



November 13, 2014

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

Dear Dr. Michaels:

We are writing this letter as a follow up to the October 31, 2014 meeting between U.S. Occupational Safety and Health Administration (OSHA) and industry petitioners to resolve critical compliance concerns with the implementation of the revised Hazard Communication Standard (HCS) and the Globally Harmonized System of Classification and Labeling of Chemicals (GHS).

While OSHA has agreed to provide relief from the June 1, 2015 implementation date for product formulators by exercising its enforcement discretion, as outlined in your October 31, 2014 letter, there remains the need for additional clarity and certainty in the language OSHA will use in its compliance directive. The fact remains that formulated product manufacturers cannot comply with the requirements of the revised HCS and GHS without the benefit of information from their suppliers, and therefore need sufficient additional time for such compliance beyond June 1, 2015.

We urge OSHA to provide further guidance in the compliance directive as to what constitutes “reasonable diligence,” and “good faith,” as well as what will be considered “reasonable efforts to comply with the June 1, 2015 deadline.” The compliance directive should also describe what will be considered a reasonable time period to develop HCS 2012 compliant Safety Data Sheets (SDS) and labels *after* receiving supplier SDSs for a formulated product. As is discussed further below, with the majority of SDSs likely to arrive on or near the deadline, the 90 and 180-day limits in the standard are not reasonably achievable for the initial compliance period. Further, the compliance directive should clarify what will be considered a reasonable time period to clear HCS 1994 compliant product already in the distribution chain, beyond December 1, 2015, *after* a company begins manufacturing product with HCS 2012 compliant SDSs and labels.

A. “Reasonable diligence” and “good faith”

As OSHA stated during the October 31 meeting, manufacturers and product formulators have been provided relief from the June 1, 2015 implementation date provided they have taken steps to comply with reasonable diligence and acted in good faith. Therefore, the petitioners recommend the following language be included in the compliance directive:

Reasonable diligence and good faith efforts can be established by documenting one or more of the following actions: (a) defining the process a manufacturer will follow to gather the necessary information from its suppliers; (b) providing a description of continued dialogue with its suppliers; (c) defining the process a

manufacturer follows to make the necessary changes to SDSs and labels; (d) a timeline for when the manufacturer expects to fulfill its compliance obligations; or (e) a timeline for when the distribution chain can be cleared of HCS 1994 compliant product.

Manufacturers or product formulators are entitled to rely on suppliers for raw material classifications and SDSs that are necessary to determine classifications and prepare the SDSs and labels for their own formulated products. A manufacturer or product formulator shall not be cited for failing to have updated labels under section (f)(1) or updated SDSs under section (g)(1) if the manufacturer or product formulator exercised reasonable diligence and in good faith attempted to obtain HCS 2012 compliant SDSs from its raw material suppliers. During the transition period, manufacturers or product formulators who have made good faith efforts to obtain and integrate the required information, but have not received all the necessary SDSs, may continue to use Material Safety Data Sheets (MSDS) and labels that conform to HCS 1994.

B. A “reasonable time period” to comply

During the October 31, 2014 meeting, OSHA stated that companies that have exercised reasonable diligence and made a good faith effort to comply with the June 1, 2015 deadline, but are unable to, would have a *reasonable time period* to create SDSs and update product labels. A cascade of updated classification information will flow into manufacturers’ hands when SDSs are finally received on or near the June 1, 2015 deadline. The petitioners believe a reasonable time period for compliance includes the time necessary to create all of a manufacturers’ SDSs and product labels for initial compliance with HCS 2012. A reasonable time period is dependent upon a company’s internal processes and practical issues, including, but not limited to: developing hazard classifications for formulated products; resolving conflicting hazard information between raw material suppliers or government agencies; integration of such information into information technology and enterprise systems; regulatory and legal reviews; marketing review; providing new hazard communication materials to label and package suppliers; acquiring new label or package stock; incorporating the new labels into the manufacturing process; and the need to continue commerce by shipping existing, HCS 1994 compliant product to their distributors. Most importantly, compliance officers must also consider the overwhelming number of products that need to be updated in relation to a company’s limited staff and resources. In many cases, the volume of affected products may be in the tens of thousands, and manufacturers or product formulators cannot update them all in parallel.

This reasonable time period must extend beyond the HCS 2012 regulatory requirements for developing SDSs and labels. The receipt of a complete data set for a product marks the first date manufacturers can begin to develop the final product classifications. At the meeting, OSHA staff acknowledged that a reasonable time period for initial conversion would be longer than three months for SDSs and six months for labels, as required in the regulations for minor updates to hazard communication materials. Again, determining the length of a reasonable transition period must take into consideration the necessary steps for initial compliance and the overwhelming number of products which need HCS 2012 compliant SDSs and labels. Nearly every other jurisdictions that has implemented the GHS has recognized the need for an extended time period for initial GHS implementation. These jurisdictions have given manufacturers of mixtures/formulated products a

reasonable time period of one to four and half years to come into compliance after substance manufacturers comply with the regulations.

The petitioners understand that what constitutes a reasonable time period is dependent on a number of individual factors for each manufacturer and requires a case-by-case determination. To ensure manufacturers have a reasonable time period for compliance, we suggest the following language for the compliance directive:

Upon receipt of HCS 2012 compliant hazard communication materials for all the raw materials in a formulated product, the product formulator shall have a reasonable time period, which may extend beyond June 1, 2015, to develop an updated SDS and label for the formulated product. A company's internal processes are relevant to determine the reasonable time period for compliance. A manufacturer or product formulator may provide documentation as to: (a) its efforts to comply with the revised HCS in a reasonable time period upon receiving revised HCS hazard communication materials; and (b) its expectations as to when it will fulfill its compliance obligations.

C. Clearance of existing inventory

Based on OSHA's agreement to extend compliance beyond June 1, 2015 for manufacturers exercising good faith, OSHA must also provide relief throughout the distribution chain as well. Without a reasonable time period to clear previously labeled and HCS 1994 compliant products in existing inventories at various locations in the distribution chain, distributors may be out of compliance with the December 1, 2015 date before HCS 2012 compliant products are supplied. Moreover, as the new labels become available, the existing language could be interpreted as requiring manufacturers and distributors to retrieve product from store and distributor shelves, open case and pallet lots, and apply new labels before repacking and restocking the product.

We also note that, in limited cases, as a result of extraordinary efforts, some chemical mixture manufacturers have been able to create HCS 2012 compliant SDSs and labels for a small percentage of their product portfolio. Due to lack of early compliance by raw material suppliers, completion of this work far exceeded the timeframe necessary to ensure that the distribution chain is cleared of all previously labeled products in existing inventories prior to December 1, 2015

To alleviate these distribution chain concerns, we suggest the following language for the compliance directive:

Distributors shall have a reasonable time period, which may extend beyond December 1, 2015, to clear existing formulated products from the distribution chain consistent with the manufacturer's good faith efforts to develop and integrate compliant labels and SDSs. Accordingly, distributors of formulated products must rely on the assurances of manufacturers or product formulators with respect to their efforts to achieve compliance under a reasonable timeframe. Distributors shall not be cited for distributing HCS 1994 compliant products that were manufactured prior to the availability of HCS 2012 compliant labels.

D. Conclusion

In summary, we urge OSHA to include the suggested language with regards to reasonable diligence, good faith, and the criteria outlined above in its forthcoming compliance directive. Since we understand that the compliance directive will not be released until 2015, we also ask that OSHA memorialize this language in a letter of interpretation and issue this letter as soon as possible. The letter of interpretation should confirm that if a regulated entity meets the recommended criteria by exercising reasonable diligence and good faith, OSHA will exercise its enforcement discretion and allow for a reasonable time period for compliance with the labeling and SDS provisions of the 2012 HCS beyond June 1, 2015, as well as a reasonable time period to clear existing product from the distribution chain after December 1, 2015.

Sincerely,

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American Coatings Association

Eric Byer
President
National Association of Chemical Distributors

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