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20 September 2011

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VIA ELECTRONIC SUBMISSION

OSHA Docket Office
Docket No. OSHA-2010-0019; RIN1218-AC50
U.S. Department of Labor, Room N-2625
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Proposed Rule: Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions - (76 Fed. Reg. 36414), June 22, 2011

Dear Sir or Madam:

The Dow Chemical Company (Dow) welcomes the opportunity to comment on OSHA's proposed rule: Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions (76 Fed. Reg. 36414), June 22, 2011. Dow is a global chemical manufacturing company with research, production, and administrative units in the United States. Consequently, Dow would be affected by the proposed rule.

Dow strongly supports appropriate recordkeeping for occupational injuries and illnesses, and in general Dow supports these proposed amendments. However, as we will explain in our detailed comments, Dow believes that some aspects of the proposed amendments are unclear and some of the proposed deadlines for reporting should be revised.

If the Agency has questions regarding these comments, or if Dow can be of any further assistance, please contact Mr. Donald H. Seiler, CIH, CSP, Health & Safety Regulatory Services Leader, 2040 Dow Center, Midland, Michigan 48674, phone (989) 636-3958.

Sincerely,

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If OSHA decides to require reporting of all amputations, the Agency should substantially clarify the definition of "amputation" in section 1904.39(b)(8).

Dow expresses no opinion on the desirability of reporting all amputations. However, if reporting is ultimately required, it is vitally important that the regulations be written in a clear and understandable manner so employers can understand what is required. The proposed wording of section 1904.39(b)(8) defines "amputation" in a manner that is extremely unclear. If OSHA ultimately decides to require reporting of amputations, the definition must be clarified significantly.

First, section 1904.39(b)(8) as proposed says amputations "include" loss of a body part due to a traumatic incident, a gunshot wound, "and" medical amputations due to irreparable traumatic injuries. The syntax makes the meaning very uncertain. For example:

- It appears that three things must all happen, or there isn't an amputation. This is because OSHA uses the word "and." There must be a traumatic incident, a gunshot wound, AND a medical removal of a body part, in order for an "amputation" to have occurred. Loss of a body part from only one of these causes apparently would not be an "amputation."
- On the other hand, if the use of the word "and" does not require all three conditions in order to have an amputation, then it appears that every gunshot wound is automatically classified as an amputation, even if no body part is lost. For example, if a stray bullet from a hunter travels half a mile, hitting an employee's left arm just hard enough to break the skin and release a drop of blood, this would be a "gunshot wound" and therefore automatically an amputation.
- Third, is it ever possible that a gunshot wound could NOT be a traumatic incident? Presumably gunshot wounds would be considered traumatic by definition. As a result, it is unclear how the first and second clauses of section 1904.39(b)(8) interact. Unless it is possible for gunshot wounds to be a peaceful, non-traumatic experience, there is probably no reason to mention gunshot wounds specifically. They would be covered by the earlier reference to traumatic injuries.
- The reference to medical "amputations," as part of the definition of an "amputation," is obviously circular. Using the defined term in the definition is not helpful.
- OSHA begins section 1904.39(b)(8) by saying amputations "include" the listed things. The word "include" could perhaps mean that the listed causes are only examples, and there could be additional circumstances that constitute amputations. If so, it is unclear what those additional circumstances might be.
- If medical amputation is not an "amputation" unless it addresses a traumatic injury, is there any need to mention medical amputations? This would seem to simply be a subset of the first clause of section 1904.39(b)(8). It would be the loss of a body part due to a traumatic injury.

- Currently the wording says medical amputation is an "amputation" only if it addressed an irreparable injury. What if the doctor was mistaken about the injury being irreparable? If the injury was not actually irreparable until after the amputation occurred, then it would not literally be an "amputation" under the current wording of the proposed rule. We would need to wait for the outcome of the medical malpractice lawsuit to determine whether there was a duty to notify OSHA.

Dow suggests that this portion of section 1904.39(b)(8) should be rewritten to simply say amputations "consist of" the loss of a body part due to a traumatic incident, "either directly or as part of the medical response" to the injury.

Second, section 1904.39(b)(8) also says there cannot be an amputation unless there is loss of bone. This raises a number of questions:

1. Are teeth "bone"? Certainly they are hard like bone. However, they may not normally be considered "bones." As a result, it is unclear whether an injury that causes loss of a tooth would constitute an amputation.
2. What if bone is lost without otherwise losing a body part? For example, suppose a bullet knocks a chip off a major bone in someone's leg, but otherwise makes a clean entry and exit. In treating the wound, a physician removes the chip of bone. The leg itself is not lost. Is this an amputation?
3. This portion of the regulation also obviously raises the issue whether enucleation (removal of an eye without removal of bone) should qualify as an amputation. Dow suggests that the loss of an eye is at least as serious an injury as the loss of one joint of a finger. If the latter would be an amputation, so should the former.
4. Is a bone a body part? Remember, the main definition says there must be loss of a body part in order to have an "amputation." For example, if someone fell and broke his/her tail bone, and doctors decided for some reason to remove the tail bone without removing any "non-bone" body part, would that be an amputation?

Dow suggests that OSHA should first consider the issue of enucleation, because that will have the greatest single impact on whether the definition of "amputation" needs to mention bone at all. After deciding whether or not to include enucleations as amputations, OSHA should then determine how to rewrite this portion of section 1904.39(b)(8) for greater clarity. Dow would be willing to assist with the wording through supplemental input if desired.

If OSHA ultimately decides to require reporting of amputations, the Agency should allow a longer period of time (not just 24 hours).

OSHA has proposed to require reporting of all work-related amputations within 24 hours. Dow suggests that such a tight deadline is unnecessary. A slightly longer period of time, such as the end of the next business day after the injury is determined to be an amputation, should be acceptable.

Dow certainly agrees that any amputation is a serious injury and justifies strenuous preventive efforts. However, from a reporting perspective, amputations are not all equal. Excessively stringent reporting requirements would not benefit OSHA or the injured worker, and would merely provide a mechanism for noncompliance and penalties.

For purposes of illustration, we will compare the current reporting of fatalities to the proposed reporting of amputations. In our experience, local OSHA offices certainly have the resources and the desire to commence an immediate investigation of all work-related fatalities. In addition, a determination that death has occurred is usually both straightforward and swift, so the employer has the necessary information to know that a reporting obligation exists. Consequently, it makes sense to report fatalities on a short timeline, as is currently required. In contrast, we believe that the number of amputations – while not large – is considerably larger than the number of fatalities. We do not anticipate that local OSHA offices would be able, or would feel the need, to commence an immediate investigation of every work-related amputation. And as OSHA itself recognizes, the decision whether an injury constitutes an "amputation" is not always straightforward. We anticipate that in some cases it may take time – including time for medical care which ultimately results in removal of tissue days after the actual incident – before an injury is classified as an amputation.

In that context, Dow suggests that if notification for amputations is ultimately required, the deadline should be the end of the next business day after the injury is classified as an amputation, rather than within 24 hours. This would facilitate compliance, because there would be greater certainty that the expert personnel who understand the reporting requirement would be available. In addition, it would allow for an accurate determination that the injury is, in fact, an amputation. This modest additional time should not materially impair OSHA's ability to investigate if an investigation is desired.

You may wonder why experts would need to be involved. It is partly because, in a large company, specialization of knowledge is an inevitable aspect of achieving compliance. And it is partly because OSHA's regulations are complex and not always intuitive. For example, even OSHA itself – in this rulemaking – is struggling to define what constitutes an "amputation." It currently appears, for example, that the loss of an external ear, the loss of a nose (with loss of

cartilage but not bone), the loss of an eye, or the loss of a finger tip (without loss of bone), would not be "amputations," even though we would normally think of them as such. In contrast, the loss of some bone within the finger tip might possibly be an "amputation" even if the finger tip itself ultimately is not lost. So, in contrast with fatalities – where a determination is made very quickly by emergency response personnel or a physician – the question whether a particular injury constitutes an "amputation" may be difficult. And in some instances an injury which is not initially an amputation, may need to be reclassified due to subsequent medical treatment that removes tissue. OSHA should not require employers to report until the necessary information exists.

For the reasons stated above, Dow requests that – if the Agency ultimately decides to require reporting of amputations -- the deadline should be the end of the next business day after the injury is determined to be an amputation.

If OSHA ultimately decides to require reporting of all in-patient hospitalizations, the Agency should allow more than the proposed eight hours to make the report.

OSHA has proposed to require reporting of literally all work-related in-patient hospitalizations within eight hours. (76 Fed. Reg. at 36415 column 2). This is too tight a deadline. Dow expresses no opinion on the desirability of requiring reporting of every in-patient hospitalization. However, if OSHA decides to impose that requirement, the Agency should allow more time for the report. Reasons include the following:

- The administrative personnel who have the expertise to determine work-relatedness and who understand the responsibility to call OSHA are usually salaried professionals. They may not be present every day, and on every shift. It may be literally impossible to make a determination of work-relatedness, and call OSHA, within a strict 8-hour timeline. This would especially be an issue during off-shifts, weekends, and holidays.
- The employer may not always have the necessary facts within 8 hours. For example, if we get word that an employee has left the work area for medical reasons but the employee has not told us what the medical condition is or whether it has anything to do with work, we may not know until the employee returns to work.
- The mere fact of an in-patient hospitalization does not usually mean there is an emergency that requires an immediate inspection by OSHA. For example, some in-patient hospitalizations are for observation.
- There does not appear to be any reason to think a slightly later notification to OSHA would impair the Agency's ability to inspect. In fact, an immediate inspection may be nonproductive because the injured employee would not be available to explain what happened, and the employer may not yet know the circumstances. If OSHA allowed a bit more time, that could actually enhance the inspection.

For the reasons stated above, Dow recommends that ***if*** the Agency decides to require reporting of every hospitalization, the deadline for reporting should be (preferably) three business days, or (at the very tightest) the following business day after the employer learns both that there was a hospitalization, and that the injury was work-related.

OSHA should not trigger the "clock" for reporting every in-patient hospitalization at the moment when "any" employee learns of the incident. Rather, the clock should start only when the information comes to the knowledge of the supervisor or another professional in a position to understand there is a reporting obligation.

OSHA has proposed in section 1904.39(b)(7) that, if the employer does not initially know about a hospitalization for a work-related injury, the reporting "clock" would start as soon as the incident is reported to "any" of our employees. That requirement is inappropriately broad.

Dow acknowledges that the existing (non-amended) section 1904.39(b)(7) already triggers the clock for reporting **fatalities** and **multiple hospitalizations** when the information is reported to "any" employee. These new amendments would simply extend that same trigger to "all" in-patient hospitalizations. However, there are two key differences. First, fatalities and multiple hospitalizations are inherently the type of event that an employer will already know about. Second, fatalities and multiple hospitalizations are very infrequent. As a result, although there is the theoretical potential for the current wording of section 1904.39(b)(7) to cause mischief, we cannot recall any real-world instance where Dow lacked the necessary information to report fatalities or multiple hospitalizations within the deadline. In contrast, if OSHA expands this rule to literally cover every in-patient hospitalization (even for observation), there will be much greater likelihood that Dow or other employers may lack awareness of information that has been communicated to some random employee. As a result, a more robust trigger is needed before the employer can appropriately be required to report.

Consider the following:

- Suppose a husband and wife are both "employees" and one of them is hospitalized. Or suppose a parent and child are both "employees" and one of them is hospitalized. It would be quite normal for a hospitalized worker to let his or her family know he or she is in the hospital. However, that does not mean the other family members (who happen to be employees) would think to tell the employer. They would be thinking about the hospitalized family member. Communicating information to these other "employees" does not put the information into the hands of the Company.
- There may also be instances where a hospitalized employee may receive a visit from a co-worker, and tell the co-worker that he or she thinks the injury was work-related. However, the co-worker is probably just getting off shift and will go home after the visit to the hospital. It may be the next day, or even later, before the co-worker comes back to work. By that time, intervening experiences (a barbecue, a child's track meet or even a difficult drive to work) may have driven the bedside conversation from this employee's mind. He or she may never pass the information along to the employer.
- Unfortunately, there may be instances when workers try to hide from their employer the fact that an injury occurred at work. In those cases, if the injured worker tells a co-

worker that the injury happened at work, he or she will probably extract a promise that the co-worker will not tell the employer.

In any of these situations, it would be unfair to start the reporting "clock." Compliance with the reporting deadline would be literally impossible.

To address this concern, OSHA should specify that the "clock" starts only when the incident, and the fact that the worker was hospitalized, have been communicated to the employee's supervisor or to other employees whose responsibilities and position qualify them to recognize the reporting requirement.

OSHA should correct an ambiguity in section 1904.39(a) that appears to encourage duplicative reporting.

Section 1904.39(a) says we must report "orally" to the nearest area office. Then it says we "may also" report to the 800 number. This is ambiguous and should be clarified.

The normal meaning of "also" would be "in addition to." So this provision seems to say that AFTER we report to the area office, we may – if we wish – file an additional, duplicative report with the 800 number. If that is the intended meaning, we cannot think of any reason why an employer would ever want to do that.

Dow suspects that OSHA probably did not really mean "also." Rather, we suspect that this regulation is trying to say that, if there is any difficulty reporting to the area office (for example, if that office is closed and nobody is answering the phone), we have the option of calling the 800 number instead of the area office. If that is OSHA's intent, the words should be clarified. For example, OSHA could revise section 1904.39(a) to say "Alternatively," we may call the 800 number.

OSHA's practice of "partially" exempting certain industries and establishments from injury and illness recordkeeping is of questionable value and should perhaps be discontinued.

OSHA has a long-standing practice of "partially" exempting certain industries and establishments from injury and illness recordkeeping. Historically, the Agency has applied the partial exemption to industries whose injury and illness rate is less than 75% of the DART rate. OSHA is proposing to continue this practice, but to update the list of partially exempt industries to reflect more recent data. Dow suggests that this practice of partial exemption has questionable value, may be counterproductive or even unworkable, and should perhaps be discontinued. We realize that reconsideration of the partial exemption is outside the scope of this rulemaking, and would require a separate proceeding with full opportunity for all parties to comment. Dow does not suggest that the partial exemption, by itself, merits such a rulemaking. However, if OSHA ever reopens part 1904 for further amendments in the future, this is a topic that would be worth discussing. Our thoughts are as follows:

1. An injury is an injury, regardless of the industry in which it occurs. Dow itself has establishments where people perform work that would fit within the descriptions of many of OSHA's proposed partially exempt industries.[1] However, we care just as much about an injury at those establishments as we do about an injury inside a chemical manufacturing establishment. Our efforts to improve safety and reduce injuries are just as important at the establishments that may be partially exempt from recordkeeping, and therefore we keep the records whether or not OSHA requires it.

2. 75% of the national average DART rate is not necessarily a good threshold. Dow has been striving for many years to improve safety and reduce injuries. We have succeeded to some extent. As a result, we are now in an odd situation: the injury rate for our office facilities – while very low -- can sometimes be higher than the injury rate in our chemical manufacturing plants. Although the injury rate in our office buildings is well below 75% of the national DART rate, there is still work to do. We use OSHA injury data as part of the information to guide our safety programs and to judge their effectiveness. As a result, we do not feel that being below 75% of the national average DART rate is a basis to cease keeping records.

[1] For example, Dow has establishments that are (wholly or in part) in-plant gasoline stations, clothing stores, shoe stores, nonscheduled air transportation facilities, "other" pipeline transportation facilities, freight transportation arrangement operations, motion picture and video studios, data processing centers, hosting services, "other" information services, "other" financial investment activities, insurance carriers, lessors of nonfinancial intangible assets, legal services, accounting and tax preparation, payroll services, architectural/engineering services, management, scientific/technical consulting services, "management of companies and enterprises," office administrative services, travel arrangement and reservation services, investigation and security services, offices of physicians, offices of other health practitioners, outpatient care centers, limited-service eating places, electronic and precision equipment repair and maintenance, and grantmaking and giving services.

3. Moving industries into and out of partially exempt status may be unworkable. As OSHA's proposed updates demonstrate, the reliance on a yardstick of 75% of the national average DART rate means that some industries will move into or out of partially exempt status. This may be unworkable, for three reasons:

    a. Considerable expertise is necessary in order to correctly make determinations under OSHA's recordkeeping regulations. This expertise does not swiftly spring into existence, just because a new update says a particular industry is no longer partially exempt. And if an industry is newly exempted, what will happen to the people whose job responsibilities included making those determinations?

    b. Detailed procedures must also be created, taught, and practiced in order to correctly make determinations under OSHA's recordkeeping regulations. To cite just one example, the fact that an injury has occurred must somehow be brought to the attention of the people who make the determinations. This requires a procedure and a reporting mechanism. These procedures do not spring into existence without effort. Moving industries into and out of partially exempt status may therefore cause confusion and incorrect determinations.

    c. Partially exempt industries must still be able to record injuries accurately if BLS or OSHA makes a request. How will this work? If an industry is partially exempt and does not normally keep OSHA records, the members of that industry will likely lack the expertise and procedures to make those determinations. So, if OSHA or BLS make a request, the affected facilities will not be positioned for success. A total exemption could be workable, or being totally subject to the requirements could be workable. In contrast, being partially exempt – meaning there is no routine requirement to keep the records but one must remain constantly expert "just in case" – would seem to be very difficult to implement.

4. While OSHA-recordable injury statistics may not be a perfect tool, they are a familiar tool and a useful tool in efforts to reduce injuries. If particular industries or establishments are not routinely required to keep records, they will lack this important tool. Safety programs may suffer as a result.

5. The partial exemption is especially unlikely to work for small employers. OSHA has partially exempted small employers (those with 10 or fewer employees) from injury and illness recordkeeping. A total exemption might work, but a partial exemption is particularly unlikely to work for this class of employers. In Dow's experience, a great many small employers think they are totally exempt from all OSHA regulations. They do not read OSHA's regulations in the Federal Register or the Code of Federal Regulations,

and they may not employ personnel with the expertise to make decisions under the recordkeeping regulations. This proposal says small employers would still be required to make prompt notification (in fact, extremely prompt notification, at a pace that in some instances has never before been attempted) for fatalities, hospitalizations and amputations. Small employers, as a class, will likely be unprepared and unequipped to comply with that requirement.

For all these reasons, Dow suggests that the partial exemption would be a good candidate for reconsideration if, at some future date, OSHA engages in further rulemaking to revise part 1904.

Some of the figures that OSHA has utilized in the regulatory cost justification seem unrealistic.

Dow does not object to appropriate recordkeeping for occupational injuries and illnesses. However, OSHA's cost-justification appears to rely on numbers that seem unrealistic.

- OSHA has estimated (76 Fed. Reg. 36420 column 1) that the cost will be approximately $50 to $100 per affected establishment. In reality, one legal opinion as to whether an injury is recordable can cost far more than that. (Unfortunately, the application of OSHA's recordkeeping regulations to real-world scenarios is sufficiently complex that legal opinions are a frequent necessity.) In addition, it can require the attention of several different people – typically salaried professionals – to make the decision whether an injury is recordable. So the cost of personnel time, all by itself, would easily exceed OSHA's estimate. In addition to that, in a large company it takes tens or hundreds of man-hours (again mostly using salaried professionals) to set up the procedures and systems that are utilized for implementation of the regulations.

- OSHA has estimated it takes 1 hour to train a person to be a recordkeeper, and then 0.2 hours per establishment per year for retraining due to turnover. In reality, a person with only one hour of training on OSHA's recordkeeping regulations would likely be a recipe for noncompliance. The process of developing a competent OSHA recordkeeper is far more time-intensive than that. At Dow, we have the benefit of being able start with intelligent, highly educated and motivated professionals who have expertise in fields such as industrial hygiene, medicine, personal safety, engineering, etc. Even so, developing those personnel into competent OSHA recordkeeping decision-makers is a gradual process that involves mentoring and frequent recourse to subject-matter experts. Some of the training occurs "on the job," through careful examination of OSHA's recordkeeping handbook, preambles to the proposed and final regulations, and published interpretations, in order to apply the regulations to particular facts. This can take considerably more than an hour, even for a single injury.

- OSHA estimates that it takes an average of 0.38 hours (which translates to 22 minutes and 48 seconds) to complete the entries on all the forms for each recordable injury and illness. In reality, that is the tip of the iceberg. Filling out the forms is the easy part. Deciding whether the injury or illness is recordable takes more time and more people. Setting up sustainable procedures also takes considerable time, as does training (including the task of developing the training programs, the task of putting the training programs into accessible electronic tools, and the task of setting up reminder/tracking systems). And if the injured employee goes to an external physician, additional time is

required for our in-house medical department to interact with that health care provider and obtain relevant information.

- OSHA estimates that it takes fifteen minutes to report a fatality or hospitalization. This may perhaps account for the time spent on the telephone, but it does not include all the people who need to participate in, or be notified of, the incident and the upcoming notification to OSHA. Nor does it include dealing with OSHA's inspection that follows the notification.

- OSHA estimates that the people who keep the records earn an average of $56,000 per year. In reality, decisions on recordability (including gathering the necessary facts) may involve physicians, industrial hygienists, personnel in the supervisory chain of the injured individual, safety professionals, attorneys and recordkeeping subject-matter experts, all of whom are salaried, degreed professionals at salaries considerably higher than $56,000 per year.

Please do not misunderstand this comment. Dow does not object to keeping appropriate records of occupational injuries and illnesses. We support the fact that there are recordkeeping regulations, and we also support most aspects of OSHA's proposed amendments. However, to the extent that cost justification may be required, it should be based on accurate numbers.