



# U.S. Chemical Safety and Hazard Investigation Board

**SUBJECT:** DESIGNATION OF AUTHORITY AND PROCEDURES FOR DEPOSITIONS AND OTHER TESTIMONY UNDER OATH

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1. **PURPOSE.** This Order designates the officers and employees who may exercise the authority of the U.S. Chemical Safety and Hazard Investigation Board (CSB) to gather information through depositions and other forms of sworn testimony. It also establishes policies and procedures governing the implementation of that authority.
2. **EFFECTIVE DATE.** This Order is effective upon passage.
3. **REFERENCES.** The statutory basis for this Order is 42 U.S.C. §§ 7412(r)(6)(L)(i)-(ii), (M), (N), and 7607(a).
4. **POLICY.** To ensure accurate, complete, and well-documented factual reports, a CSB incident investigation may require the taking of testimony under oath. It is the policy of the Board to exercise the full range of its investigative authority in accordance with the law and the procedures prescribed in this Order, whenever such action is necessary for the discharge of its statutory duties.
5. **RESPONSIBILITIES.** The sections on policies and procedures in this Order set out the responsibilities of the respective offices and individuals affected by this Order.
6. **DEFINITIONS.**
  - a. **Board:** The appointed members of the U.S. Chemical Safety and Hazard Investigation Board acting in their capacity as a unified corporate body.
  - b. **CSB:** The U.S. Chemical Safety and Hazard Investigation Board.
  - c. **Deposition:** The testimony of a witness taken under oath and recorded verbatim, usually in response to a subpoena.
  - d. **General Counsel:** The person duly appointed by the Board to serve as its General Counsel. Any person designated by the Board or General Counsel to act in his or her absence during a vacancy, incapacity or temporary absence, shall, during the term of their service, have the same power and authority as that of the duly appointed General Counsel.
  - e. **Information gathering (or investigative) authority:** The authority of the CSB, in furtherance of its statutory duties, to, among other things: convene and conduct depositions; issue subpoenas compelling the attendance and testimony of witnesses at such depositions; administer oaths; order responses to requests and questions, and/or the production of relevant papers, books, documents, records, reports, and other evidence, at such times and places and in such form as it may direct.
  - f. **In such form:** The form required by the CSB for responses to its inquiries. Forms of response may include, but are not limited to, testimony before a

verbatim court reporter in a question and answer format, written reports, responses under oath to written interrogatories or other sworn or unsworn statements, and verbal or written answers to questions propounded by the Board or employees of the CSB.

- g. **Method of recording:** Deposition testimony may be recorded by sound, sound and visual, or stenographic means.
- h. **Oath:** An affirmation or acknowledgement by a witness in substantially the following form: “Do you swear/affirm/aver/state, under the penalties of perjury, that the testimony/statement(s)/answer(s) you are about to give/have given are true, complete, and correct to the best of your knowledge, information, and belief.”

The oath or acknowledgment of a court reporter should be in substantially the following form: “Do you swear/affirm/aver/state, under the penalties of perjury, that you will well and truly record and transcribe these proceedings, and, upon request, render a true and accurate transcript thereof.”

- i. **Respondent:** The person or entity testifying, answering interrogatories, or providing documents, evidence, or other information. The term is synonymous with “deponent” and “witness.”
- j. **Transcript:** A complete, verbatim, written record of testimony given in a deposition. Transcripts are usually certified by the transcriber as being a true and accurate record of the deposition proceedings.
- k. **Upon authority of the Board:** The officers and employees who the CSB designates and authorizes to exercise its information gathering authority.
- l. **Verbatim:** Word-for-word.

7. **DESIGNATION / DELEGATION OF AUTHORITY.** The General Counsel is hereby duly designated and authorized to exercise the information gathering authority of the CSB. The General Counsel may delegate this authority, in writing, to any full-time CSB employee who requires such authority to carry out his or her duties in furtherance of the CSB’s statutory purposes. No one other than the General Counsel, or the Board, may delegate this authority.

8. **CONSTRUCTION WITH INVESTIGATIVE PROTOCOL.** This Order sets forth specific policies and procedures that must be followed when taking depositions, other testimony under oath, or otherwise compelling the cooperation of respondents by force of law. Information and evidence may also be collected using less formal means, such as simple interviews. For the purpose of conducting informal interviews and other non-compulsory information gathering, the procedure established in the

CSB's Incident Investigation Protocol entitled "Procedure C: Collecting and Managing Evidence" remains in full force and effect, to the extent it is not inconsistent with this Order. In case of a conflict, the provisions of this Order will prevail.

9. **DEPOSITION PROCEDURES.**

- a. The CSB attempts to conduct investigations in an atmosphere of cooperation. In many cases, informal interviews may be used instead of depositions. However, it may sometimes be necessary or desirable to obtain sworn testimony. For example, when there is conflicting factual information, reluctant or uncooperative witnesses, or highly controversial and/or critical information, sworn and transcribed testimony should be taken. Sworn testimony and compelled document production might also be necessary to preserve the accounts of critical witnesses with life-threatening injuries, or in other situations where crucial evidence might be lost or destroyed. In such cases, ensuring an accurate record of the questions asked and the answers given may be critical to the success of the investigation.
- b. Depositions and other methods of compelled cooperation may be initiated at any point in an investigation. Whenever possible, however, they should follow more informal efforts, such as attempting to obtain needed information and evidence through voluntary cooperation.
- c. When the Investigator-in-Charge (IIC) determines that depositions are needed, he or she will coordinate with and obtain the approval of the Director of the Office of Investigations and Safety Programs. The Director and/or IIC will request that the General Counsel or his/her designee issue the subpoenas, and will arrange for their service in accordance with Board Order 011.
- d. Ordinarily, depositions should be overseen and/or conducted by the IIC. Other Field Investigation Team (FIT) members may depose witnesses, if they have been delegated authority to do so by the General Counsel and have received permission from the IIC. The Director of the Office of Investigations and Safety Programs and the General Counsel may also depose witnesses. Notwithstanding any other statement to the contrary, a CSB employee must be delegated authority from the Board or the General Counsel before deposing a witness.
- e. Depositions and other methods of compelled cooperation are a tool available to the CSB as an extension of the field phase of the investigation. Subject to the mandatory requirements of this order, standard good investigative techniques should be used.
- f. Exercising the CSB's information gathering authority does not constitute a judicial proceeding or administrative adjudication. Compliance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence is not required.

Any question or request for document production, other evidence, or information that adequately specifies the requested material, is relevant to the investigation, and that furthers the execution of the CSB's statutory purpose - determining the root causes of chemical accidents and recommending ways such accidents can be prevented - is proper.

A deposition is not a public proceeding. Those present at a deposition are limited to authorized CSB personnel, the deponent and his/her attorney, if requested.

- g. Depositions should generally be conducted in conformity with the following format:
- (1) Ask the court reporter to pre-mark exhibits for purposes of identification. If there is no court reporter, the investigator should pre-mark the exhibits. Try to arrange exhibits in the order to which they will be referred.
  - (2) Swear in the court reporter and announce that the record is open, and state the time and date.
  - (3) If the deposition will not be taken before a court reporter, announce how the deposition will be recorded and transcribed.
  - (4) Make an opening statement. (See sample statement attached to this Order as Appendix A). The investigator should describe the schedule and procedure he or she will follow.
  - (5) Announce the name of the deponent. Identify the witness and his or her representative, if any.
  - (6) If the court reporter is a Notary Public, ask him or her to swear in the deponent. If the court reporter is not a Notary Public, or if the investigator prefers, he or she should swear in the witness.
  - (7) Ask the witness to state his or her full name and correct address and telephone number. Obtain the same information from the witness' representative, if any.
  - (8) Begin questioning the witness. Try to go from the general, such as education, work experience, job titles, duties, and responsibilities to the more specific. If you ask the witness to refer to a document, be sure there are enough copies for everyone present. Mark the document as an exhibit, and make a reference to the exhibit number for the record. Avoid accusatorial questions. Use a conversational tone whenever possible.
- h. **Disruptive witnesses.** If the witness or his/her attorney become disruptive or uncooperative to the point that the deposition is compromised, announce that the

proceeding is recessed while you seek the guidance of the Office of General Counsel. Emphasize that the deposition is not terminated and will be resumed after you have consulted with the General Counsel and, if necessary, the appropriate United States Attorney's office. If an acceptable compromise cannot be reached, it may be necessary to adjourn the deposition while an enforcement action is instituted in an U.S. District Court. However, the investigator may attempt to resolve disputes if he or she can do so without compromising the deposition and investigation.

- i. A witness in an administrative investigation has the right to invoke his/her Fifth Amendment privilege against self-incrimination. The witness may assert his/her privilege as to any disclosure, which he/she "reasonably believes" could be used against him/her in a future criminal prosecution or could lead to other evidence that might be so used. A witness' intent to invoke the Fifth Amendment privilege DOES NOT excuse him/her from appearing in response to a subpoena. The witness must appear, submit to questioning, and invoke the privilege under oath, on the record.
- j. **Closing the deposition.** When the investigator has finished questioning, he or she may allow the witness to supplement the record by making a narrative statement. The investigator should then ask any appropriate follow-up questions and announce the time and that the record is closed as to that witness.
- k. **Witness fees.** After the record is closed, release the witness and ask him/her to complete the form for claiming witness fees.
- l. **Transcript review.** If appropriate, ask the court reporter to explain the procedures for reviewing and pointing out errors in the transcript or, in the alternative, waiving signature.

## 10. **REPRESENTATION OF WITNESSES.**

### a. **Voluntary Interviews.**

Witnesses appearing voluntarily do not have a right to have an attorney present during questioning. The IIC, in consultation with the General Counsel, may permit a witness to be accompanied by an attorney or non-attorney representative. If so accompanied, the role of the attorney or non-attorney representative is limited to raising objections to questions that are outside the scope of the investigation and to advising the witness with respect to any legal privilege, for example, under the Fifth Amendment to the U.S. Constitution. An attorney or non-attorney representative may not represent more than one witness in each investigation in this fashion absent the consent of the IIC and the General Counsel.

**b. Witnesses Who Are Compelled to Appear for a Deposition.**

Witnesses who are compelled to appear (i.e., by subpoena) are entitled to be accompanied, represented, and advised by an attorney as follows:

- (1) Counsel for a witness may advise the witness with respect to any question asked where it is claimed that the testimony or other evidence sought from a witness is outside the scope of the investigation, or that the witness is privileged to refuse to answer a question or to produce other evidence. For these allowable objections, the witness or counsel for the witness may object on the record to the question or requirement and may state briefly and precisely the ground therefor. If the witness refuses to answer a question, then counsel may briefly state on the record that he has advised the witness not to answer the question and the legal grounds for such refusal. The witness and his counsel shall not otherwise object to or refuse to answer any question, and they shall not otherwise interrupt the oral examination.
- (2) Any objections made will be treated as continuing objections and preserved throughout the further course of the deposition without the necessity for repeating them as to any similar line of inquiry. Cumulative objections are unnecessary. Repetition of the grounds for any objection will not be allowed.
- (3) Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs (b)(1) and (2) of this section, interrupt the examination of the witness by making any objections or statements on the record.
- (4) Following completion of the examination of a witness, counsel for the witness may on the record request the person conducting the deposition to permit the witness to clarify any of his or her answers. The grant or denial of such request shall be within the sole discretion of the person conducting the deposition.
- (5) The person conducting the deposition shall take all necessary action to regulate the course of the deposition to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language. Such person shall, for reasons stated on the record, immediately report to the Board any instances where an attorney has allegedly refused to comply with his or her directions, or has allegedly engaged in disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of the deposition. The Board will thereupon take such further action, if any, as the circumstances warrant, including exclusion of that attorney from further participation in the particular investigation.

11. **TESTIMONY FROM INJURED WITNESSES.** In some circumstances it may be necessary or desirable to preserve, or attempt to preserve, the testimony of a critically or seriously injured witness. Such attempts require special care and extreme

sensitivity, both toward the needs and condition of the witness, and to his/her family and friends. Every effort must be made not to unreasonably interfere with hospital personnel in the discharge of their duties. The IIC should not attempt to interview a critically or seriously injured witness until the IIC has:

- (1) Determined that the desired information is essential or highly important to the success of the investigation;
- (2) Determined that there is no other source from which the information can be reliably obtained;
- (3) Obtained as much information as possible about the witness' condition and prognosis from his or her treating physician, including the ability of the witness to answer questions without jeopardizing his or her condition; and
- (4) Obtained approval for the interview from the Director of the Office of Investigations and Safety Programs and the Office of General Counsel.

If the interview is approved the IIC should:

- (1) Try to meet with a family member(s) and explain the need for the interview. However, the injured witness ultimately decides if he/she will be interviewed.
- (2) Describe the manner in which the interview will be conducted.
- (3) If the family and/or witness agree, consult appropriate medical personnel to determine if the witness' condition will allow an interview. Make certain that medical personnel are of the opinion that an interview will not over tax the witness or exacerbate his/her condition.
- (4) Try to ascertain the effect of the injury or medications on the witness' ability to reliably provide the needed information.
- (5) Use the method of recording testimony that will be least intrusive to hospital personnel and other patients.
- (6) Ask the witness whether he/she is willing to be interviewed. Assure him/her that you will end the interview at any time if it becomes too taxing, or whenever the witness requests that it be terminated.
- (7) Prepare the questions ahead of time. Ask as few questions as possible to obtain the desired information.
- (8) Allow the witness to proceed at his/her own pace. Encourage a narrative account. Do not unnecessarily interrupt the witness.
- (9) Try to have a family member and medical personnel present during the interview. Unless the witness insists on continuing, end the session if either requests it.

Ordinarily, an oath need not be administered to a critically or seriously injured witness. A court reporter should always be sworn in.

12. **INTERROGATORIES**. Interrogatories may be served upon any witness, but the following general conditions should be observed whenever possible.

- a. The interrogatories should not be unnecessarily numerous, lengthy, or burdensome.
- b. Ordinarily, interrogatories should be served before taking depositions.
- c. Each interrogatory should be separately numbered. Each subpart of a question should be separately designated by a letter.
- d. If interrogatories are being served by subpoena they should conform to Rule 33 of the Federal Rules of Civil Procedure.
- e. Whenever possible, give the respondent 30 days in which to answer the interrogatories.
- f. A general statement should be made in the beginning of the interrogatories, as follows:

Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to. If an interrogatory is objected to, the witness must state with specificity all grounds for the objection. The interrogatory must be answered to the extent it is not objectionable.

- g. If an interrogatory is objected to, an attempt should be made to resolve the issue amicably with the assistance of the Office of General Counsel. If that is not possible, the General Counsel may elect to refer the case to the appropriate United States Attorney's Office and request that it seek an Order of Enforcement.

13. **WRITTEN DEPOSITIONS.** In certain situations, it may be desirable to take the testimony of a witness by deposition upon written questions. This method would generally be used in conjunction with other regular depositions, and if the:

- (1) Witness has not been deposed previously by the CSB;
- (2) Witness has made statements in an interview or in other settings that require brief inquiry, clarification, or follow-up; and
- (3) IIC determines that it is not necessary for the witness to personally appear at or participate orally in the scheduled deposition.

Depositions upon written questions should be served upon the deponent by subpoena. The deponent should be subpoenaed to appear personally at the time, date, and place of the regularly scheduled depositions. He/she should be given the option in the subpoena of responding to the written depositions in lieu of appearing personally. This option should be conditioned upon the IIC receiving the responses at a specified date before the regular deposition is to be taken.

The IIC should read the written questions and their responses aloud, verbatim. They should be recorded in the same manner being used to record the regular deposition.

**U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD**

Adopted August 25, 2000. Amended December 21, 2000.

APPENDIX A

**SAMPLE OPENING STATEMENT TO BE READ TO ALOUD TO WITNESSES**

<b>Opening statement checklist</b>	
<input type="checkbox"/>	I am <i>[your name]</i> of the Chemical Safety and Hazard Investigation Board (CSB).
<input type="checkbox"/>	With me is <i>[other CSB team members]</i> , also of the CSB
<input type="checkbox"/>	Today is <i>[today's date]</i>
<input type="checkbox"/>	Please state you full name, employer, and job title.
<input type="checkbox"/>	Notes are (or a court reporter transcript is) being made of this deposition to ensure that we accurately retain the information that you provide.
<input type="checkbox"/>	The CSB is authorized by Congress to conduct investigations of serious chemical accidents. It is investigating the facts of the <i>[incident date]</i> accident at <i>[incident location]</i> to determine how and why it occurred and to prevent similar accidents in the future.
<input type="checkbox"/>	The CSB does not assign blame or fine companies or individuals.
<input type="checkbox"/>	If you think that any of the information you may provide is a trade secret or confidential business information, please tell me so at the time that you start to discuss it.
<input type="checkbox"/>	Your appearance here is required by a duly issued subpoena of the United States Chemical Safety and Hazard Investigation Board.
<input type="checkbox"/>	[If attorney present] Your attorney's role under CSB rules is limited to raising objections to questions that are outside the scope of the investigation and to advising you with respect to a legal privilege to refuse to answer a question.
<input type="checkbox"/>	Do you understand everything that I have explained?
<b>Notes</b>	