

May 21, 2015

Dr. David Michaels  
Assistant Secretary of Labor for Occupational Safety and Health  
U.S. Department of Labor  
Frances Perkins Building  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Re: Request for Administrative Stay on the Hazard Communication Standard, 29 CFR 1910.1200 for Pre-labeled and Stocked Inventory

Dear Dr. Michaels:

On behalf of the National Association of Chemical Distributors<sup>1</sup> (NACD), I write to request an immediate, short-term administrative stay of the U.S. Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard (HCS) effective date for companies' chemical products previously labeled and stored in their existing inventory.

In the 2012 HCS final rule, OSHA made an exception<sup>2</sup> to the effective date to allow distributors to continue to ship containers labeled by the chemical manufacturer or importer until December 1, 2015. This exception attempted to address NACD's comments on the proposed rule to accommodate prepackaged [containers that are unopened in the normal course of business and labeled by the upstream supplier] products received by distributors very close to the compliance date.<sup>3</sup> However, more than 75% of NACD chemical distributor members are prevented from continuing to ship stockpiled products after June 1, 2015. The HCS defines "chemical manufacturer" broadly as "an employer with a workplace where chemical(s) are *produced*<sup>4</sup> [manufactured, processed, formulated, blended, extracted, generated, emitted, or repackaged] for use or distribution."<sup>5</sup> Given the very limited scope of OSHA's definition of distributor, the majority of chemical distributors are regulated as manufacturers, and therefore cannot ship any stock after June 1, 2015, without an updated label regardless of whether the label is created by that company or the upstream supplier. Thus, the exception for distributors does not actually provide relief to the majority of downstream chemical users it was intended to benefit.

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<sup>1</sup> The National Association of Chemical Distributors is an international association of more than 440 chemical distributors and supply-chain partners. NACD's membership comprises businesses representing in total more than 85% of the chemical distribution capacity in the nation and generating 93% of the industry's gross revenue. NACD members, operating in all 50 states through nearly 1,800 facilities, are responsible for more than 155,000 direct and indirect jobs. NACD members are predominantly small regional businesses, many of which are multigenerational and family owned. The typical chemical distributor has 26 employees and operates under an extremely low margin. NACD members meet the highest standards in safety and performance through mandatory participation in NACD Responsible Distribution®, the association's third-party-verified environmental, health, safety, and security program. Through Responsible Distribution, NACD members demonstrate their commitment to continuous improvement in every phase of handling, transportation, storage, and disposal of chemical products.

<sup>2</sup> 29 CFR 1910.1200(j)(2)(i).

<sup>3</sup> Hazard Communication, 77 Fed. Reg. 17739-17740 (March 26, 2012) (codified at 29 CFR 1910)

<sup>4</sup> The definition of produced is bracketed.

<sup>5</sup> 29 CFR 1910.1200(c), emphasis added.

The scope of the problem NACD chemical distributor members face is further explained in the attached document.

There is clear precedent for OSHA to issue an administrative stay on the HCS. *The agency previously issued an administrative stay that remained in effect until the new standard on requiring updated labeling was lifted in response to a request from chemical manufacturers.*<sup>6</sup> The key concern in lifting this stay was what to do about stockpiles of chemicals that are already labeled.<sup>7</sup> Manufacturers detailed some of the factors beyond their control that influence their ability to update a label and justified a delay in providing the updated information. OSHA stated in the final rule that “six months should be long enough to revise labels, and allow for the depletion of already labeled product.”<sup>8</sup>

Additionally, OSHA noted “that an administrative stay is a tool available to OSHA to cease enforcement for reasons the Agency finds appropriate. It is not, as some appeared to assume, something that is adjudicated by an outside body, nor does it involve publication or documentation based on any type of record. It is usually a short-term solution to a problem that can be resolved through discussions with affected parties.”<sup>9</sup>

The June 1, 2015, compliance deadline is problematic for NACD members because the majority of them are defined as a “manufacturer.” While a substantial portion of member companies’ operations involve receiving and shipping products without altering them in any way, many members also repackage or blend other products. For the prepackaged stocked products, NACD members are dependent upon their suppliers for HCS 2012 compliant labels. A longer time period for compliance is justified for the same reason it is for a company considered a “distributor” under OSHA’s definition: the company has the same prepackaged product in inventory that was lawfully and properly labeled before the June 1, 2015, deadline that must work its way through the supply chain before December 1, 2015. To deny a chemical distributor the six-month time period for existing stock because that company produces some chemicals when distributors who do not produce chemicals can continue to ship prepackaged stock for the same products for six additional months is inconsistent and is causing unintended consequences, disrupting the entire chemical supply chain.

The difficulties companies face because of issues beyond their control in replacing labels on prepackaged stock include safety concerns, supply chain disruptions, feasibility issues, contractual obligations, and economic impacts and are detailed in the attached document. These difficulties, coupled with the intent of the delayed effective date for distributors, are appropriate reasons for OSHA to cease enforcement of certain provisions of the standard. The agency found six months to be appropriate for manufacturers to deplete already labeled products that are found to have new significant hazard information and six months to be suitable for distributors to clear their existing inventory of prepackaged product. Applying this six-month time frame to all prepackaged products labeled before June 1, 2015, is consistent with OSHA’s previous enforcement adjustments, does not require additional rulemaking, and provides multi-operation chemical distributors a short-term solution to their problems.

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<sup>6</sup> “No citations shall be issued on paragraph (f)(11). An indefinite stay-of-enforcement has been placed on the requirement that manufacturers update label information within 90 days of becoming aware of significant information regarding the hazards of the chemical. OSHA will alert the regulated community at the time that the stay is lifted.” Inspection Procedures for the Hazard Communication Standard, CPL 02-02-038, Subpart XI.D. (March 20, 1998)

<sup>7</sup> Hazard Communication, 77 Fed. Reg. 17726

<sup>8</sup> Id. at 17727.

<sup>9</sup> Id. at 17726.

For the reasons listed above and on the attached document, NACD requests an immediate stay of the final rule's effective date until December 1, 2015, to allow for chemical manufacturers, importers, and distributors to ship containers received by June 1, 2015, and labeled by the chemical manufacturer or importer. After December 1, 2015, NACD requests OSHA to continue to exercise its enforcement discretion for stockpiled products that do not comply with the modified provisions of the final rule due to circumstances beyond a downstream user's control.

Thank you for your consideration and prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric R. Byer". The signature is fluid and cursive, with the first name "Eric" being the most prominent.

Eric R. Byer  
President

Enclosure

cc: Thomas Galassi, Director, Directorate of Enforcement Programs  
Dionne Williams, Director, Office of Health Enforcement  
Sven Rundman, Supervisory Industrial Hygienist, Office of Health Enforcement  
Bill Perry, Director, Directorate of Standards and Guidance  
Maureen Ruskin, Director, Office of Chemical Hazards - Metals

## The Case for Broadening Hazard Communication Standard 2012 Enforcement Discretion: Implications of Requiring Existing Stock to be Relabeled as of June 1, 2015

### Statement of Issue:

- The majority of the NACD membership, known to the chemical industry as distributors, repackage or import products and are therefore considered by the Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard (HCS) to be "manufacturers" for many operational safety issues.
- As such, the way the HCS regulation is currently written, these distributors may only ship products with HCS 2012 compliant labels as of June 1, 2015.
- Because manufacturers are not required to provide HCS 2012-compliant labels to their downstream customers until June 1, companies distributing factory-packaged products [chemicals in sealed containers that are not opened] will not have HCS 2012 compliant labels on the products stored in the warehouse. As the rule currently stands, *these products cannot be sold unless these companies relabel the products.*

### Solution/Proposed Relief

- NACD understands and appreciates that OSHA is considering its response to inventory stocked prior to June 1, 2015, as referred to in the response to Question #6 of the FAQ issued to NACD on May 13, 2015.
- NACD specifically requests OSHA to place an administrative stay<sup>1</sup> on the compliance deadline for factory-packaged products until December 1, 2015, and to extend the February 9, 2015, guidance document to allow the agency to exercise reasonable discretion to waive enforcement if a company is reselling factory-packaged product lawfully labeled and stocked prior to June 1, 2015. The ultimate deadline remains December 1, 2015. This does not impact at all the requirement that a distributor that repackages, mixes, or otherwise interacts with the product is subject to the June 1 deadline.
- OSHA understood time is required to move product lawfully labeled prior to June 1, 2015, through the supply chain when the agency adopted the distribution exception allowing product labeled before June 1, 2015, to be shipped until December 1, 2015.
- OSHA further understood the dependencies of downstream supply chain transactions when the agency issued its guidance on February 9, 2015, indicating OSHA would exercise enforcement discretion if a producer was unable to obtain the HCS 2012 compliant safety data sheet (SDS) from a supplier necessary to update the producer's own SDS/labels for mixtures.
- The rationale behind these two exemptions applies equally to material held in stock for resale. A company that is considered to be a "manufacturer" for some products because it repackages or imports has the exact same issue as a company considered a

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<sup>1</sup> 1 "It should also be noted that an administrative stay is a tool available to OSHA to cease enforcement for reasons the Agency finds appropriate. It is not, as some appeared to assume, something that is adjudicated by an outside body, nor does it involve publication or documentation based on any type of record. It is usually a short-term solution to a problem that can be resolved through discussions with affected parties." Hazard Communication, 77 Fed. Reg. 17726 (March 26, 2012) (codified at 29 CFR 1910)

“distributor” under OSHA’s definition: the company has the same prepackaged stock in inventory that was lawfully and properly labeled before the June 1 deadline that must work its way through the supply chain before December 1. This company is not the true manufacturer of the product so does not create and adhere the product labels to the stock - the product manufacturer controls the labels. The company with stocked material is dependent upon its supplier for HCS 2012 compliant labels.

- There no reason to deny a chemical distributor the six-month interim period for stock because that distributor has some packaging activities, when distributors who do not package can use this deferral period for the same products.

### Scope of the Problem - Economic, Supply Chain, Safety / Case for Relief

- The implementation of the HCS 2012 SDS/labeling requirements has created an unintended consequence. By failing to extend the distributor exemption to all factory-packed products a company simply resells without regard to whether the company is considered a “manufacturer” under OSHA’s general definition, the vast majority of the packaged chemical supply chain is removed from the distribution exemption designed to allow lawfully labeled and unaltered product to move through the supply chain.
- The purpose of adopting HCS 2012 is to increase the understanding of hazards of chemicals in a globally consistent and uniform way. This public policy of improving awareness and understanding is actually undermined by asking a chemical distributor to adhere labels it is not responsible for producing or printing to the diverse and varied stock stored in warehouses. Problems include:
  - Despite the best diligence, there will be errors in labeling. A product may be shipped with an incorrect label or lot number, which does the opposite of providing additional protections: it incorrectly identifies a product, potentially compromises traceability if the lot numbers are compromised, and creates the potential for a customer to misuse the product and create chemical reactions resulting in employee exposure.
  - It also exposes workers to unnecessary risk in handling millions of units.
- Among those distributors directly impacted by the June 1, 2015, deadline for relabeling stocked factory-pack product, there are tens of millions of *individual* factory-packed units (bags, drums, IBCs, boxes, supersack, carboys, etc.) worth hundreds of millions of dollars.
- Distributors of these products must request labels from manufacturers. However, manufacturers are reluctant to release labels to be adhered outside of their oversight because this presents general quality control and lot control issues.
- Delays in the supply chain while waiting for labels will occur because:
  - Manufacturers are reluctant to provide labels separately,
  - Labels will not be ready until June 1,
  - Time is needed to send the labels,
  - Incorrect label counts are likely,
  - Some labels will not match, and
  - Manufacturers are not required by the standard to provide HCS 2012 labels before June 1, 2015.
- There will be an additional delay in the supply chain while relabeling stocked products.
- Customers/end users will be reluctant to accept packaged product not HCS 2012 compliant unless there is clear guidance from OSHA.
- Transporters will be reluctant to accept packaged product not HCS 2012 compliant unless there is clear guidance from OSHA.
- In addition to economic impact on the distributor, there is the likely impact on the downstream users as many have “just in time” delivery and their manufacturing processes do not allow for any delays.

- Chemical manufacturers similarly will have to staff to meet the requests from distributors for labels. This is likely to include developing controlled processes to manage liability associated with labels being out of their control, lot number integrity, and other quality/product integrity issues.
- ***Requiring all chemical distributors to relabel all factory-packed products is akin to requiring grocery stores to relabel all of their products before selling them.*** Requesting, picking, and breaking down wrapped and banded units and relabeling individual units is a manual process. The complexity of the task is amplified by the distribution model that relies on a number of different suppliers from many different “ship-from” locations. The process needs to be done at the distribution warehouse. In a low margin business, few have the internal resources to tackle a job of this magnitude and import with staff on hand. This will require hiring temporary employees less familiar with the chemical industry, stock, and practices. These workers will need to be trained on the hazardous chemicals, provided with personal protective equipment, and familiarized with all safety procedures.
- There is no measurable benefit to creating these supply chain complications and worker safety risks. The products in question are factory-packed and lawfully labeled when produced by the manufacturer. These are the same products distributed in the same manner as those for which OSHA formally extended the six-month transition period to allow the lawfully labeled chemicals to work their way through the supply chain.
- **For the reasons stated above, NACD respectfully requests OSHA to place an administrative stay on the compliance deadline for factory-packaged products until December 1, 2015, and to extend the February 9, 2015, guidance document to allow the agency to exercise reasonable discretion to waive enforcement if a company is reselling factory-packaged product lawfully labeled and stocked prior to June 1, 2015.**