standard of scientific achievement through the quality of its research and its research partnerships with government agencies such as NIOSH. For these partnerships to be successful, perceptions and opinions must be cast aside and good science must prevail. Our research partnership with NIOSH, to advance the knowledge of beryllium health and safety, is now in its ninth year. One very key benefit of this work has been Brush Wellman's ability to move the research findings to the shop floor to improve safe work practices at a rapid pace. In fact, the NIOSH/Brush Wellman relationship was reviewed in detail by the NIOSH Board of Scientific Councilors, in part to ensure that industry was not unduly influencing NIOSH researchers. The Board found no such conflicts and stated that:

"The subcommittee was impressed with the current NIOSH research program on beryllium, both in terms of the scientific quality of the work and the progress made to date. The cooperative and close interaction with Brush Wellman has also been beneficial to the quality and achievements of this research."

and,

"The NIOSH beryllium research program includes a high degree of collaboration with Brush Wellman Inc. In many respects, the level and degree of collaboration offers a model for similar work with industry groups."

Brush Wellman is currently in discussions with NIOSH to extend its research partnership into other areas such as how best to communicate the lessons learned from our joint research to users of beryllium-containing materials downstream of the primary beryllium industry.

In reviewing the comments of those who provided direct testimony to the Subcommittee on Workforce Protections, Brush Wellman has identified misleading statements and errors of fact that we wish to bring to the attention of the Subcommittee.

The statement by Congressman Major Owens regarding his description of beryllium as an example of a "powerful carcinogen" inappropriately overstates the potential carcinogenic risk of exposure to beryllium.

Even if one were to accept the relative risks for cancer used to establish beryllium as a carcinogen, the risk values for beryllium remain the lowest ever used to so designate a human carcinogen.<sup>1</sup> It is also clear that beryllium exposure does not pose a cancer risk today. Studies conducted on worker populations have found no excess cancer risk in facilities operated after the 1950s when inhalation exposures were typically 10 to 1000 times lower than that experienced in pre-1950 facilities. Scientific organizations have addressed this finding by stating that any association which may exist between beryllium and cancer is only at the extremely high levels of airborne beryllium particulate exposure which existed at facilities operating before the 1950s.<sup>2,3</sup>

Whether beryllium should even be listed as a carcinogen remains a serious question in scientific circles. In the most current study regarding the potential for beryllium to cause lung cancer,<sup>4</sup> Dr. Paul S. Levy concluded:

"There is no statistical association between beryllium exposure in these workers and lung cancer when using the most appropriate population cancer rates."

The Levy study, which was published in 2002, reanalyzes the data and conclusions of the 1992 study by Ward<sup>5</sup> which has been used to support cancer classifications for beryllium by organizations such as IARC and the NTP.

The Levy study establishes that there is no statistical association between beryllium exposure and lung cancer. In addition, a 2004 study by the U.S. Department of Energy<sup>6</sup> concludes that:

“No associations were found between lung cancer mortality and cumulative external penetrating radiation dose or cumulative exposures to asbestos, beryllium, hexavalent chromium, or nickel.”

The reports from the organizations that have classified beryllium as a carcinogen show that they have not yet considered the Levy or DOE study in their evaluation of beryllium. The scientific evidence provided by the Levy and DOE studies warrants a review of the carcinogenicity classification for beryllium.

The carcinogenicity of beryllium has been and will continue to be debated in the scientific and regulatory community. Although unconvinced of the validity of a causal relationship between beryllium exposure and lung cancer, Brush Wellman has for years included information on the cancer classification of beryllium in its product Material Safety Data Sheets and warning labels.

The testimony of Dr. Michaels to the Subcommittee contains misleading statements and errors of fact which require clarification. Dr. Michaels made the following statement to Congress.

“OSHA’s current beryllium exposure standard dates to 1949. Fifty years later, when I was Assistant Secretary of Energy, we issued a workplace exposure standard for beryllium that is ten times stronger than OSHA’s. After much initial opposition, even the beryllium industry now acknowledges the current OSHA standard is inadequate. The bill being considered today would prohibit OSHA from referencing the ACGIH’s recommendations on beryllium, or IARC’s findings that beryllium is a human carcinogen.”

The DOE did not issue a workplace exposure standard 10 times lower than the OSHA beryllium standard. The DOE rule uses the current Occupational Safety and Health Administration health standard of  $ug/m^3$  as its legal exposure level to protect workers. The DOE did issue a 10-fold lower “action level”. The DOE “action level” for beryllium prompts the use of control measures such as personal protective equipment, air monitoring and warning signs. The DOE final rule contains the following statement.

“DOE has decided that the most prudent course is to lower the action level to 0.2  $ug/m^3$  rather than set a new exposure limit.”

The DOE rule did not identify a new PEL for beryllium. In addition, the DOE would not automatically accept a new ACGIH beryllium TLV as its new beryllium exposure limit without reopening the rulemaking process in a manner subject to public review. The DOE rule states:

“The incorporation of any new ACGIH TLV in this rule would require that DOE conduct a rulemaking on the specific exposure level and present the scientific basis for public comment. As stated previously in this SUPPLEMENTARY INFORMATION section, DOE believes, based on the existing scientific evidence, that such a rulemaking is premature.”

Even today, the ACGIH has not adopted a new TLV for beryllium and, in fact, has proposed three different values for a new beryllium TLV over the past 8 years. The current ACGIH TLV for beryllium still remains the same as the current OSHA PEL for beryllium.

Dr. Michaels went on to say “After much initial opposition, even the beryllium industry now acknowledges the current OSHA standard is inadequate.” This statement is not accurate. What Brush Wellman objected to regarding the DOE’s consideration of a lower PEL was that there was not yet a good scientific basis to set a new standard for beryllium exposure. Based on research studies conducted by Brush Wellman in cooperation with the National Jewish Medical Center, Brush Wellman issued a written letter in August of 1996 advising all of its customers that:

“Brush Wellman continues to recognize this standard [OSHA 2 microgram PEL]. At the same time, it remains the best practice to maintain concentrations of all atmospheric contaminants as low as feasible, and continue to work to improve exposure control practices and procedures. At this time, it is uncertain whether persons exposed only below the standard can become sensitized to beryllium or develop clinical signs or symptoms of CBD.”

Brush Wellman made this statement regarding the uncertainties of the current standard three years before the DOE issued its beryllium rule.

Regarding Brush Wellman’s position on the current OSHA standard, we have publicly stated the following to all of our customers.

“Research findings<sup>7</sup> suggest that a high level of compliance with the current Occupational Safety and Health Administration (OSHA) Permissible Exposure Limit (PEL) of 2  $\mu\text{g}/\text{m}^3$  can prevent clinical CBD.<sup>8,9,10</sup> Recent research findings<sup>11</sup> indicate that individuals at operations with exposures that rarely exceed 0.2  $\mu\text{g}/\text{m}^3$  did not experience sensitization<sup>12,13,14</sup> or sub-clinical CBD.<sup>15,16</sup>

The 2001 Department of Energy (DOE) study by Johnson<sup>3</sup> reviewed and analyzed the results of the beryllium monitoring program at the Atomic Weapons Establishment beryllium facility in Cardiff Wales. The Cardiff study analyzes the single most extensive historical database of personal exposure monitoring data within the beryllium industry. A notable feature of the program was that it included personal exposure monitoring on every worker for every day worked. More than 200,000 personal samples were collected between 1981 and 1997. Based on these extensive sampling data, the Cardiff facility achieved compliance with the current beryllium standard 98 percent of the time. Since its inception, the Cardiff facility maintained a state-of-the-art exposure management program which included strict and consistent use of engineering controls, work practices, housekeeping, process containment, migration controls and the use of personal protective equipment. The Cardiff program resulted in one case of clinical CBD over 36 years of operation. Johnson concluded that the Cardiff experience “\* \* \* appears to have successfully prevented the incidence of clinical CBD with the exception of one unique case.”

The final results from the National Institute for Occupational Safety and Health (NIOSH)/Brush Wellman 2000 study<sup>7</sup> of the Brush Wellman Reading, Pennsylvania facility have shown that sensitization and sub-clinical CBD can occur when airborne beryllium levels have been mainly below the OSHA PEL of 2  $\mu\text{g}/\text{m}^3$ . The results also show that workers in operations which rarely exceeded 0.2  $\mu\text{g}/\text{m}^3$  had no sensitization or sub-clinical CBD. This facility processes alloys containing 0.1% to 2.0% beryllium and manufactures thin gauge strip and wire products using a variety of processes including rolling, drawing, pickling, annealing, heat treating, degreasing and welding.

Although the Cardiff study suggests that a high level of compliance with the 2  $\mu\text{g}/\text{m}^3$  standard may prevent clinical CBD, the results from the Reading study, along with uncertainties of particle size,<sup>17,18</sup> chemical form<sup>19</sup> and process related risks,<sup>20</sup> support taking a more conservative approach. As a result, Brush Wellman has adopted an action level for airborne beryllium of 0.2  $\mu\text{g}/\text{m}^3$  as an 8-hour time weighted average. Brush Wellman utilizes good work practices, engineering controls, and respiratory protection in its efforts to maintain worker exposures below 0.2  $\mu\text{g}/\text{m}^3$ . ”

In closing, the absence of a general understanding of the difference between sub-clinical and clinical CBD, the lack of understanding that all beryllium disease is not symptomatic, and widespread misunderstandings associated with the beryllium blood test have all been used to distort the perception of health effects of occupational exposure to beryllium. Beryllium health and safety represents a complex medical issue that can be easily misunderstood even by the most thoughtful person. Unfortunately, it is also all too often manipulated by non-altruistic critics to the disservice of the thousands of men and women that the industry employs and to the discredit of the incredible range of benefits its products bring to society. Beryllium and beryllium-containing materials are making the world a better, more connected and safer place. You'll find them at work helping to ensure our national defense and homeland security, and saving lives in airbag sensors, fire control sprinkler heads, mammography x-ray equipment and medical lasers.

#### ENDNOTES

<sup>1</sup>Comments of Dimitrios Trichopoulos, MD The Alleged Human Carcinogenicity of Beryllium Submitted to the National Toxicology Program June, 1999.

<sup>2</sup>American Conference of Governmental Industrial Hygienists. Beryllium and Compounds, Documentation of Threshold Limit Values (1997).

<sup>3</sup>International Agency for Research on Cancer. Beryllium, cadmium, mercury and exposures in the glass manufacturing industry. IARC Monographs on the Evaluation of the Carcinogenic Risks to Humans 58:41-117 (1993).

<sup>4</sup>Levy P., Roth H., Hwang P., Powers T. Beryllium and Lung Cancer: A Reanalysis of a NIOSH Cohort Mortality Study. Inhalation Toxicology 14:1003-1015 (2002).

<sup>5</sup>Ward, E., et al. A Mortality Study of Workers at Seven Beryllium Processing Plants. Am J Ind Med 22: 885-904 (1992).

<sup>6</sup>Brown S.C., et al. Lung Cancer and Internal Lung Doses among Plutonium Workers at the Rocky Flats Plant: A Case-Control Study. Am J Epidemiol 160(2): 163-172 (2004).

<sup>7</sup>Johnson J., et al. Beryllium Exposure Control Program at the Cardiff Atomic Weapons Establishment in the United Kingdom. Appl Occup Environ Hyg 16(5): 619-630 (2001).

<sup>8</sup>Clinical CBD is defined as symptomatic lung disease with abnormal chest x-ray or lung function test.

<sup>9</sup>Hardy H.L., Tabershaw I.R. Delayed Chemical Pneumonitis Occurring in Workers Exposed to Beryllium Compounds. *J Indus Hyg Toxicol* 28: 197 (1946).

<sup>10</sup>Kriebel D., Brain J.D., Sprince N.L., et al. The Pulmonary Toxicity of Beryllium. *Am Rev Respir Dis* 137(2): 464-473 (1988).

<sup>11</sup>Schuler, C., et al. Process-Related Risk of Beryllium Sensitization and Disease in a Copper-Beryllium Alloy Facility. *Am J Ind Med* (In Press)

<sup>12</sup>Sensitized is defined as confirmed beryllium positive blood lymphocyte proliferation test or beryllium positive broncho-alveolar lavage lymphocyte proliferation test without granuloma upon lung biopsy.

<sup>13</sup>Maier L.A. Beryllium Health Effects in the Era of the Beryllium Lymphocyte Proliferation Test. *Appl Occup Environ Hyg* 16(5): 514-520 (2001).

<sup>14</sup>Stokes R.F., Rossman, M.D. Blood cell proliferation response to beryllium: analysis by receiver operating characteristics. *J Occup Med* 33: 23-28 (1991).

<sup>15</sup>Sub-clinical CBD is defined as beryllium sensitization plus granuloma upon lung biopsy with normal chest X-ray and lung function test.

<sup>16</sup>Kreiss K., Newman L., Mroz M., Campbell P. Screening Blood Test Identifies Subclinical Beryllium Disease. *J Occup Med* 31(7): 603-608 (1989).

<sup>17</sup>Kent M., Robins T., Madl A. Is Total Mass or Mass of Alveolar-Deposited Airborne Particles of Beryllium a Better Predictor of the Prevalence of Disease? A Preliminary Study of a Beryllium Processing Facility. *Appl Occup Environ Hyg* 16(5): 539-558 (2001).

<sup>18</sup>McCawley M. et al. Ultrafine Beryllium Number Concentration as a Possible Metric for Chronic Beryllium Disease Risk. *Appl Occup Environ Hyg* 16(5): 631-638 (2001).

<sup>19</sup>Deubner D., et al. Beryllium Sensitization, Chronic Beryllium Disease, and Exposures at a Beryllium Mining and Extraction Facility. *Appl Occup Environ Hyg* 16(5): 579-592 (2001).

<sup>20</sup>Kreiss K., Mroz M., Zhen B., Wiedemann H., Barna B. Risks of beryllium disease related to work processes at a metal, alloy, and oxide production plant. *Occ. and Env. Medicine* 54: 605-612 (1997).

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INDUSTRIAL MINERALS ASSOCIATION,  
PENNSYLVANIA AVE., NW,  
Washington, DC, June 19, 2006.

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, Rayburn House Office Building, Washington, DC.*

DEAR CHAIRMAN NORWOOD: The Industrial Minerals Association—North America (IMA-NA) wishes to express its appreciation for your introduction on H.R. 5554, the “Workplace Safety and Health Transparency Act of 2006.” IMA-NA member companies operating in the United States are impacted by both the Occupational Safety and Health Administration’s (OSHA) and the Mine Safety and Health Administration’s (MSHA) Hazard Communication Standards (HCSs). IMA-NA shares your concern about the Department of Labor’s practice of incorporating by reference non-consensus standards set by outside standard-setting organizations without the benefit of notice and comment rulemaking required by the organic statutes establishing these agencies. IMA-NA supports H.R. 5554 and is asking its membership to contact their Members of Congress to urge them to cosponsor this legislation.

IMA-NA has a number of concerns relative to the Department of Labor’s reliance, particularly by OSHA, on independent organizations, such as the American Conference of Governmental Industrial Hygienists (ACGIH), as authoritative bodies in its HCSs. Your June 14, 2006 subcommittee hearing on “Addressing Concerns about the U.S. Department of Labor’s use of Non-Consensus Standards in Workplace Health and Safety” helped prompt IMA-NA to pen a letter to Assistant Secretary of Labor Edwin Foulke illustrating our concerns. A copy of that letter is enclosed and we respectfully request that it be introduced into the hearing record.

In closing, IMA-NA appreciates your leadership on this issue and we look forward to working with you and your colleagues on securing the passage of H.R. 5554.

Sincerely,

MARK G. ELLIS,  
*President.*

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INDUSTRIAL MINERALS ASSOCIATION,  
PENNSYLVANIA AVE., NW,  
Washington, DC, June 19, 2006.

The Honorable Edwin G. Foulke, Jr.,  
*Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC.*

*Re: OSHA Hazard Communication Standard*

DEAR SECRETARY FOULKE: The Industrial Minerals Association—North America (IMA-NA) is a trade association representing producers and processors of industrial

minerals, as well as equipment manufacturers, railroad and trucking companies, law firms and consulting professionals that serve the industrial minerals industry. Industrial minerals are critical to the manufacture of glass, ceramics, rubber, pharmaceutical and cosmetic goods. They also are used to make foundry cores and molds used for metal castings, paints, metallurgical applications, refractory products and specialty fillers. IMA-NA member companies operating in the United States are impacted by the Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard (HCS), hence this letter to you.

The OSHA HCS, as interpreted and enforced by the Department of Labor, incorporates by reference both current and future Threshold Limit Values (TLVs) published by the American Conference of Governmental Industrial Hygienists (ACGIH). It requires that employers must consider hazardous any substance for which a TLV limit exists, now or in the future. As a result, when a TLV Limit is created or modified for a substance, the HCS automatically requires employers to include the new TLV Limits in Material Safety Data Sheets distributed to employees, distributors and retailers.

IMA-NA has a number of concerns relative to OSHA's reliance on independent organizations, such as ACGIH, as authoritative bodies in its HCS. For example, the procedural deficiencies endemic in the ACGIH TLV development process make it inappropriate for OSHA to automatically incorporate these TLV Limits in a legally binding regulation. ACGIH TLVs lack the basic indicia typical of national consensus standards or the more rigorous procedural safeguards legislatively mandated for OSHA rulemakings. By way of illustration:

- **Lack of Notice**—OSHA does not provide notice to the public when the ACGIH identifies substances as being “under study,” subject to a “notice of intended change” or when a notice of intended change is adopted by the ACGIH Board of Directors. Consequently, potentially affected parties are not put on notice that a TLV Limit may be under development. Moreover, the available documentation supporting these developmental steps are not made freely available to the affected public by either ACGIH or OSHA.

- **Consideration of the Best Available Information**—neither ACGIH nor OSHA ensures that all published literature is evaluated in the Documentation of TLVs. A master list of relevant scientific literature is not compiled, and neither ACGIH TLV Committee members, the ACGIH Board of Directors, nor the affected public are aware when potentially relevant research is eliminated from the TLV Documentation, or upon what basis. There is no defined scientific methodology or audit process for the evaluation of draft TLV Limits.

- **Professional Expertise**—ACHIH has no qualification requirements for its TLV authors. It does not ensure that an array of professional disciplines is involved in the development of TLV Limits. The draft TLVs typically are authored by one, unidentified individual, who cannot possibly have all the necessary insights to evaluate the body of scientific evidence relevant to the establishment of an occupational exposure limit. Professional disciplines that properly should be reflected in the development of any occupational exposure limit are industrial hygienists, epidemiologists, toxicologists, biostatisticians, risk assessors, occupational physicians, etc.

- **Bias/Conflicts of Interest**—ACGIH has a policy that it claims prevents conflicts of interest and bias, including a form that ACGIH officials are supposed to complete listing potential conflicts. However, we understand that even where conflicts are identified by ACGIH the organization merely ranks them from high to low. Biases are not listed, identified or discussed. Where TLV Committee members have such significant conflicts that they must abstain from voting on TLV Limits, they nonetheless are free to participate in drafting them.

- **Opportunity to be Heard**—ACGIH typically limits public input on draft TLV limits to written submissions. There is no right to engage the author(s) of the draft TLV, or the TLV Committee, on the basis for the draft TLV, the emphasis (or lack thereof) placed on particular studies, factors weighing on the strength or weight of evidence, etc. Comments filed by other affected parties are not freely available for public inspection, rebuttal or affirmation. A consensus-building process does not exist that would allow persons interested and affected by the draft TLV to reach substantial agreement on its adoption. Importantly, in the absence of necessary procedural safeguards, OSHA does not provide an opportunity for the affected public to comment on its adoption of the ACGIH TLVs in its HCS before they take regulatory effect.

- **Independent Scientific Peer Review**—ACGIH does not subject its notices of intended change or final TLV Limits to independent scientific peer review. In fact, ACGIH refuses to seek and obtain independent, outside peer review of TLV Limits and TLV Documentation, even after requested to do so. Review processes employed by scientific journals and federal administrative procedures for public participation

are not observed, which otherwise might help alleviate deficiencies in draft TLVs or TLV Documentation. OSHA could, and should, provide for independent peer review of the ACGIH TLVs before adopting them in its HCS.

- **Right of Appeal**—There is no right of appeal when the ACGIH adopts a TLV. When the TLV Committee completes its work on notices of intended change, we understand a list of recommended actions is compiled for adoption by the ACGIH Board of Directors. Only after the ACGIH Board of Directors adopts a TLV Limit is the affected public made aware of ACGIH's determination. ACGIH has no procedures for reconsideration of TLV Limits by the Board of Directors or for an appeal from its decision. At a minimum, OSHA should afford an administrative appeal within the agency before adopting ACGIH TLVs in its HCS. When OSHA incorporates by reference a standard not developed through the Agency's rulemaking procedures, that decision by OSHA should be subject to judicial review.

While not a complete list, the foregoing examples highlight some major procedural deficiencies in the ACGIH TLV development process. Either ACGIH TLVs must satisfy the requirements of a national consensus standard as specified in the OSHAct or OSHA should conduct notice and comment rulemaking as provided in that Act when incorporating TLV Limits in a legally binding agency regulation. What we would prefer to see implemented are the more rigorous procedural safeguards legislatively mandated for OSHA rulemakings.

We respectfully request that you review the appropriateness of continuing to rely on ACGIH as an authoritative body in OSHA's HCS because ACGIH TLV Limits truly are not national consensus standards.

Thank you for your consideration of this request.

Respectfully submitted,

MARK G. ELLIS,  
*President.*

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#### **Prepared Statement of the Interlocking Concrete Pavement Institute**

Mr. Chairman, the Interlocking Concrete Pavement Institute (ICPI) fully supports passage and adoption of HR5554, the Workplace Safety and Health Transparency Act. We applaud the introduction of the bill, calling to light a serious concern for manufacturers who are subject to regulation using standards in which they have had no fair opportunity to participate or challenge. This matter directly affects members of ICPI, who have exposure to regulations developed by issued by OSHA.

ICPI's principle concerns are addressed by the sections of HR5554 that would restrict OSHA's use and consideration of certain outside sources of regulatory material, and we will focus on the OSHA issues.

Fundamental requirements of substantive and procedural due process, federal acquisition law, the Date Quality Act and more establish a strong set of fundamental practices and principles designed to provide for openness, transparency, notice, hearings, opportunities for appeal and much more to allow all parties interested in a regulation to participate in the regulatory process. These principles sound in fundamental fairness and go to the heart of the integrity of the process.

However, under current law, a large gap exists in the regulatory scheme that allows OSHA to act upon and incorporate by reference standards developed by non-governmental organizations that do not adhere to the quality control practices and procedures designed to assure the accuracy, validity and integrity of the standards-making process.

Under current law, OSHA is allowed to use or incorporate by reference new regulatory standards issued by non-government entities whose motivations are unknown, whose possible conflicts of interests may not be disclosed, whose internal quality control procedures are beyond reach, whose key decision-making staff are unidentified and unavailable for interview, who act without holding public hearings or considering balanced testimony, and in fact need not meet or adhere to any reasonably acceptable degree of third-party accountability.

Where present, these factors prevent many parties affected by such non-government standards from participating in any efforts to develop consensus regulations.

In short, all these deficiencies may be summed up by saying that such standards are developed in a manner so lacking in consensus-building procedures that they should be considered fatally flawed for the purposes of government use and should be utterly barred from use or consideration in OSHA regulations.

HR5554 would repair the most imminent and egregious consequence of this gap in quality, fair process by prohibiting OSHA from promulgating or incorporating by reference any such non-government organization's regulatory action unless the Secretary affirmatively finds that (1) such determination has been adopted and promul-

gated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) it was formulated in a manner which afforded an opportunity for diverse views to be considered; and (3) has been designated as such a standard by the Secretary after consultation with other appropriate Federal agencies.

Such a finding and a summary of its basis shall be published in the Federal Register and shall be considered a final action subject to judicial review.

The bill would also extend this obligation to the approval of state plans that may be influenced by or incorporated by reference in regulatory materials issued by non-government organizations.

ICPI believes that these protections are necessary to avoid subjecting the regulated community to regulatory practices and schemes that would clearly be subject to challenge or disallowed altogether if they were used by OSHA. In fact, the current gap in the law could promote unsavory stratagems to establish unbalanced, invalid regulatory controls using surrogates for OSHA to do what OSHA may not do itself. ICPI recommends that entities be required to use analogues to the quality control required of OSHA, or OSHA should be completely barred from making any use of or enforcing the work product such organizations.

Mr. Chairman, time is of the essence. Non-government organizations work every day taking action that may ultimately impact the regulated community.

ICPI supports HR5554 in its entirety and urges its passage at the earliest possible time.

With kind regards,

CHARLES A. McGRATH, CAE,  
*Executive Director.*

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NATIONAL ASSOCIATION OF MANUFACTURERS,  
1331 PENNSYLVANIA AVE., NW,  
Washington, DC, June 26, 2006.

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, Rayburn House Office Building, Washington, DC.*

DEAR CHAIRMAN NORWOOD: On behalf of the National Association of Manufacturers (NAM), the nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 states, I write to you today in support of H.R. 5554, the Workplace Safety and Health Transparency Act.

H.R. 5554 will help ensure that any future guidelines put in place will be based on public notice and comment rulemaking. NAM believes that organizations that meet in private and do not permit stakeholders to participate in their proceedings should never be the basis for federal regulations. Specifically, your legislation will prohibit the Occupational Safety and Health Administration or the Mine Safety and Health Administration from incorporating any regulation based on a determination from a non-consensus organization. NAM supports the development of regulations through public notice and comment rulemaking-and delegating agency authority to outside non-consensus organizations violates that basic principle.

The NAM thanks you for your continued leadership on regulatory fairness and safer workplaces. We look forward to continuing to work with you on these matters which are critical to both U.S. employers and their employees.

Thank you again.

Sincerely,

SANDRA BOYD,  
*Vice President, Human Resources Policy.*

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#### **Prepared Statement of the National Concrete Masonry Association**

Mr. Chairman, the National Concrete Masonry Association (NCMA) supports passage of HR5554, the Workplace Safety and Health Transparency Act.

This matter directly affects members of NCMA, who have exposure to regulations developed by issued by OSHA. We will focus on the impact that HR5554 would have on OSHA's use of standards generated by non-governmental organizations that generate standards on a non-consensus basis.

We suggest that HR5554 would require OSHA to act consistently and fairly in restricting the NGO standards which influence it or are incorporated by reference in such OSHA regulations like the Hazard Communication rule. NCMA feels it is inap-

propriate for OSHA to incorporate information and standards whose development would not meet the procedural requirements for OSHA standards per se.

Stakeholders in the regulated community need to have access to the regulatory development process. Transparency and openness in the process are important to ensure that the information, and the regulations they generate, have validity and will stand up to scrutiny as part of the consensus process.

Today, a large gap exists in the regulatory scheme that allows OSHA to act upon and incorporate by reference standards developed by non-governmental organizations that do not adhere to the quality control practices and procedures designed to assure the accuracy, validity and integrity of the standards-making process. OSHA is allowed to use or incorporate by reference new regulatory standards issued by non-government entities whose motivations are unknown, whose possible conflicts of interests may not be disclosed, whose internal quality control procedures are beyond reach, whose key decision-making staff are unidentified and unavailable for interview, who act without holding public hearings or considering balanced testimony, and in fact need not meet or adhere to any reasonably acceptable degree of third-party accountability.

In short, all these deficiencies may be summed up by saying that such standards are developed in a manner so lacking in consensus-building procedures that they should be considered fatally flawed for the purposes of government use and should be utterly barred from use or consideration in OSHA regulations.

HR5554 would repair the most imminent and egregious consequence of this gap in quality, fair process by prohibiting OSHA from promulgating or incorporating by reference any such non-government organization's regulatory action unless the Secretary affirmatively finds that (1) such determination has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) it was formulated in a manner which afforded an opportunity for diverse views to be considered; and (3) has been designated as such a standard by the Secretary after consultation with other appropriate Federal agencies.

Such a finding and a summary of its basis shall be published in the Federal Register and shall be considered a final action subject to judicial review.

HR5554 would extend this obligation to the approval of state plans that may be influenced by or incorporated by reference in regulatory materials issued by non-government organizations.

NCMA supports HR5554, its goals and its terms, and urges its passage.

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#### **Prepared Statement of the Society for Occupational and Environmental Health**

SOEH opposes this proposed legislation because we believe that, if enacted, it would limit useful evidence-based information that our members and other practitioners in occupational and environmental health rely on to protect worker and community health and safety. We support time-tested science-based guidelines and information for federal regulation. However, while waiting for the regulatory actions to be completed, there is a need for information within the scientific and clinical communities to assist in maintaining the health of workers and others. Most clinicians are not trained in toxicology and therefore depend on resources such as the material safety data sheets (MSDS). The MSDS include information from sources such as the threshold limit values (TLV) from the American Conference of Governmental Industrial Hygienists, the National Toxicology Program (NTP) and the International Agency for Research on Cancer (IARC). The data from these organizations have been accepted by the occupational medicine community as well-established, peer-reviewed sources of information to be used for clinical assessments as well as for industrial hygiene assessments. Accurate and up-to-date information on the MSDS is needed to protect not only workers but also our communities. Under this bill, this resource for clinicians and industrial hygienists would be seriously limited.

We believe the Occupational Safety and Health Administration's (OSHA) current authority is sufficient for developing standards. OSHA appropriately takes into account the nature and weight of evidence for health hazards and considers the technical and economic feasibility of implementation from many sources.

The Society for Occupational and Environmental Health is a non-profit membership organization established in 1972 as a multi-faceted forum for academics, government policy makers, and industry and union representatives to formulate positions on public policy issues. We convene scientific meetings to address public health

policy issues involving occupational and environmental health to provide a scientific basis for informed public policy decision-making.

We believe this proposed bill will impede efforts to protect worker and community health and safety.

Thank you for considering our comments,  
Sincerely,

DENNY DOBBIN,  
*Chair.*

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PORTLAND CEMENT ASSOCIATION,  
*June 21, 2006.*

Hon. CHARLIE NORWOOD,  
*Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, Rayburn House Office Building, Washington, DC.*

DEAR CHAIRMAN NORWOOD: We respectfully submit this letter for the record of the recent legislative hearing on HR 5554 on behalf of the Portland Cement Association (PCA). PCA strongly supports HR 5554 and extends its thanks and gratitude to you for your leadership in this important public policy matter.

PCA is a trade association representing cement companies in the United States and Canada. PCA's U.S. membership consists of 36 companies operating 107 plants in 34 states and distribution centers in all 50 states servicing nearly every Congressional district. PCA members account for more than 97 percent of cement-making capacity in the United States and 100 percent in Canada.

Portland cement is the powder which acts as the glue or bonding agent that, when mixed with water, sand, gravel and other materials, forms concrete. Cement is produced from various naturally abundant raw materials, including limestone, shale, clay and silica sand. Portland cement is an essential construction material and a basic component of our nation's infrastructure. It is utilized in numerous markets, including the construction of highways, streets, bridges, airports, mass transit systems, commercial and residential buildings, dams, and water resource systems and facilities. The low cost and universal availability of portland cement ensure that concrete remains one of the world's most essential and widely used construction materials.

While PCA members support sound standards that protect the environment and employees, our members oppose scientifically invalid, non-consensus standards, and we do not feel the United States government should support such standards. Non-consensus standards are developed in closed meetings by unknown authors, which often include federal employees and grant recipients. Yet these can influence or become the basis for federal regulations. For example, the OSHA Hazard Communication Rule mandates that the latest edition of the ACGIH TLVs—a non-consensus group by their own admission—be listed on Material Safety Data Sheets. Similarly, the MSHA Haz Com Rule mandates that the 2001 ACGIH TLVs define whether a chemical is hazardous.

These hundreds of recent ACGIH TLV were adopted by reference by OSHA and MSHA, without mandated rulemaking proceedings to examine their validity. Moreover, a number of DOL and HHS agency personnel served on the ACGIH Board of Directors or Committees and adopted or authored the recent TLVs, permitting conflicts of interest and bias to impact government rules without public disclosure.

Non-consensus standards, like the ACGIH TLV, are scientifically suspect since the qualifications of their authors, and even their identity is kept secret, and they are not subjected to independent, outside expert peer review, like true scientific work products. These non-consensus standards not only cause harm to impacted industries through agency actions, but they also are used in tort litigation as alleged standards of care that have government support.

PCA members were vindicated when a non-consensus standard (the ACGIH TLV for trona) was withdrawn by ACGIH in a public apology, following the favorable settlement of a lawsuit against ACGIH and DOL, in 2001 whereby ACGIH admitted that there were no health effects supporting the TLV, and that misconduct by its agent had occurred. Yet, adversely impacted parties should not be forced to litigate against these government supported and sanctioned non-consensus standard setting groups, and we believe that HR 5554 provides the needed sunshine on government actions to prevent future abuses.

We urge passage of HR 5554, and again thank you for your leadership.

THOMAS J. GIBSON,  
*Senior Vice President.*

