S. HRG. 112–725

TIME TAKES ITS TOLL: DELAYS IN OSHA'S STANDARD-SETTING PROCESS AND THE IMPACT ON WORKER SAFETY

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

ON

EXAMINING DELAYS IN OSHA'S STANDARD-SETTING PROCESS AND THE IMPACT ON WORKER SAFETY

APRIL 19, 2012

Printed for the use of the Committee on Health, Education, Labor, and Pensions

Available via the World Wide Web: http://www.gpo.gov/fdsys/

U.S. GOVERNMENT PRINTING OFFICE

73–974 PDF WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
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STATEMENTS

THURSDAY, APRIL 19, 2012

ADDITIONAL MATERIAL

TIME TAKES ITS TOLL: DELAYS IN OSHA'S STANDARD-SETTING PROCESS AND THE IMPACT ON WORKER SAFETY

THURSDAY, APRIL 19, 2012

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in Room SD–430, Dirksen Senate Office Building, Hon. Tom Harkin, chairman of the committee, presiding.

Present: Senators Harkin, Enzi, Murray, Isakson, Whitehouse, Franken, and Blumenthal.

OPENING STATEMENT OF SENATOR HARKIN

The CHAIRMAN. The Senate Committee on Health, Education, Labor, and Pensions will please come to order.

We're here today to discuss the important issue of workplace safety and, specifically, why it takes so long for OSHA to issue a new safety standard. We are going to hear from GAO about a new study finding that there are alarming delays in this process. But before I get into what the report says, I first want to talk about why delays at OSHA matter.

Statistics tell us that 12 American workers are likely to die today from a workplace injury. Countless more will be seriously hurt or contract a fatal illness or disease in their workplace. These injuries take a massive toll on our economy and society, dramatically increasing the costs of medical care and decreasing productivity in workplaces across the country.

But these economic costs don't begin to reflect the grief that families feel when their lives are torn apart by a tragedy on a job. No dollar figure can capture what a family must endure when a loved one goes to work in the morning and never comes home again.

In honor of Workers' Memorial Day, which is later this month, I'd like to now take a moment to acknowledge some people that are in attendance here today. These are the family members of victims of workplace tragedies and others who have been personally affected by workplace deaths and injuries. I know many of you have brought pictures. Others of you haven't.

So could I ask all of you who are here who have had a family member, a loved one, others who have been affected by workplace deaths and injuries—could you please just stand up? Let's just see how many of you are here. And you all have pictures. Thank you

very much for being here. You add greatly to our hearing. Thank you.

The pictures that you hold are the faces that we should remember every time we hear that safety rules are too burdensome or that regulations cost jobs. Safety rules save workers' lives, and that should be our top priority.

I now ask that the statements of these individuals be included in the record.

[The information referred to may be found in Additional Material.]

The CHAIRMAN. Keeping our workers safe is the responsibility of every employer across this country. The Occupational Safety and Health Administration's job is to make sure that employers are living up to this responsibility. While there are many tools that OSHA can use to achieve these goals, safety standards are among the most important and most effective ways that OSHA can help save lives.

But, unfortunately, as we will hear today, the standard-setting process at OSHA is broken. Even when the evidence is undeniable that our workers are dying from workplace hazards, OSHA still takes an eternity to issue a new safety rule. It took OSHA nearly a decade to issue a commonsense rule on crane safety. In the meantime, several cranes toppled and lives were ruined. OSHA's silica standard has been under consideration since 1974. But OSHA hasn't even published a proposed rule yet for the public to even comment on.

Since the 1980s, it has taken OSHA an average of almost 8 years to put out a final rule. That's 50 percent longer than the EPA, twice as long as the Department of Transportation, and five times as long as the SEC takes to issue a rule. Detailed scientific analysis is a big part of OSHA rulemaking, and, of course, that analysis is going to take time. But 8 years seems to be unduly long.

The GAO report explores some of the procedural problems that hamstring OSHA's efforts. It tells us how inefficient the process is. I know today's witnesses will offer even more constructive criticism of OSHA's rulemaking. No one wants or expects OSHA to issue new rules without careful consideration of the impact on health and the cost of compliance. But it is simply unconscionable that workers must suffer while an OSHA rule is mired in bureaucracy.

Slow procedures alone cannot explain why OSHA has issued so few rules recently. Rules have always taken a long time to finalize. Yet, after putting out 47 new safety standards in the 1980s and 1990s, OSHA has put out only 11 since then. I might note that the Reagan administration issued new rules at a rate four times faster than the current Administration.

I suspect that the lack of new rules is at least partly the result of relentless external pressure from business lobbyists and anti-labor groups. These groups pressure both OSHA and OMB to create delays that cost lives.

Today, rather than hearing outrage over worker deaths, we hear misinformation campaigns from corporate lobbyists about OSHA supposedly killing jobs. We see legislative proposals that call for blanket prohibitions on new regulations and proposals to add even more red tape to the regulatory process. Some folks don't seem to

be satisfied until it will take 80 years for OSHA to issue a regulation instead of 8. But that is unacceptable.

The truth is that OSHA doesn't kill jobs. It keeps jobs from killing people. OSHA's process must be reformed to be more responsive to workplace safety concerns, not less. We must come up with ways for OSHA to do its job without intimidation or interference.

I know GAO has some ideas on how to do this, and I think the witnesses from our second panel have even more ideas. So I look forward to today's hearing and I hope it can be the start of a productive conversation about making workers safer.

And with that, I will turn to Senator Enzi for his opening statement.

OPENING STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Mr. Chairman, and thank you for holding this hearing today. This is the first workplace safety hearing the HELP Committee has held since 2010, when we spent a great deal of time discussing mine safety because of the most tragic accident in 40 years that had just occurred at the Upper Big Branch Mine in West Virginia. Twenty-nine men lost their lives in that single accident, yet they represent just a fraction of the workplace deaths that occur all over the world.

Here in the United States, statistics confirm that we are making significant progress. Workplace fatalities, injuries, and illnesses continue their historic decline. Since 2003, injuries and illnesses have decreased by nearly 30 percent, and fatal injuries have decreased 19 percent.

Despite this decline, I agree with the Chairman that we can and must do better. I remember when my daughter was going to have a tonsillectomy, and the doctor explained to us that it's 99.9 percent safe. But it occurred to me that if that one tenth was my daughter, it was 100 percent to me, and I recognize that to all of you in the audience, too. So we do have to do better.

Workplace safety is surely one of the most important missions Congress has authorized for the Department of Labor. There are literally lives and livelihoods on the line. This hearing focuses on one tool: issuing new safety and health standards by regulation. This is a necessary tool. I'm interested in the findings of the Government Accountability Office, GAO, on this subject.

But I would also encourage OSHA to better pursue multiple methods to improve safety, rather than focusing all its resources into new regulations and stronger enforcement. Voluntary programs involving employees and management, such as the Voluntary Protection Programs, have been shown to make workplaces considerably safer and save money. Yet under the current Administration, VPP has been threatened and undermined. Instead, we should be talking about expanding VPP to smaller employers and making it even more effective.

I'm pleased that several Senators sitting on this committee have co-sponsored legislation introduced by Senator Landrieu and I to preserve VPP. I thank Senators Hagan, Isakson, Murkowski, and Burr for their support and look forward to opportunities to bring this bill up for a markup.

I've been to some of the ceremonies where companies are being awarded for their safety at these VPP sites. And I know that one of the reasons they're successful is the pride that all of the employees are taking in making sure that all of them are safe.

Workplace drug testing is another important way to reduce risk of injury and death in the workplace. All of the regulations and required compliance in the world are not going to work if an employer or manager disregards them because his or her judgment is impaired.

The field of workers' compensation insurance has developed a long record of experimentation with strategies to make workplaces safer and has measureable results. Every State creates its own workers' comp regime. OSHA should look at the best practices out there and determine if there are any new ideas that can be translated to the Federal level.

As someone who has run a workplace safety program personally, I am very supportive of giving employers quality information and flexibility to see what works best to keep their work site safe. Today, even the smallest employers must grapple with thousands of pages of regulation and burdensome recordkeeping requirements.

But what should matter the most is the result, and that's keeping workplaces safe. Since it was created in 1970, OSHA has been empowered to establish standards for workplace safety and health. Congress has entrusted OSHA to identify common workplace hazards which cause injuries and illness, to conduct survey and research on the cause of hazards, to discover what preventative steps can be taken to mitigate hazards, and to issue and enforce regulations.

Given this broad delegation of authority, Congress also required that OSHA use it appropriately. A new standard must address an actual hazard. The preventative steps OSHA may mandate must actually work to reduce the risk. They must be feasible to institute and cost-effective. If the cost will weigh heavily on small businesses, OSHA must engage in panel discussions with actual small business stakeholders.

All of these considerations are appropriate for OSHA to undertake before finalizing a new standard. And this committee should closely scrutinize any proposals to shortcut them.

As the GAO report released today makes clear, the interval of time between when a standard is proposed and finalized can range from 15 months to 19 years, which is comparable to other agencies GAO has reviewed, such as the Food and Drug Administration. The finalization interval has varied throughout OSHA's existence. In fact, it was much longer in the 1990s than in either the 1980s or the 2000s.

GAO reports on the many factors that affect the finalization interval. Some of them are the same issues facing regulations from any agency, such as shifting priorities. Change in administration is a clear example of when priorities shift. But they also shift under the same leadership when different hazards capture attention.

For example, today's report notes that the ergonomic standard issued at the end of the Clinton administration was proposed and finalized in just 1 year. In order to accomplish that, the vast major-

ity of OSHA's standard-setting resources were focused on the ergonomics rule and taken off of other standards.

While most standards use about 5 staff members, OSHA deployed 50 office staffers, 7 attorneys, and half of the agency's economists for the development of the ergonomics rule. You don't have to be a management guru to see how disruptive that would be to the development of other agency priorities.

In the administration's response to this GAO report, OSHA endorses the notion of statutory deadlines imposed by Congress to speed standard-setting. Deadlines imposed by Congress or the courts do, indeed, seem to speed up the regulatory process by about half. But OSHA should be cautious about wishing for such dictates.

The entire point of creating OSHA was to allow experts to determine the most dangerous and addressable hazards, the best ways to mitigate them, and when it was most appropriate to do so. If Congress is setting the agenda instead of safety experts, American employees will not benefit.

Let me cite a recent example. In 2007, legislation was passed by the House of Representatives to require an interim standard within 90 days and the final standard within 2 years to restrict the use of a flavoring additive. The bill was not taken up in the Senate, and the Bush administration and OSHA did not initiate rulemaking.

One of the co-sponsors of the bill, Congresswoman Hilda Solis, became the Secretary of the Department of Labor just a year later. Yet under 3 years of her leadership, OSHA has not finalized a standard for the flavoring additive. In fact, they found that a new regulation was not needed because manufacturers acted quickly to mitigate the risk. Therefore, if the legislation to dictate new standards had been enacted, OSHA would have spent valuable resources on a regulatory effort that was no longer necessary.

I also hope this GAO report will not be misconstrued to justify limiting stakeholder involvement in OSHA's regulatory process. Stakeholder review and discussion is one of the most beneficial parts of the rulemaking process. That's where you work out the kinks of the new regulation and ensure both that it will work in the real world and that it accomplishes the goal in the most efficient manner.

Many of the best examples of regulatory efforts that have failed because of insufficient stakeholder outreach come from OSHA itself. One of today's witnesses, Mr. David Sarvadi, will testify about those missteps and suggest ways OSHA can be more effective in setting new standards. One of his suggestions is to involve stakeholders earlier in the process, not just after the risk has been assessed and the remedy formed.

There's one recent example of OSHA standard-setting which I do want to comment on, because I've had a long involvement with the issue, and that's the new Hazard Communication Standard finalized last month. OSHA spent more than 6 years working to harmonize the current Hazard Communication Standard with the global standard.

Recognizing that chemicals and goods routinely cross country lines today, it's beneficial to all involved if the hazard labels and the material safety data sheets, MSDS, are uniform and easily un-

derstood. This rulemaking has had a great deal of support from all stakeholders.

Several years ago, Senator Murray and I introduced legislation intended to aid this rulemaking process by involving stakeholders through a commission. Last year, President Obama listed this regulation as one of his accomplishments to reduce costs imposed by regulations.

With all of this support, this should have been an easy win. Instead, the rule that was finalized last month included new provisions not covered in earlier stakeholder outreach and is already being questioned on several fronts. Safety data sheets will have to include additional information not required by other countries, erasing some of the cost savings.

The final rule also inserted two provisions that are sure to cause confusion by having it cover combustible dust, which is an undefined hazard, and unclassified hazards. In this case, shortcutting stakeholder involvement and other regulatory steps required by law have only led to a more questionable standard that may now be prolonged even further.

Considering that this regulation was advertised as reducing regulatory burden and saving money, it's even more disappointing. And I used to do some work in safety in the oil well servicing business and found that what works for the oil well drilling is not the same safety procedures as for the oil well servicing. And that's why stakeholders need to be involved in the process, so that it will actually work with the kind of equipment they're using which can often be different.

I look forward to hearing the testimony and suggestions for improvement from today's witnesses. And I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Enzi.

We have two panels. Our first panel is the GAO. Revae Moran is the Director in the Government Accountability's Office of Education, Workforce, and Income Security Group. She directs teams of analysts in conducting reviews of the Department of Labor's enforcement agencies, including the Occupational Safety and Health Administration.

The GAO report has just been released this morning. We have a copy of it. I was able to give it a cursory review last evening.

Without objection, your statement will be made a part of the record in its entirety, that is, the document itself.

Ms. Moran, we welcome you, and if you can sum up in 5 minutes or so, we would appreciate that.

Welcome to the committee. Please proceed.

STATEMENT OF REVAE MORAN, DIRECTOR, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), WASHINGTON, DC

Ms. MORAN. Thank you.

Mr. Chairman and members of the committee, I'm pleased to be here today to discuss the Occupational Safety and Health Administration's, OSHA's, standard-setting process. GAO recently reviewed this process and the factors that affect the length of time it takes OSHA to set standards.

We reviewed standards set by OSHA from 1981 through 2010. We selected that year as our starting point because several laws

that affect the length of time it takes OSHA to set standards were passed in or after 1980, including the Regulatory Flexibility Act and the Paperwork Reduction Act.

We reviewed all of the standards OSHA issued except minor ones such as technical amendments to existing standards. During this period, OSHA has issued 58 standards. The time it took OSHA to finalize them ranged widely from 15 months to 19 years, with an average time of 7 years, 9 months. Fifteen of these standards, over 25 percent, took OSHA over 10 years to issue.

We found that many factors affect the time it takes OSHA to finalize a standard, including the complex framework of procedural requirements the agency must follow; shifting priorities within the agency, the Congress, and presidential administrations; and the high standard of judicial review for OSHA's standards. For example, an Executive order issued in 1993 requires OSHA to determine whether a new standard is economically significant, such as whether it will have an annual effect on the economy of $100 million or more. If it is, OSHA must submit a detailed cost-benefit analysis to the Office of Management and Budget for review, which can add several months to the process of setting a new standard.

Under another new law enacted in 1996, OSHA is one of only three agencies required to seek and consider input from panels of small businesses affected by certain new standards, a process that can add 8 months to the time it takes OSHA to set a new standard. Court decisions and actions by the Congress can also significantly affect the timeframes, either slowing them down or speeding things up.

For example, in 1981, the U.S. Supreme Court ruled that the Occupational Safety and Health Act requires OSHA to determine that all new standards are technologically and economically feasible. And other courts have held that OSHA must evaluate the feasibility of new standards on an industry by industry basis, which takes a lot of time.

On the other hand, when laws or the courts specify timeframes for developing these standards, it can speed up the process. Such timeframes were specified for nine of the 58 standards we reviewed. For these standards, it took OSHA about half the time to issue them, 4½ years on average, compared to the almost 8 years for standards for which timeframes were not specified.

We also reviewed the standard-setting processes of regulatory agencies similar to OSHA, such as the Environmental Protection Agency, EPA, and the Mine Safety and Health Administration, MSHA. We found, however, that their processes offered little insight into the challenges OSHA faces, because their statutory frameworks and resources differed so markedly from OSHA's. For example, one provision of the Clean Air Act gives EPA clear requirements and statutory deadlines for regulating air pollutants and for periodically reviewing and updating them.

We sought the opinions of occupational safety and health experts and agency officials on ways to improve OSHA's standard-setting process. In our report, released today, we present the pros and cons of each of these ideas, noting that many of them would make it easier for OSHA to develop new standards more quickly, but might not allow all stakeholder concerns to be considered. In addition,

many of these ideas would require substantive procedurally legislative changes, for example, changing the standard of judicial review, which would require Congress to amend the Occupational Safety and Health Act.

In conclusion, it is essential that OSHA set occupational standards that protect the safety and health of workers. The administrative burdens and costs associated with such standards must be carefully considered. But once the need for a new standard has been established, it is important for OSHA to be able to move forward as quickly and efficiently as possible in order to protect workers.

This concludes my oral statement. I would be happy to answer any questions you have at this time.

[The prepared statement of Ms. Moran follows:]

PREPARED STATEMENT OF REVAE MORAN

SUMMARY

• GAO reviewed the time it took OSHA to set all of the standards set by the agency from 1981 through 2010 (except minor ones such as technical amendments to existing standards).

• We selected 1981 as the starting point because several new laws that affect the length of time it takes OSHA to set standards were passed in or after 1980, including the Regulatory Flexibility Act, the Paperwork Reduction Act, and the Small Business Regulatory Enforcement Fairness Act (SBREFA).

• During this 30-year period, OSHA issued 58 standards.
  • It took OSHA from 15 months to 19 years to issue these standards—on average, 7 years, 9 months.
  • It took OSHA over 10 years to complete 15 of the 58 (over 25 percent).
  • Most of the standards (over 80 percent) were issued prior to 2000.

• Many factors affect the time it takes OSHA to finalize a new standard:

(1) the multiple procedural requirements the agency must follow;

(2) shifting priorities within the agency, the Congress, and presidential administrations; and

(3) the high standard of judicial review OSHA's standards must meet (the rigorous "substantial evidence" standard vs. the more deferential "arbitrary and capricious" standard for most other agencies).

• Court decisions and actions by the Congress can also significantly affect the timeframes, both slowing them down and speeding things up. For example, timeframes for 9 of the 58 standards were specified in laws or by the courts, and it took OSHA half the time to issue those standards.

• We sought the opinions of agency officials and safety and health experts on how to streamline the process. Our report presents the pros and cons of the major policy options, noting that many of them would make it easier for OSHA to develop new standards more quickly but might curtail opportunities for full stakeholder input. Many of the ideas suggested would require legislative action, such as amending the OSH Act to change the judicial standard OSHA's rules must meet.

Chairman Harkin, Ranking Member Enzi, and members of the committee, thank you for the opportunity to discuss the challenges the Department of Labor's (Labor) Occupational Safety and Health Administration (OSHA) faces in developing and issuing safety and health standards. Workplace safety and health standards are designed to help protect over 130 million public and private sector workers from hazards at more than 8 million worksites in the United States, and have been credited with helping prevent thousands of work-related deaths, injuries, and illnesses. However, questions have been raised concerning whether the agency's approach to developing standards is overly cautious, resulting in too few standards being issued. Others counter that the process is intentionally deliberative to balance protections provided for workers with the compliance burden imposed on employers. Over the past 30 years, various presidential Executive orders and Federal laws have added new procedural requirements for regulatory agencies, resulting in multiple and sometimes lengthy steps OSHA and other agencies must follow.

My remarks today are based on findings from our report, which is being released today, entitled *Workplace Safety and Health: Multiple Challenges Lengthen OSHA's Standard Setting*.[1] For this report, we were asked to review: (1) the time taken by OSHA to develop and issue occupational safety and health standards and the key factors that affect these timeframes, (2) alternatives to the typical standard-setting process that are available for OSHA to address urgent hazards, (3) whether rulemaking at other regulatory agencies offers insight into OSHA's challenges with setting standards, and (4) ideas that have been suggested by occupational safety and health experts for improving the process. To determine how long it takes OSHA to develop and issue occupational safety and health standards, we analyzed new standards and substantive updates to standards finalized between calendar years 1981 and 2010 and identified as significant by the agency. Through semistructured interviews with current and former Labor officials and occupational safety and health experts representing both workers and employers, we identified the key factors affecting OSHA's timeframes for issuing standards and ideas for improving OSHA's standard-setting process. We reviewed relevant Federal laws and interviewed current OSHA staff and attorneys from Labor's Office of the Solicitor to identify alternatives to the typical standard-setting process available for OSHA to address urgent hazards. To determine whether rulemaking at other regulatory agencies offers insight into OSHA's challenges with setting standards, we conducted semistructured interviews with policy and program officials at the Environmental Protection Agency (EPA) and at the Mine Safety and Health Administration (MSHA). For more information on our scope and methodology, see the full report. This testimony is based on work performed between February 2011 and April 2012 in accordance with generally accepted government auditing standards.

In summary, we found that, between 1981 and 2010, the time it took OSHA to develop and issue safety and health standards ranged from 15 months to 19 years and averaged more than 7 years. Experts and agency officials cited several factors that contribute to the lengthy timeframes for developing and issuing standards, including increased procedural requirements, shifting priorities, and a rigorous standard of judicial review. We also found that, in addition to using the typical standard-setting process, OSHA can address urgent hazards by issuing emergency temporary standards, although the agency has not used this authority since 1983 because of the difficulty it has faced in compiling the evidence necessary to meet the statutory requirements. Instead, OSHA focuses on enforcement activities—such as enforcing the general requirement of the Occupational Safety and Health Act of 1970 (OSH Act)[2] that employers provide a workplace free from recognized hazards—and educating employers and workers about urgent hazards. Experiences of other Federal agencies that regulate public or worker health hazards offered limited insight into the challenges OSHA faces in setting standards. For example, EPA officials pointed to certain requirements of the Clean Air Act to set and regularly review standards for specified air pollutants that have facilitated the agency's standard-setting efforts. In contrast, the OSH Act does not require OSHA to periodically review its standards. Also, MSHA officials noted that their standard-setting process benefits from both the in-house knowledge of its inspectors, who inspect every mine at least twice yearly, and a dedicated mine safety research group within the National Institute for Occupational Safety and Health (NIOSH), a Federal research agency that makes recommendations on occupational safety and health. OSHA must instead rely on time-consuming site visits to obtain information on hazards and has not consistently coordinated with NIOSH to assess occupational hazards. Finally, experts and agency officials identified several ideas that could improve OSHA's standard-setting process. In our report being released today, we draw upon one of these ideas and recommend that OSHA and NIOSH more consistently collaborate on researching occupational hazards so that OSHA can more effectively leverage NIOSH expertise in its standard-setting process.

BACKGROUND

The basic process by which all Federal agencies typically develop and issue regulations is set forth in the Administrative Procedure Act (APA),[3] and is generally

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[1] GAO–12–330 (Washington, DC: Apr. 2, 2012).

[2] Pub. L. No. 91–596, 84 Stat. 1590.

[3] Pub. L. No. 79–404, 60 Stat. 237 (1946), codified in 1966 in scattered sections of title 5, United States Code. Agencies may follow additional or alternative procedures if certain exceptions apply, or when required by other statutes.

known as the rulemaking process.[4] Rulemaking at most regulatory agencies follows the APA's informal rulemaking process, also known as "notice and comment" rulemaking, which generally requires agencies to publish a notice of proposed rulemaking in the *Federal Register*, provide interested persons an opportunity to comment on the proposed regulation, and publish the final regulation, among other things.[5] Under the APA, a person adversely affected by an agency's notice and comment rulemaking is generally entitled to judicial review of that new rule, and a court may invalidate the regulation if it finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," sometimes referred to as the arbitrary and capricious test.[6] In addition to the requirements of the APA, Federal agencies typically must comply with requirements imposed by certain other statutes and Executive orders. In accordance with various presidential Executive orders, agencies work closely with staff from the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs, who review draft regulations and other significant regulatory actions prior to publication.[7] Most of the additional requirements that affect OSHA standard setting were established in 1980 or later.

The process OSHA uses to develop and issue standards is spelled out in the OSH Act. Section 6(b) of the act specifies the procedures OSHA must use to promulgate, modify, or revoke its standards.[8] These procedures include publishing the proposed rule in the *Federal Register*, providing interested persons an opportunity to comment, and holding a public hearing upon request. Section 6(a) of the act directed the Secretary of Labor (through OSHA) to adopt any national consensus standards or established Federal standards as safety and health standards within 2 years of the date the OSH Act went into effect, without following the procedures set forth in section 6(b) or the APA.[9] According to an OSHA publication, the vast majority of these standards have not changed since originally adopted, despite significant advances in technology, equipment, and machinery over the past several decades. In leading the agency's standard-setting process, staff from OSHA's Directorate of Standards and Guidance, in collaboration with staff from other Labor offices, explore the appropriateness and feasibility of developing standards to address workplace hazards that are not covered by existing standards. Once OSHA initiates such an effort, an interdisciplinary team typically composed of at least five staff focus on that issue.

OSHA'S STANDARD-SETTING TIMEFRAMES VARY WIDELY AND ARE INFLUENCED BY THE MANY PROCEDURAL REQUIREMENTS AND OTHER FACTORS

We analyzed the 58 significant health and safety standards OSHA issued between 1981 and 2010 and found that the timeframes for developing and issuing them aver-

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[4] The APA defines a rule as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). For this testimony, we use the terms rule and regulation interchangeably.

[5] The APA also provides for formal rulemaking in certain cases. Formal rulemaking includes a trial-type hearing, and if challenged in court, the resulting rule will be struck down if unsupported by substantial evidence. 5 U.S.C. § 553.

[6] 5 U.S.C. §§ 702, 706(2)(A).

[7] A regulatory action is "significant" if it will (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (sometimes referred to as "economically significant"); (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of the recipients; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. Executive Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). The principles, structures, and definitions established in Executive Order 12866 were reaffirmed by Executive Order 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

[8] Codified at 29 U.S.C. § 655(b).

[9] Codified at 29 U.S.C. § 655(a). In general, national consensus standards are voluntary safety and health standards that a nationally recognized standards-producing organization adopts after reaching substantial agreement among those who will be affected, including businesses, industries, and workers. For purposes of section 6(a) of the OSH Act, a national consensus standard must have met certain requirements. See the full report for more information on national consensus standards. The OSH Act defines an "established Federal standard" as any operative occupational safety and health standard established by any Federal agency or contained in any Act of Congress that was in effect on the date of enactment of the OSH Act. 29 U.S.C. § 652(10). Prior to the enactment of the OSH Act, other Federal laws included provisions designed to protect workers' safety and health, such as the 1936 Walsh-Healey Act.

aged about 93 months (7 years, 9 months), and ranged from 15 months to about 19 years (see table 1).[10]

Table 1: Significant OSHA Safety and Health Standards Finalized between 1981 and 2010

Decade/year	Number of standards finalized [1]	Average number of months from initiation to final rule [2]	Average number of months from proposed rule to final rule [3]
1980s	24	70	30
1990s	23	118	50
2000s	10	91	36
2010	1	—[3]	—[3]
Overall	58	93	39

Source: GAO analysis of Federal Register.

[1] For the purposes of this analysis, we considered a standard to have been finalized on the date it was published in the ***Federal Register*** as a final rule.

[2] For the purposes of this analysis, we considered a standard to be initiated on the date OSHA publicly indicated initiating work on the standard in the ***Federal Register***, by publishing a Request for Information or Advance Notice of Proposed Rulemaking. In cases where OSHA mentioned neither of these in the final rule, we used the date the standard first appeared on OSHA's semiannual regulatory agenda.

[3] Because only one standard was finalized in 2010, we did not list the average number of months. However, the overall calculations include the 2010 standard.

During this period, OSHA staff also worked to develop standards that have not yet been finalized. For example, according to agency officials, OSHA staff have been working on developing a silica standard since 1997, a beryllium standard since 2000, and a standard on walking and working surfaces since 2003.[11] For a depiction of the timelines for safety and health standards issued between 1981 and 2010, see appendix I.

Experts and agency officials frequently cited the increased number of procedural requirements established since 1980 as a factor that lengthens OSHA's timeframes for developing and issuing standards. They indicated that the increased number of procedural requirements affects the agency's standard-setting timeframes because of the complex requirements OSHA must comply with to demonstrate the need for new or updated standards (see fig. 1). For example, OSHA must evaluate technological and economic feasibility of a potential standard[12] using data gathered by visiting worksites in industries that will be affected, on an industry-by-industry basis.[13] Agency officials told us this is an enormous undertaking because, for example, it requires visits to multiple worksites. In addition to the feasibility analyses, OSHA staff generally must also conduct economic analyses, including assessing the costs and benefits of significant standards,[14] and may be required to initiate a panel process that seeks and considers input from representatives of affected small businesses.[15] According to agency officials, the small business panel process takes about 8 months of work, and OSHA is one of only three Federal agencies that is subject to this requirement.[16]

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[10] We included in our review standards that OSHA considered to be important or a priority, including but not limited to standards that met the definition of "significant" under Executive Order 12866.

[11] Agency officials told us that OSHA issued a proposed standard on beryllium in 1975, but it was never issued as a final rule. Staff started collecting information on beryllium again in 2000. In addition, they told us that a 2010 proposed rule on walking and working surfaces replaced an outdated proposed rule from 1990 that was never issued as a final rule because of other regulatory priorities.

[12] These analyses are necessary because the Supreme Court has held that the OSH Act requires that standards be both technologically and economically feasible. *Am. Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 513 n.31 (1981).

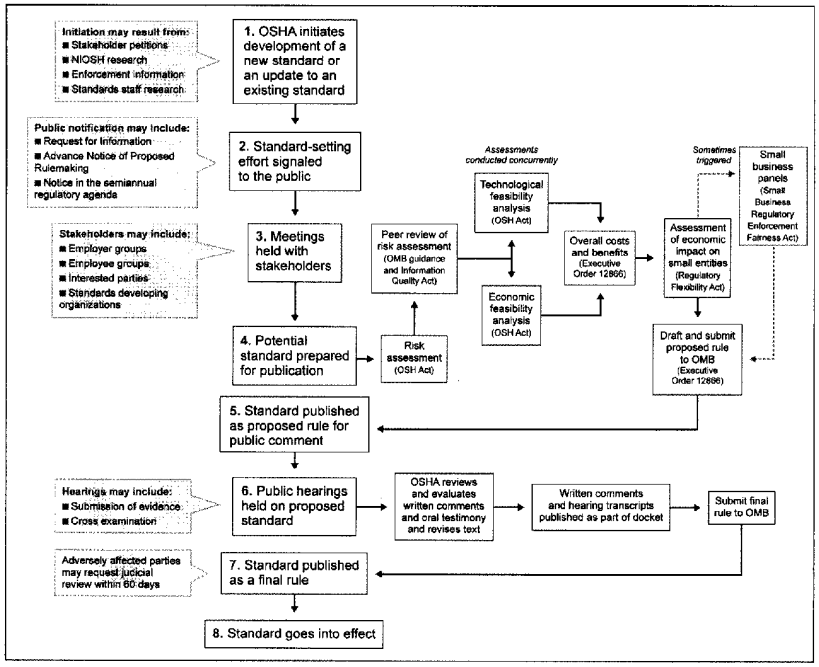
[13] See *United Steelworkers* v. *Marshall*, 647 F.2d 1189, 1301 (D.C. Cir. 1980), quoted in *AFL–CIO* v. *OSHA*, 965 F.2d 962, 980 (11th Cir. 1992). Assessing feasibility on an industry-by-industry basis requires that the agency research all applications of the hazard being regulated, as well as the expected cost for mitigating exposure to that hazard, in every industry.

[14] Executive Order 12866 requires that OSHA provide an assessment of the potential overall costs and benefits for significant rules to OMB. For rules that are "economically significant," the agency must also submit a more detailed cost-benefit analysis. See 58 Fed. Reg. 51,735 (Sept. 30, 1993).

[15] Under the Small Business Regulatory Enforcement Fairness Act of 1996, this panel process is required if OSHA determines that a potential standard would have a significant economic impact on a substantial number of small entities, such as businesses. OSHA staff must work with the Small Business Administration to set up the small business panels. 5 U.S.C. § 609(b),(d).

[16] The other two agencies that are subject to this requirement are EPA and the Consumer Financial Protection Bureau.

Figure 1: Steps in a Typical OSHA Standard-Setting Process



Sources: GAO analysis of interviews with agency officials and relevant federal laws and regulations

Note: This figure is for illustrative purposes only. Not all steps identified here may be performed for all standards and some standards may involve additional steps not included here.

Experts and agency officials also told us that changing priorities are a factor that affects the timeframes for developing and issuing standards, explaining that priorities may change as a result of changes within OSHA, Labor, Congress, or the presidential administration. Some agency officials and experts told us such changes often cause delays in the process of setting standards. For example, some experts noted that the agency's intense focus on publishing an ergonomics rule in the 1990s took attention away from several other standards that previously had been a priority.[17]

The standard of judicial review that applies to OSHA standards if they are challenged in court also affects OSHA's timeframes because it requires more robust research and analysis than the standard that applies to many other agencies' regulations, according to some experts and agency officials. Instead of the arbitrary and capricious test provided for under the APA, the OSH Act directs courts to review OSHA's standards using a more stringent legal standard: it provides that a standard shall be upheld if supported by "substantial evidence in the record considered as a whole."[18] According to OSHA officials, this more stringent standard (known as the "substantial evidence" standard) requires a higher level of scrutiny by the courts and as a result, OSHA staff must conduct a large volume of detailed research in order to understand all industrial processes involved in the hazard being regulated, and to ensure that a given hazard control would be feasible for each process.

According to OSHA officials and experts, two additional factors result in an extensive amount of work for the agency in developing standards:

[17] OSHA issued a final standard just 1 year after publishing the proposed rule, but, according to agency officials, in order to develop the rule so quickly, the vast majority of OSHA's standard-setting resources were focused on this rulemaking effort, including nearly 50 full-time staff in OSHA's standards office, half the staff economists, and 7 or 8 attorneys. The rule was invalidated by Congress 4 months after it was issued under the Congressional Review Act. Pub. L. No. 107–5, 115 Stat. 7 (2001).

[18] 29 U.S.C. § 655(f).

• *Substantial data challenges*, which stem from a dearth of available scientific data for some hazards and having to review and evaluate scientific studies, among other sources. In addition, according to agency officials, certain court decisions interpreting the OSH Act require rigorous support for the need for and feasibility of standards.

An example of one such decision cited by agency officials is a 1980 Supreme Court case, which resulted in OSHA having to conduct quantitative risk assessments for each health standard and ensure that these assessments are supported by substantial evidence.[19]

• *Response to adverse court decisions*. Several experts with whom we spoke observed that adverse court decisions have contributed to an institutional culture in the agency of trying to make OSHA standards impervious to future adverse decisions. However, agency officials said that, in general, OSHA does not try to make a standard "bulletproof" because, while OSHA tries to avoid lawsuits that might ultimately invalidate the standard, the agency is frequently sued. For example, in the "benzene decision," the Supreme Court invalidated OSHA's revised standard for benzene because the agency failed to make a determination that benzene posed a "significant risk" of material health impairment under workplace conditions permitted by the current standard.[20] Another example is a 1992 decision in which a U.S. Court of Appeals struck down an OSHA health standard that would have set or updated the permissible exposure limit for over 400 air contaminants.[21]

OSHA HAS AUTHORITY TO ADDRESS URGENT HAZARDS THROUGH EMERGENCY TEMPORARY STANDARDS, ENFORCEMENT, AND EDUCATION

OSHA has not issued any emergency temporary standards in nearly 30 years, citing, among other reasons, legal and logistical challenges.[22] OSHA officials noted that the emergency temporary standard authority remains available, but the legal requirements to issue such a standard—demonstrating that workers are exposed to grave danger and establishing that an emergency temporary standard is necessary to protect workers from that grave danger—are difficult to meet. Similarly difficult to meet, according to officials, is the requirement that an emergency temporary standard must be replaced within 6 months by a permanent standard issued using the process specified in section 6(b) of the OSH Act.

OSHA uses enforcement and education as alternatives to issuing emergency temporary standards to respond relatively quickly to urgent workplace hazards. OSHA officials consider their enforcement and education activities complementary. Its enforcement efforts to address urgent hazards, OSHA uses the general duty clause of the OSH Act, which requires employers to provide a workplace free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to their employees.[23] Under the general duty clause, OSHA has the authority to issue citations to employers even in the absence of a specific standard under certain circumstances. Along with its enforcement and standard-setting activities, OSHA also educates employers and workers to promote voluntary protective measures against urgent hazards. OSHA's education efforts include on-site consultations and publishing health and safety information on urgent hazards. For example, if its inspectors discover a particular hazard, OSHA may send letters to all employers where the hazard is likely to be present to inform them about the hazard and their responsibility to protect their workers.

OTHER REGULATORY AGENCIES' EXPERIENCES OFFER LIMITED INSIGHT INTO OSHA'S CHALLENGES

Although the rulemaking experiences of EPA and MSHA shed some light on OSHA's challenges, their statutory framework and resources differ too markedly for them to be models for OSHA's standard-setting process. For example, EPA is directed to regulate certain sources of specified air pollutants and review its existing regulations within specific timeframes under section 112 of the Clean Air Act, which EPA officials told us gave the agency clear requirements and statutory deadlines for

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[19] *Indus. Union Dep't, AFL–CIO* v. *Am. Petroleum Inst*., 448 U.S. 607, 639 (1980). Although the decision interpreted a provision of the OSH Act that applied only to health hazards, Labor officials said that there is little practical distinction between the evidence OSHA must compile to support health standards and the evidence it must compile for safety standards.

[20] *Indus. Union Dep't, AFL–CIO* v. *Am. Petroleum Inst*., 448 U.S. 607, 639 (1980).

[21] *AFL–CIO* v. *OSHA*, 965 F.2d 962, 986–87 (11th Cir. 1992).

[22] Section 6(c) of the OSH Act authorizes OSHA to issue these standards without following the typical standard-setting procedures if certain statutory requirements are met. 29 U.S.C. § 655(c).

[23] 29 U.S.C. § 654(a)(1).

regulating hazardous air pollutants.[24] MSHA benefits from a narrower scope of authority than OSHA and has more specialized expertise as a result of its more limited jurisdiction and frequent on-sight presence at mines. Officials at MSHA, OSHA, and Labor noted that this is very different from OSHA, which oversees a vast array of workplaces and types of industries and must often supplement the agency's inside knowledge by conducting site visits.

EXPERTS SUGGESTED MANY IDEAS TO IMPROVE OSHA'S STANDARD-SETTING PROCESS, INCLUDING MORE INTERAGENCY COORDINATION AND STATUTORY DEADLINES

Agency officials and occupational safety and health experts shared their understanding of the challenges facing OSHA and offered ideas for improving the agency's standard-setting process.[25] Some of the ideas involve substantial procedural changes that may be beyond the scope of OSHA's authority and require amending existing laws, including the OSH Act.

• *Improve coordination with other agencies*: Experts and agency officials noted that OSHA has not fully leveraged available expertise at other Federal agencies, especially NIOSH, in developing and issuing its standards. OSHA officials said the agency considers NIOSH's input on an ad hoc basis but OSHA staff do not routinely work closely with NIOSH staff to analyze risks of occupational hazards. They stated that collaborating with NIOSH on risk assessments, and generally in a more systematic way, could reduce the time it takes to develop a standard by several months, thus facilitating OSHA's standard-setting process.

• *Expand use of voluntary consensus standards*: According to OSHA officials, many OSHA standards incorporate or reference outdated consensus standards, which could leave workers exposed to hazards that are insufficiently addressed by OSHA standards that are based on out-of-date technology or processes. Experts suggested that Congress pass new legislation that would allow OSHA, through a single rulemaking effort, to revise standards for a group of health hazards using current industry voluntary consensus standards, eliminating the requirement for the agency to follow the standard-setting provisions of section 6(b) of the OSH Act or the APA. One potential disadvantage of this proposal is that any abbreviation to the regulatory process could also result in standards that fail to reflect relevant stakeholder concerns, such as an imposition of unnecessarily burdensome requirements on employers.

• *Impose statutory deadlines:* OSHA officials indicated that it can be difficult to prioritize standards due to the agency's numerous and sometimes competing goals. In the past, having a statutory deadline, combined with relief from procedural requirements, resulted in OSHA issuing standards more quickly. However, some legal scholars have noted that curtailing the current rulemaking process required by the APA may result in fewer opportunities for public input and possibly decrease the quality of the standard.[26] Also, officials from MSHA told us that, while statutory deadlines make its priorities clear, this is sometimes to the detriment of other issues that must be set aside in the meantime.

• *Change the standard of judicial review*: Experts and agency officials suggested OSHA's substantial evidence standard of judicial review be replaced with the arbitrary and capricious standard, which would be more consistent with other Federal regulatory agencies. The Administrative Conference of the United States has recommended that Congress amend laws that mandate use of the substantial evidence standard, in part because it can be unnecessarily burdensome for agencies.[27] As a result, changing the standard of review to "arbitrary and capricious" could reduce the agency's evidentiary burden. However, if Congress has concerns about OSHA's current regulatory power, it may prefer to keep the current standard of review.[28]

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[24] 42 U.S.C. § 7412. However, as GAO reported in 2006, EPA failed to meet some of its statutory deadlines under section 112 of the Clean Air Act. See GAO, *Clean Air Act: EPA Should Improve the Management of its Air Toxics Program*, GAO 06–669 (Washington, DC: June 23, 2006).

[25] The ideas presented here are those most frequently mentioned in our interviews by agency officials and experts that are not addressed in other sections of the full report. For more information on our methodology, see the full report.

[26] See, for example, Jacob E. Gersen and Anne Joseph O'Connell, "Deadlines in Administrative Law," *University of Pennsylvania Law Review*, vol. 156 (2007–8).

[27] 59 Fed. Reg. 4669, 4670–71 (Feb. 1, 1994). The Administrative Conference of the United States is an independent Federal agency that makes recommendations for improving Federal agency procedures, including the Federal rulemaking process.

[28] One suggested justification for judicial review of agency rulemaking is when there is genuine concern about the power agencies have in the regulatory process. Mark Seidenfeld, "Bending the Rules: Flexible Regulation and Constraints on Agency Discretion," Administrative Law Review (spring, 1999).

• *Allow alternatives for supporting feasibility*: Experts suggested that OSHA minimize on-site visits—a time-consuming requirement for analyzing the technological and economic feasibility of new or updated standards—by using surveys or basing its analyses on industry best practices. One limitation to surveying worksites is that, according to OSHA officials, in-person site visits are imperative for gathering sufficient data in support of most health standards. Basing feasibility analyses on industry best practices would require a statutory change, as one expert noted, and would still require OSHA to determine feasibility on an industry-by-industry basis.

• *Adopt a priority-setting process*: Experts suggested that OSHA develop a priority-setting process for addressing hazards, and as GAO has reported, such a process could lead to improved program results.[29] OSHA attempted such a process in the past, which allowed the agency to articulate its highest priorities for addressing occupational hazards. Reestablishing such a process may improve a sense of transparency among stakeholders and facilitate OSHA management's ability to plan its staffing and budgetary needs. However, it may not immediately address OSHA's challenges in expeditiously setting standards because such a process could take time and would require commitment from agency management.

CONCLUDING REMARKS

The process for developing new and updated safety and health standards for occupational hazards is a lengthy one and can result in periods when there are insufficient protections for workers. Nevertheless, any streamlining of the current process must guarantee sufficient stakeholder input to ensure that the quality of standards does not suffer. Additional procedural requirements established since 1980 by Congress and various Executive orders have increased opportunities for stakeholder input in the regulatory process and required agencies to evaluate and explain the need for regulations, but they have also resulted in a more protracted rulemaking process for OSHA and other regulatory agencies. Ideas for changes to the regulatory process must weigh the benefits of addressing hazards more quickly against a potential increase in the regulatory burden imposed on the regulated community. Most methods for streamlining that have been suggested by experts and agency officials are largely outside of OSHA's authority because many procedural requirements are established by Federal statute or Executive order. However, OSHA can coordinate more routinely with NIOSH on risk assessments and other analyses required to support the need for standards, saving OSHA time and expense. In our report being released today, we recommend that OSHA and NIOSH more consistently collaborate on researching occupational hazards so that OSHA can more effectively leverage NIOSH expertise in its standard-setting process. Both agencies agreed with this recommendation.

Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions you or other members of the committee may have.

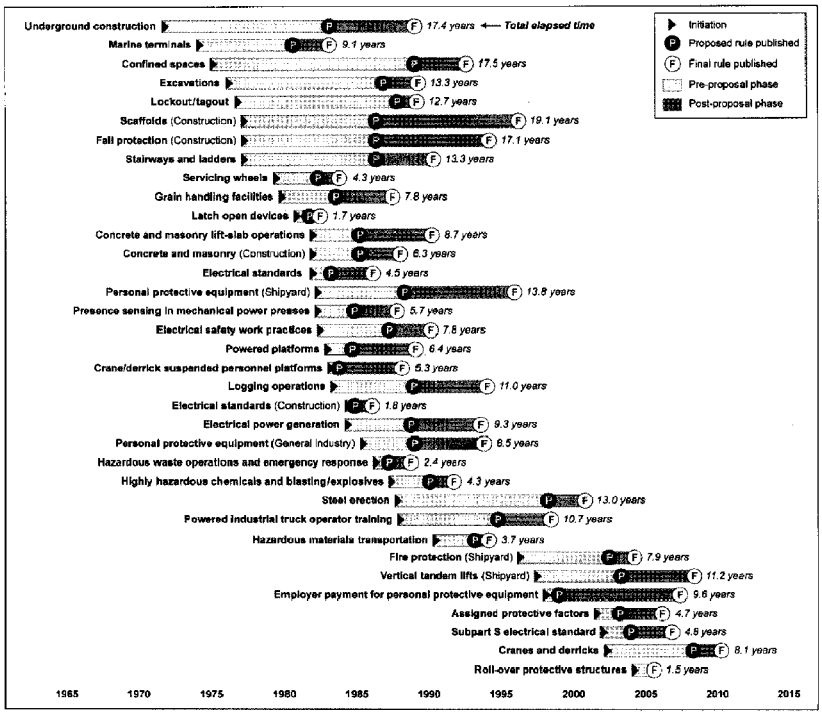
(*GAO Contact and Staff Acknowledgments: For questions about this testimony, please contact me at (202) 512–7215 or moranr@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals who made key contributions to this statement include, Gretta L. Goodwin, assistant director; Susan Aschoff; Tim Bober; Anna Bonelli; Sarah Cornetto; Jessica Gray; and Sara Pelton.*)

APPENDIX I: TIMELINES OF SIGNIFICANT OSHA SAFETY AND HEALTH STANDARDS

The following two figures (fig. 2 and fig. 3) depict a timeline for each of the 58 significant safety and health standards OSHA issued between 1981 and 2010.

[29] See GAO, *Managing for Results: Enhancing Agency Use of Performance Information for Management DecisionMaking*, GAO–05–927 (Washington, DC: Sept. 9, 2005).

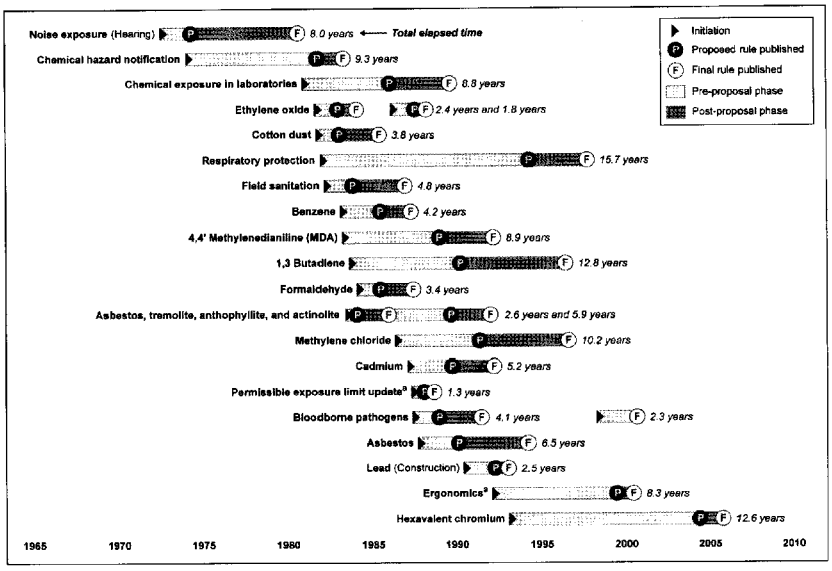
Figure 2: Significant OSHA Safety Standards Timeline



Sources: GAO analysis of interviews with agency officials and *Federal Register* notices.

Note: For the purposes of this analysis, we considered a standard to be initiated on the date OSHA publicly indicated initiating work on the standard in the *Federal Register*, by publishing a Request for Information or Advance Notice of Proposed Rulemaking. In cases where OSHA mentioned neither of these in the final rule, we used the date the standard first appeared on OSHA's semiannual regulatory agenda. We considered a standard to be finalized on the date it was published in the *Federal Register* as a final rule.

Figure 3: Significant OSHA Health Standards Timeline



Sources: GAO analysis of interviews with agency officials and *Federal Register* notices.

Note: For the purposes of this analysis, we considered a standard to be initiated on the date OSHA publicly indicated initiating work on the standard in the *Federal Register*, by publishing a Request for Information or Advance Notice of Proposed Rulemaking. In cases where OSHA mentioned neither of these in the final rule, we used the date the standard first appeared on OSHA's semiannual regulatory agenda. We considered a standard to be finalized on the date it was published in the *Federal Register* as a final rule.

[a]These two health standards were wholly invalidated either by court decision or congressional action. Parts of other standards may have been invalidated but such analysis is beyond the scope of our review.

The CHAIRMAN. Thank you very much, Ms. Moran. We'll now start a series of 5-minute questions.

In looking through this document last evening, it occurred to me that other agencies move more quickly on rulemaking, even ones that also have to have a lot of scientific analysis and stakeholder input. Can you describe for me in general terms how OSHA's rulemaking process compares to the process at other Federal agencies, and why does OSHA take so much longer than these others?

Ms. MORAN. I'm afraid that this isn't a very satisfying answer. But in some cases, we were not able to tell exactly why it takes OSHA so long. There are certain factors, such as the Small Business Enforcement Act, the SBREFA, as it's called, that—OSHA is one of only three agencies, including EPA and the Consumer Financial Protection Bureau, that have to meet the requirements and pull together small business panels, a process that can take 8 months, add 8 months to the process.

But that doesn't explain the entire timeframe. And a lot of times, I think it's because of the shift in priorities within the agency. It will start work on a new standard or, you know, updating an existing standard, and then put it aside, work on other things, and come back to it, and that's not documented anywhere.

So it was difficult for us to determine exactly what happened, for example, on the scaffold standard. Why it would take 19 years to set a scaffold standard doesn't necessarily make sense.

The CHAIRMAN. But, again, can you speak just a little bit—other agencies have rulemaking processes that require similar kinds of inputs as OSHA—scientific inputs, stakeholder inputs—but their timeframes are much less. But maybe you can't speak to that. I don't know.

Ms. MORAN. We did look a little bit at, for example, the EPA. But in that case, under the Clean Air Act, there were statutory deadlines set. For MSHA, it deals with one industry for the most part. There are some ancillary ones like trucking that's involved in mining.

But for the most part, MSHA can set standards more quickly because it's dealing with one industry, and it has inspectors that go into the mines at least twice a year and for underground coal mines four times a year. So they have a lot of close knowledge of what the hazards are that miners face.

The CHAIRMAN. One option in your report deals with the standard of review that courts use to consider OSHA rules. OSHA must demonstrate to a court that there was substantial evidence to support its conclusions, whereas most Federal agencies only have to show that the decision was not arbitrary and capricious.

Can you explain in practical terms what this means, and how significant of a burden is this for OSHA?

Ms. MORAN. I do believe it is a significant factor in the timeframe that it takes OSHA to set standards, the substantial evidence standard that they must meet. When the courts go to review the standards that OSHA sets, most other agencies—and that's a very good point that you're making, that they only have to show that the standards that they set were not arbitrary and capricious, that the agency was not being arbitrary and capricious in setting a new standard.

For OSHA, they have to show substantial evidence that a material impairment would occur to a worker, and that is a much higher standard for them to meet. So they spend a lot of time gathering evidence, scientific evidence, to support the need for a new standard. And I do believe that adds a substantial time burden to the agency.

The CHAIRMAN. As part of the regulatory process, OSHA clears regulations through the Office of Management and Budget. My understanding is that OMB is supposed to respond to OSHA within 120 days. OSHA submitted a proposed rule governing silica exposure to OMB in February 2011. OMB has still not responded to the proposed rule, 14 months later.

What role does OMB play, generally, in the time it takes for OSHA to issue a regulation, and, particularly, with respect to the silica rule?

Ms. MORAN. We have heard that the silica standard has been with OMB since February 2011. We asked them about that, and they said they could not comment on their review of a proposed rule. It is, however, one of the only instances that we heard people complain about. We did not hear substantial complaints about the time it takes OSHA to review other standards that we reviewed.

The CHAIRMAN. That it takes OMB.

Ms. MORAN. Right. We did not hear a lot of complaints about OIRA's review, the office within OMB that reviews the standards.

The CHAIRMAN. I'll have more about that for other witnesses, also. But thank you very much, Ms. Moran.

Senator Enzi.

Senator ENZI. Thank you, Mr. Chairman.

Some of the people that you consulted for your report mentioned that more frequent use of negotiated rulemaking could help OSHA. Why isn't that used more often? Do you believe that would speed up the process or could speed up the process?

Ms. MORAN. Well, we know that negotiated rulemaking has been used for a number of different rules. When we spoke with the OSHA staff, they said that it, unfortunately, doesn't really buy them a lot of time. For example, the cranes and derrick standard committee was established and work was started in 2003. They completed the work in 1 year and pulled together the small business panels that were required under SBREFA—completed their work in 2006 and issued a 276-page report on that work. But it still took OSHA until 2011 to finalize the rule.

So even despite negotiated rulemaking, it didn't speed up the process substantially. And that's the case with other standards, such as 1,3-Butadiene in 1985–95. They used negotiated rulemaking, but it took them 12 years.

Senator ENZI. You mentioned that the previous example even included the small business review and that only took 6 months, but then it took them 3 years to write the rule after they got that done?

Ms. MORAN. I believe it took a couple of years for the small business panels, that process. But that was completed in 2006, and then the final rule was not published until 2011.

Senator ENZI. So they had all their information for 5 years before they put out the rule.

Ms. MORAN. Yes.

Senator ENZI. Thank you. An OSHA official in your report said that they do not attempt to make any standard bulletproof. I'm a little curious as to what that means. Congress and the courts have worked to ensure that agencies take the necessary steps to establish a thorough record of the rulemaking process, whether it's holding a small business roundtable, conducting economic or technical feasibility analyses or conducting risk assessments, or OMB review.

All of these steps, while time-consuming, are integral to making a proposed rule that would actually work and be enforceable. Would you agree?

Ms. MORAN. Yes, I would. But the comment that the OSHA staff made was that they still know that they're going to be sued, no matter how much work that they do on a rule. And that's where the bulletproof comment came from, that they realize that at some point, they have to move forward.

Senator ENZI. I think that's a normal result on a lot of regulation. As you mentioned in the report, OSHA was able to complete its ergonomic standard in just over 1 year, due to an influx of more than 50 staffers who worked on the rule. Despite the rule being invalidated by Congress a short time after it was finalized, this example shows that the agency can use the necessary resources available on a priority standard.

Did you find that this happens in other OSHA rulemakings? And if not, why not?

Ms. MORAN. It does happen sometimes, but we didn't find an example where they put that level of resources to bear on one standard that was being worked on. And I will mention that even though the final part of putting together the ergonomic standard took only a year, they had been working on it for some time and collecting information from the stakeholder community.

Senator ENZI. Thank you. And your report concludes that any streamlining of the current process must guarantee sufficient stakeholder input to ensure the quality of standards does not suffer. Over the last few years, OSHA has taken a number of actions that can be described as sub regulatory. Essentially, the intent seems to be to achieve its standard of enforcement change without having to go through the regulatory process.

In many cases, these have been misguided precisely because they did not benefit from the step or the regulatory process such as stakeholder outreach, feasibility and cost-effective assessments. Given your years of experience reviewing the Federal regulatory process, how important is the stakeholder input?

Ms. MORAN. I think it's essential. I'm not sure that it should take over 10 years to issue some of these standards. But it is important in order for them to hold up to court challenges for the stakeholder input to be considered throughout the entire process.

Senator ENZI. Now, you did find—going back to my previous question—the shifting priorities within OSHA was a major factor in the length of time that it took to finalize new standards. It's obvious this occurs when the administrations change, but it also occurred within one administration.

It's not necessarily a bad thing when a priority shifts. We want the government to be able to respond to new developments and concerns of the people. But when significant resources are taken from other important priorities, it may not serve the agency well in the long run.

Did you find any example of that in your review?

Ms. MORAN. Well, the ergonomic standard was the one that we talk about in the report, where they had taken so many resources to work on that standard that they had to put other standards, potential ones, aside at that time. That was the biggest one.

Senator ENZI. Thank you for your answers.

My time has expired, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Enzi.

Senator Isakson.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Thank you, Mr. Chairman.

And thank you for your testimony today. In your prepared statement, you note that OSHA has authority to address urgent hazards through emergency and temporary standards under the general duty clause. Is that not correct?

Ms. MORAN. Yes, it is.

Senator ISAKSON. So even though it may take a substantial period of time to have enough evidence to determine that a rule should be made, OSHA has the ability in the absence of that evi-

dence to issue a temporary standard because of—in the interest of the health, safety, and welfare of workers in most cases. Is that not true?

Ms. MORAN. It is. OSHA has to prove that there is a grave danger and that an emergency temporary standard is needed to address that grave danger within a 6-month period. So that is the requirement, and it's very difficult for them to meet. They have not issued an emergency temporary standard since 1983.

Senator ISAKSON. Under the general duty clause, they haven't?

Ms. MORAN. Not under the general duty clause. But an emergency temporary standard—they have not issued one since 1983.

Senator ISAKSON. Well, we had a hearing on MSHA—Mr. Chairman, you'll remember—a couple of years ago. And people were suggesting they ought to have injunctive rights to go to court, and they had them, but they never exercised them. So some of the things we're talking about are agency-specific in terms of their initiative, not necessarily because of the requirements we place on them. Is that not true?

Ms. MORAN. I think that is true, yes.

Senator ISAKSON. And there's a second agency that we have a lot of say-so over, and that's the FDA, the Food and Drug Administration. We're hopefully going to be doing a reauthorization of PDUFA and getting some expansion of industry input and industry fees to accelerate the time period it takes to take a drug from its discovery to actually being able to be prescribed.

But it's very important that we have substantial evidence that that's a safe drug. That's why it takes a long time to approve a lot of things through the FDA. If we remove substantial evidence, as the Chairman was asking earlier, are we not putting ourselves at risk of OSHA being arbitrary in its rulemaking?

Ms. MORAN. That's really a policy decision. What I can say is that substantial evidence—that standard is a higher standard than other agencies to which they're held, the arbitrary and capricious standards. So it's really something that does make OSHA take longer in proving that it has substantial evidence of a material impairment to a worker to go through their standard-setting process. So it does take time.

Senator ISAKSON. And one of those agencies you're referring to is EPA. Is that not correct?

Ms. MORAN. Yes, it is.

Senator ISAKSON. I have one other comment about the small business—the requirements for the small business panels and the fact that it took, I think you said, about 8 months to meet that standard. Is that right?

Ms. MORAN. That's what OSHA's officials told us, yes.

Senator ISAKSON. That's 8 months. In a 19-year rulemaking procedure, 8 months is a small amount of that time. So I want to point out that I ran a small business, and the biggest thing I worried about was my workers' comp premiums and losing a worker or having an accident that caused productivity to go down.

So it's very important for those small businesses to have input as the rule is made, because many times, they can come up with a better standard than the Occupational Safety and Health Admin-

istration might come up with, because they're doing it on a daily basis.

The second comment I would make—we've had three instances in Georgia that have involved health, safety, and welfare of the public. The Peanut Corporation of America in Camilla, where salmonella got released—and that was—it turned out to be a criminal act by an individual who had actually tested and found evidence of salmonella but hid it from OSHA inspectors and from health and safety inspectors that came in.

But many of the other accidents we've had—I know the Sago Mine accident—Chairman Enzi, at the time, went with me and Senator Kennedy and Senator Rockefeller. Everybody was rushing to judgment. But we finally found out after about 18 months that a lightning strike that hit a buried ground wire removed from the mine had actually caused the explosion.

We had to wait to get the substantial evidence to make the determination of the right thing to do in terms of improving the MSHA law. Much of the improvements that we made came from suggestions by the mine owners themselves. So I would caution anybody for thinking that we ought to remove or lessen the input or the standard of small business in terms of their input into regulatory rulemaking, because many times they can offer suggestions that are far better than what a neophyte may offer otherwise.

I just wanted to make that point, Mr. Chairman, and I appreciate the time.

The CHAIRMAN. I hope the Senator doesn't think that I was in any way implying that the standard should be changed to lessen the input of small businesses. That's not—I never said that, and I never intended to say that or imply that.

Senator ISAKSON. And I didn't mean to imply that. But I was just noting the comment to make the statement that I made. But I didn't mean to imply that, if I did.

The CHAIRMAN. I'm just saying that I agree with Senator Enzi. Stakeholder input is vitally important in this. The question is why does it take so long after the stakeholder input. After they do that, then they sit on it for years and years after that. That was sort of what I was trying to get at, and maybe Senator Enzi, too. I don't know. You were asking that, too.

Senator Franken.

STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Ms. Moran, thank you for testifying today and for your work on this report. I'm sorry I wasn't here for your testimony, but I read it last night.

In advance of Workers' Memorial Day in a couple of weeks, this hearing is highlighting some vital issues, issues affecting lives of working men and working women across this country. The Occupational Safety and Health Act was passed with the intent to guarantee, "every working man and woman in the Nation safe and healthful working conditions."

Today, we're going to be examining the question: Is the current system enabling OSHA to fulfill its mission? And I think the answer is it's not good enough. There were 4,340 workplace deaths in

2010. That is 4,340 too many. I'd like to recognize all the families that are here with pictures of their loved ones.

This is America. This is 2012. I believe that we can do better, and today we should be serious about trying to figure out how to do that.

Ms. Moran, despite the length of your report, GAO only identifies one recommendation to improve OSHA's standard-setting. How did GAO arrive at this recommendation, and what is GAO's response to some suggestions raised in our next panel? Did you read the testimony of the next panel?

Ms. MORAN. I did.

Senator FRANKEN. OK. What is GAO's response to suggestions like—and I'll run through four of them—legislation allowing OSHA to easily adopt industry voluntary consensus standards; legislation directing OSHA to work on regulating certain hazards; using surveys instead of onsite studies to determine rule feasibility; or, eliminating or reducing OMB economic analyses since OSHA already conducts its own analyses?

Ms. MORAN. I'll start with the last one. The reason we did not recommend that last issue is because we did not hear that that was a substantial problem in terms of the amount of time that it takes OSHA to issue regulations. As I mentioned, other than OMB's review of the silica standard that has been there for 14 months, they generally, as far as we were told from OSHA, by OSHA, do maintain the 90 days that it takes—that they're required to review them and with a 30-day possibility of an extension.

But, generally, they do adhere to the 90-day period, which certainly isn't the bulk of the time that it takes. Some of the other recommendations that have been made just really are things like voluntary consensus standards that OSHA is required now to consider. So they do do that.

However, the standards that are proposed by consensus setting organizations, such as the American National Standards Institute, ANSI, and the National Fire Protection Association, are not required to be based on the same information on which OSHA standards are based. They're not quite as scientifically based. They're not based on the same economic and technological feasibility that OSHA is required to meet. So it would take a legislative change to require that.

Senator FRANKEN. Right.

Ms. MORAN. But that's really a policy consideration. We didn't see that that would necessarily——

Senator FRANKEN. So if we changed that legislatively, it could make sense, because Senator Isakson was talking about the input of the industry, and if the industry has some common-sense voluntary standards that they've adopted, consensus standards that would be an improvement, it's possible that OSHA adopting those could further the process along in a more expeditious manner. Is that right?

Ms. MORAN. It's possible. It also might not allow all the exact same stakeholder input that's being considered in the current process.

I also wanted to comment on one of the other recommendations that one of the witnesses has proposed, and that's using data from

EPA and their Integrated Risk Information System, IRIS. GAO reported on that system in another report from one of our other units in 2008, and we found serious problems with the data in that system, that it was at risk of becoming obsolete, and we pointed to a lot of problems with the quality of the data. So that was why we wouldn't have recommended something like that.

Senator FRANKEN. What about legislation directing OSHA to work on regulating certain hazards, in particular?

Ms. MORAN. I think that certainly could speed up the time. On the nine standards for which timeframes were either mandated in the law or by the courts, it took OSHA about half the time to issue those. And so it really can speed up the process.

Senator FRANKEN. OK. And what about using surveys instead of onsite studies to determine rule feasibility?

Ms. MORAN. I think that could speed it up slightly. It's not something that we found was a major problem. It does take more time because they have to go to OMB to get—under the Paperwork Reduction Act—those surveys approved. But they do use surveys now. It's just not the only piece of evidence that they use.

Senator FRANKEN. OK. Thank you. We have another panel of witnesses, and I might ask them the same questions.

Ms. MORAN. Sure.

Senator FRANKEN. Thank you very much for your service, Ms. Moran.

Ms. MORAN. Thank you.

The CHAIRMAN. Thank you, Senator Franken.

Thank you very much, Ms. Moran, for your work and for your service to our country. We appreciate it very much.

Ms. MORAN. You're very welcome.

Senator ENZI. Good report and good presentation. Thank you.

The CHAIRMAN. Very good. Thank you.

Now, we'll move to our second panel. At the table, we have Mr. Tom Ward, a member of the Bricklayers Union Local 1 near Detroit, MI. After many years in the bricklayer trade, he became involved in safety training for his fellow workers. Mr. Ward has had firsthand experience of the impact of silica dust in the workplace.

We have Dr. Michael Silverstein, recently retired as director of the State OSHA Program at Washington State Department of Labor and Industries; formerly a Policy Director at Federal OSHA. Dr. Silverstein is also a Professor of Occupational Health and has 40 years of experience in the field.

Next, we have Randy Rabinowitz, the Director of Regulatory Policy at OMB Watch, an organization that monitors Federal safety regulations. She previously served as co-chair of the American Bar Association's Committee on Occupational Safety Law and as an adjunct professor teaching safety and health law. Before beginning her work at OMB Watch, she represented labor unions in OSHA proceedings.

And Mr. David Sarvadi, an attorney at the law firm of Keller and Heckman, who specializes in occupational safety and health law. Mr. Sarvadi also has over 30 years of experience as a certified industrial hygienist. He has participated in OSHA rulemaking on behalf of companies and trade associations on numerous occasions.

We thank you all for being here to testify today. We'll just go from left to right as I introduced you. Each of your statements will be made a part of the record in their entirety. I would ask each of you to sum up in about 5 minutes. We'll go through the panel, and then we'll open up for general discussion.

Mr. Ward, welcome and please proceed.

STATEMENT OF TOMMY C. WARD, Jr., MEMBER, LOCAL 1 MICHIGAN, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, WOODHAVEN, MI

Mr. WARD. Thank you, Chairman Harkin, for the opportunity to testify before you today, Ranking Member Enzi and the other distinguished Senators. My name is Tom Ward, and I'm a member of the International Union of Bricklayers and Allied Craftworkers Local 1 Michigan, and it is an honor to be here today. Thank you.

What I'm about to share with you is deeply personal. But the reason I agreed to speak with you today is much more important than just my story. It's a chance to speak on behalf of every American worker in the country.

I was just 13 years old when my dad passed of silicosis. He did sandblasting work for about 6 years in his twenties. And I remember going to work with him one day, and I was amazed. A rusty old truck frame came in, and, man, it looked brand new at the end of the day. And I see that same look in my son's eyes every time he sees me fix something around the house or build something or look at a building that I had something to do with.

My dad eventually moved on to a better job with better pay, benefits for the family, and he was a proud member of the Teamsters Union. A few years into his new job, he started becoming short of breath, and the doctors couldn't figure it out for quite a while. The official diagnosis of silicosis came when he was 34. It took 5 years to kill him, and he died at the age of 39.

It was a slow and very painful process for our family to watch. As painful as it was, the hardest day for me is the last day he worked. He came in, closed the door, fell to the ground and started crying. He said, "I just can't do it anymore."

I started my apprenticeship in 1991 after working as a laborer for a few years. I had no idea that I was going into a trade that had the same hazard. I was exposed to the same hazard that killed my father, and I didn't know. I didn't have the training at the time. Training back then—it was just 20 years after the OSHA Act, so it wasn't a big deal at the time.

It was only after several years ago, when I became involved in training myself, that I learned all the hazards, the details of the hazard, what it's about. What is silicosis? I was in a train-the-trainer course at our international training center, and the presenter showed us the video called Stop Silicosis. I don't know if anyone in here has seen it.

But what was shocking for me is that the video was produced in 1938. Almost 70 years ago, we knew exactly what it was. Thousands of people were dying every year due to silicosis, and there are simple control hazards to fix it. In some cases, most cases, it's as simple as adding water to whatever you're drilling or grinding. And it's on Youtube if you want to take a minute to look at it.

The workers in that video refer to their jack hammers as widowmakers. I'm here to tell you, we have our own modern day widowmakers on construction sites. Masonry saws, concrete saws, and grinders, when they're used dry, are our widowmakers. They just came around in the late 1970s, 1980s. So to set a timeline up for you, my generation of guys are going to come down with it next, in my opinion.

The control measures are simple as water or hooking up a vacuum. Manufacturers of this equipment have been on board for a couple of decades almost. Most saws and grinders come with control measures, and we're supposed to use engineer controls. It's real simple.

Every year, about 4,000 or 5,000 people die on the job. And in our OSHA classes, we have to spend 6 hours on the Focus Four, the four leading causes of death on the job, and only two on health hazards, hazards that kill 50,000 people every year. It's amazing to me that we can't get this done.

In my opinion, the problem is it's not the contractor's problem. It's your family's problem when you're trying to enjoy retirement. It'll get you a few years later. Since my dad died, there's been no change in the silica standard, and I wonder to myself if I'm going to—if my family is going to watch me suffer the same fate.

We must get this done now. There's no telling how many workers have contracted silicosis in the 14 years it's been in the process. The video I mentioned earlier states at the end that these workers will not have died in vain if we use what we have gained to help prevent workers from contracting this disease.

The standard is complicated. But I'm here to tell you it really isn't. If you look at the standard, it says that we are allowed to be exposed to 0.1 milligrams per meter cubed. This is 1 gram. If you divide it in a thousand pieces, it would take 0.1—that's how much we're allowed to be exposed to in an 8-hour period. It doesn't take an industrial hygienist or a rocket scientist to figure out that if you're standing, dry cutting in a plume of dust, you are well over the limit.

In conclusion, I just want to say again that I am honored to be here today and to be, hopefully, a small part of ensuring that my father and all that have perished on the job or from diseases from the job did not die in vain.

Thank you.

[The prepared statement of Mr. Ward follows:]

PREPARED STATEMENT OF TOMMY C. WARD, JR.

SUMMARY

When I was 13 years old, my father died of silicosis. In his late twenties, he worked as a sandblaster, and was exposed to silica dust on the job. A few years later, he started getting short of breath. He was officially diagnosed with silicosis at age 34. My dad was 39 years old when he died in February 1982.

I joined the International Union of Bricklayers and Allied Craftworkers (BAC) in 1991 after working as a laborer for a few years. I had no idea when I started working as a laborer and later as a bricklayer that I could be exposing myself to silica dust. To this day, I wonder if I will develop silicosis myself and if my children will have to watch me suffer the same fate as my father.

After 14 years on the wall, I became involved in training; part of my job is to provide safety training to apprentices and journeyworkers. I'm concerned that the men and women I'm training are being exposed to the same hazard that killed my dad

all these years later. I'm concerned that the same weak OSHA silica standard that was adopted in 1972 remains on the books today, allowing workers to be exposed to harmful, even deadly, levels of silica dust. OSHA has been working on a new stronger silica standard for more than 14 years—since 1997. But there have been all kinds of delays in issuing this rule. Currently the draft of a new proposed rule is at OMB for review, where it has been for more than a year.

We can fix this problem. Young men and women don't have to die from exposure to silica. There are simple and cost-effective solutions to prevent exposure to silica dust on the job.

It's as simple as water; as simple as outlawing dry cutting on construction sites. Most, if not all, of the tools that when used may disperse silica dust come with water hook-ups or have other attachments that prevent dust from becoming airborne. Without a stronger standard in place including dust control provisions, however, there is nothing to compel employers to provide these simple and relatively inexpensive tools. Good contractors get it and do the right thing; they put in place controls and good programs, but they're having problems competing with contractors who won't, contractors who see their workers as disposable, and who know OSHA can't do a thing to make them protect their workers?

We must act together now so our children and grandchildren are not victims. We cannot let another generation pass us by without taking action.

Thank you Chairman Harkin for the opportunity to testify before you, Ranking Member Enzi, and the other distinguished Senators on the Committee on Health, Education, Labor, and Pensions this morning. My name is Tom Ward, and I am a member of the International Union of Bricklayers and Allied Craftworkers, Local 1 Michigan. It is an honor to have this opportunity to testify before you on the delays in OSHA's Standard-Setting Process and the Impact on Worker Safety. This topic is particularly important to me and my family.

When I was 13 years old, my father died of silicosis. In his twenties, he worked as a sandblaster for 5 to 6 years. There's not a whole lot I remember clearly about my childhood; but I do remember going to work with my dad a couple times. I remember old rusty truck frames coming in to be blasted and primed, the effort he put into the job, his work ethic; and I remember being amazed that it was my dad that made them look new at the end of the day.

After he left his job sandblasting, my dad took a job where he was represented by the Teamsters' Union—he had good pay and benefits that my family relied on. A few years into his new job, he started getting short of breath. I remember my mom telling me the doctors suspected lung infections. We got the official diagnosis—silicosis—when he was 34 years old. The hardest memory to live with is the last day he worked—he came in the door, fell to the floor and started crying. He said "I can't do it anymore."

My dad was 39 years old when he died in February 1982. It took 5 years for silicosis to kill him. It was a slow and very painful process for me, my sisters and for my mother to witness. In the end, his disease suffocated him.

My dad's death had profound impacts on me. He was a very hands-on guy—he would fix the car himself, and make repairs to the house. It's a trait that I inherited from him, and that led me into the trades myself. I'm not sure if I inherited his tremendous work ethic or if it was the result from watching him work until he dropped, I still live with the image every day even though it's been 30 years already.

In 1991, I joined the International Union of Bricklayers and Allied Craftworkers (BAC) after working as a laborer for a few years. Coming into the trade was easy for me because I loved working with my hands. I got a great job, and turned it into a great career. I had no idea when I started working as a laborer and later as a bricklayer that I could be exposing myself to silica dust. To this day, I wonder if I will develop silicosis myself.

At the time I started in the trades, there wasn't a lot of training being done about respiratory protection or silica. A lot of the guys I worked with were completely unaware of the seriousness of silica exposure, and the contractors out there weren't consistent about providing protective equipment because the standard was completely lacking; the rules were lax and there was no enforcement. The same standard exists today.

Once I became aware of the silica hazards in the trade I had chosen—and given my father's experience—I did what I could to protect myself including research on the standard. It was very confusing for an apprentice, paper masks were the only option on the job. After 14 years in the trade I became involved in training, this is when I first received training on the hazard. When the presenter showed us a video called "Stop Silicosis" my heart sunk as I wondered if my children ages 7 and

5 at the time would watch me suffer the same fate as my father. What may be shocking to you about the video is that it was produced in 1938 by Secretary Frances Perkins' Department of Labor. In the video, they refer to jackhammers as "widow makers." A digital copy is available on Youtube, its 11 minutes that shows simple, very inexpensive control measures to *eliminate the hazard*.

As bricklayers, we have our own widow makers—masonry saws and grinders. Before the 1970s, most of our cuts were made by hand with a hammer and chisel. In the late seventies, though, diamond-bladed saws were increasingly prevalent on jobsites, and later gas-cutoff saws started appearing. In the early eighties, more and more saws were used because the newer, more complicated buildings required more and more cuts to the masonry materials. These saws all come with a water hookup or an available vacuum attachment, but they rarely get used even though they are a cheap and effective way of reducing exposure to airborne silica dust.

Part of my job instructing apprentices and journeyworkers is to provide safety training to them. I'm concerned about the men and women I'm training; that they're being exposed to the same hazard my dad was all these years later.

In my own classes, I try to give our apprentices and journeymen and women a good understanding of respiratory dangers and how to use protective equipment. In addition to sharing my personal story, I tell them that according to NIOSH, over 50,000 men and women die each year from diseases contracted at work including silicosis. We are required to spend 6 hours teaching the Focus 4 in our OSHA 30-hour course—falls, electrocution, caught-in or between and struck by—the leading causes of death on the job. These Focus 4 hazards kill 4,000 to 5,000 workers each year. We are only required to teach 2 hours on health hazards—hazards that kill 10 times that every year. In my opinion we have forgotten about the very real threat of inhaling dust on the job; about the workers who slowly suffer for years and then die from an illness like my dad did and like 50,000 others do each year. Training apprentices and journeymen and women helps them understand the risks they face from silica, and they understand how to protect themselves.

It's not easy for workers to apply this knowledge on the jobsite; those who speak up may not be called back for the next project. Although there are good contractors out there who are aware of the dust hazards, construction workers are typically employed by many contractors in a given year and not all of them provide such equipment, or even require the use of the equipment when it is provided. Without strengthened standards and enforcement efforts, there is nothing compelling employers to keep their employees safe from silica and other dust.

For my entire career—no, longer— since my dad died—there has been no change in the OSHA silica exposure limits or changes to strengthen the silica standard. OSHA has been working on a new stronger silica standard for more than 14 years—since 1997. But there have been all kinds of delays in issuing this rule. Currently the draft proposed rule is at OMB for review, where it has been for more than a year.

I'm concerned that in the entire careers of the young men and women I'm training today there will be no change in the silica standard and to make stronger the requirements for dust control. For some it may already be too late. It is in our power to fix the problem. Young men and women don't have to die from exposure to silica. Secretary Perkins gave us the solutions some 74 years ago; they are easy and relatively inexpensive—especially when compared to the years of health care costs for the thousands of men and women that have died from disease related to silica exposure on the job. We must get this done *now*.

The 1938 video I mentioned earlier addressing the dangers of silica exposure ends with the line "these workers will not have died in vain." Thousands of workers have died in vain since that video was produced. It's impossible to believe that in almost 80 years we have done little to reduce the dangers to our working men and women from silica. After years of hard work, no one should lose everything then end his or her life struggling to draw a breath because of minute dust inhaled on the job.

I am honored to have an opportunity to ensure that my father and all that have perished from diseases contracted at work will not have died in vain.

The CHAIRMAN. Thank you, Mr. Ward, for a very poignant presentation. I appreciate it very much.

Dr. Silverstein, please proceed.

STATEMENT OF MICHAEL SILVERSTEIN, M.D., MPH, CLINICAL PROFESSOR OF ENVIRONMENTAL AND OCCUPATIONAL HEALTH, UNIVERSITY OF WASHINGTON SCHOOL OF PUBLIC HEALTH AND COMMUNITY MEDICINE; RETIRED DIRECTOR OF STATE OSHA PROGRAM AT WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, SEATTLE, WA

Dr. SILVERSTEIN. Thank you. Chairman Harkin, Ranking Member Enzi, I appreciate the opportunity to speak to you today. And I'd like to summarize my testimony in five points.

First of all, nearly 40 years after the OSHA Act was signed, the national toll of preventable workplace illness, injury, and death remains appallingly high. A recent study found 5,600 fatal injuries, 53,000 fatal illnesses, and 9 million other workplace injuries and illnesses every year for an annual cost of $250 billion.

Second, OSHA's rules have kept workers from being killed, but roadblocks have interfered with forward progress. OSHA had a good start in the 1970s with rules for asbestos, arsenic, lead, cotton dust, and there's strong evidence that these have been effective in protecting workers with no evidence of reduced competitiveness, productivity, or profits.

Simply put, OSHA regulations have saved lives without killing jobs. However, myths about rules have overshadowed this reality, and procedural and political roadblocks have brought OSHA rulemaking to a virtual halt. If there is a crisis, it's not over-regulation, but unregulated hazards. For example, the U.S. Chemical Safety Board reported on the dangers from combustible dust in 2006 after reviewing nearly 300 serious fires and explosions that had killed 119 workers. The Board recommended new OSHA rules.

Just 2 years later, a huge explosion of combustible sugar dust at the Imperial Sugar Refinery in Georgia killed 14 workers. And 3 years after that, five more workers were killed in iron dust explosions in Texas. Now, 6 years since the Board warning, without a new OSHA standard, it is a national embarrassment that workers continue to be blown up in combustible dust explosions.

My third point is that lost time means lost lives. It takes OSHA almost 8 years, as you've heard, on average, to adopt a safety and health rule and, in many cases, much longer. Exposure to silica dust causes crippling lung disease and lung cancer. OSHA started toward rulemaking in 1974. After 37 years of bureaucratic delay, draft documents were finally submitted for OMB review.

And now, as you pointed out, Mr. Chairman, more than a year later, the proposal remains handcuffed within OMB. Now, assuming a very best case scenario, it will take another 3 years after the proposal emerges from OMB for a new silica rule to be adopted, 41 years after the process started. And by this time, more than 2,000 lives could have been saved.

Fourth point, when problems are found, we need to find solutions, and here are some suggestions. First, OSHA and the National Institute of Occupational Safety and Health, or NIOSH, should be required to establish a shared priority list for rulemaking. OSHA should work with NIOSH on a new national survey of workplaces to get detailed information on worker exposures and control measures for hazards that are on the priority list.

OMB should acknowledge that OSHA's public hearing process is especially robust. All issues of concern to OMB are discussed and debated on the record—economic impacts, potential alternatives, technological and economic feasibility. The OMB review only slows things down without adding substantial value. OMB should limit itself to cursory review of this, or simply exempt OSHA from the review requirements of Executive Order 12866.

Congress should direct OSHA to update more than 400 chemical exposure limits that haven't been changed for more than 40 years. It should allow an expedited process for OSHA to adopt modern consensus standards that have widespread support in reputable national or international organizations.

Congress should also be more willing to step in when the rulemaking process fails in a timely way to protect workers from known hazards. And I would point out that this approach has, in fact, worked well on several occasions at the Federal level and more recently has worked quite well in two specific examples in the State of Washington.

In one of these, the Washington State Legislature directed the State OSHA program to develop rules to protect healthcare workers from exposure to chemotherapy and other hazardous drugs, drugs that are helpful to patients but can actually kill workers. The second was a requirement for employers who have violated safety and health regulations to correct the hazards right away, even if they've appealed the citation. And that rule also provides due process for employers to seek a stay and to be granted a stay if, in fact, one is appropriate. In both these cases, the State completed the process in about 6 months.

Also, improved standard-setting is necessary but it's not sufficient. Public employees in 31 States and territories are completely excluded from OSHA protections. Now, while public employees in the other 27 States and territories may experience long delays before a standard is passed, they at least enjoy protections when the rules are adopted. The rest have remained out in the regulatory cold for 38 years, and this is a gap that Congress can and should fix.

Finally, my fifth point is that a bad situation can, in fact, become worse. Several proposals now before Congress will slow OSHA standard-setting even further, and we simply need to be moving in the other direction. You know, most OSHA rules that were adopted before 1981, before the GAO timeframe, were completed quickly.

The rules for asbestos, arsenic, cotton dust, and lead were all adopted within just a few years. And there's no evidence at all that those rules were any more burdensome or costly, any less protective or effective, or any less supported by scientific evidence than subsequent rules that have taken many, many years longer.

We have created barriers based on false alarms. And the need now is to lower them so that worker protection can proceed again without delay. And it's no exaggeration to say that lives are at stake.

That concludes my comments, and I'll be happy to respond to questions later. Thank you.

[The prepared statement of Dr. Silverstein follows:]

PREPARED STATEMENT OF MICHAEL SILVERSTEIN, M.D., MPH

SUMMARY

I am a physician certified in occupational medicine with nearly 40 years of experience in workplace safety and health. I recently retired from the Washington State Department of Labor and Industries where I directed the State OSHA Program for 10 years. My previous positions include Director of Policy for Federal OSHA, Washington State Health Officer, and assistant director for Occupational Safety and Health for the United Automobile Workers.

1. Nearly 40 years after the OSHAct was signed the national toll of preventable workplace injury, illness and death remains appallingly high. The most recent published study has documented 5,600 fatal workplace injuries, 53,000 fatal illnesses and more than 9 million non-fatal injuries and illnesses every year for total estimated annual costs of $250 billion.

2. OSHA's rules have kept workers from being killed, but roadblocks have interfered with forward progress. There is strong evidence that OSHA rules have been effective in protecting workers with no evidence of interference with competitiveness, productivity or profits. However, myths about rulemaking have overshadowed this reality. As a result, procedural and political roadblocks have brought OSHA rulemaking to a virtual halt.

3. Lost time means lost lives. OSHA started rulemaking on silica dust in 1974. OSHA estimates that 60 worker deaths a year would have been prevented with a new rule. We've already lost the opportunity to prevent more than 2,000 deaths from silica exposure.

4. When problems are found, we need to find solutions. OSHA and NIOSH should be required to establish a shared priority list for rulemaking. OMB should acknowledge that OSHA's public hearing process is especially robust and should limit itself to cursory reviews or exempt OSHA from OIRA review. Congress should direct OSHA to update its 400 obsolete chemical exposure limits. Congress should extend the protections of OSHA rules to all public employees.

5. A bad situation could become worse. Several proposals on regulatory process currently before Congress will cause harm by slowing down OSHA's standard setting process even further.

Chairman Harkin and Ranking Member Enzi, my name is Dr. Michael Silverstein and I appreciate the opportunity to testify before you today.

1. Nearly 40 years after the OSHAct was signed the national toll of preventable workplace injury, illness and death remains appallingly high. The most recent published study of workplace injuries and illnesses by Dr. Paul Leigh has documented 5,600 fatal injuries, 53,000 fatal illnesses and more than 9 million non-fatal injuries and illnesses every year for total estimated annual costs of $250 billion.[1] The human impact and national cost for these predictable and preventable losses is unacceptably huge.

2. OSHA's rules have kept workers from being killed, but roadblocks have interfered with forward progress. Congress intended rulemaking to be one of the principle vehicles for OSHA to ensure that workers return home safe and healthy every day. OSHA had a good start with rules protecting workers from asbestos, vinyl chloride, coke oven emissions, arsenic, lead, cotton dust and hazards associated with power transmission and generation, scaffolding, and mechanical power presses. There is strong evidence that these and other OSHA rules have been effective in protecting workers for reasonable costs with no evidence of interference with competitiveness, productivity or profits.[2] Simply put, OSHA regulations have saved lives without killing jobs. However, in recent years myths about rulemaking have overshadowed this reality. As a result, procedural and political roadblocks have brought OSHA rulemaking to a virtual halt.

If there is a crisis it is not over-regulation, but persistently deadly unregulated hazards such as silica, workplace violence and combustible dust. For example, the U.S. Chemical Safety Board (CSB) issued a report on the dangers from combustible dust in 2006 after reviewing nearly 300 serious fires and explosions that killed 119

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[1] Leigh, JP. (2011) Economic Burden of Occupational Injury and Illness in the United States. Milbank Quarterly, 89(4):728–72.

[2] Office of Technology Assessment, Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health: An Appraisal of OSHA's Analytical Approach. Washington, DC, OTA, 1995.

workers, including a 2003 plastic dust[3] explosion in Tennessee that killed seven workers and a 2003 plastic dust[4] explosion in North Carolina that killed six workers. The CSB recommended that OSHA conduct rulemaking to prevent these deadly explosions.[5] Just 2 years later, while OSHA was struggling with the bureaucratic obstacles to rulemaking, a huge explosion of combustible sugar dust at the Imperial Sugar refinery near Savannah, GA killed 14 workers. And 3 years after that five workers were killed in a series of iron dust explosions in Gallatin, TX. Now, nearly 6 years since the CSB warning, it is a national embarrassment that workers continue to be blown up.

3. Lost time means lost lives. Between 1981 and 2010 it has taken OSHA an average of 7 years 9 months to adopt a workplace safety and health standard. Over 25 percent of the rules completed during these years took more than 10 years with several being delayed for nearly 20 years. And there have been even longer delays for some that have yet to be completed.

For example, workplace exposure to silica dust (the basic ingredient in common sand) has long been known to cause crippling lung disease and lung cancer. OSHA started the rulemaking process for a new silica standard in 1974 after the National Institute for Occupational Safety and Health (NIOSH) reported that the old standard left workers at high risk. A draft was finally presented for review, 29 years later, to a small business panel as required by the Small Business Regulatory Fairness Enforcement Act (SBREFA). After 8 more years rulemaking documents were submitted for OMB review under Executive Order 12866. Today after yet another year the silica proposal remains handcuffed within OMB. Assuming a best-case scenario after this hearing, it will still take another 3 years for a new silica rule to be adopted—*41 years* after the process started! OSHA has estimated that 60 worker deaths a year would be prevented by reducing the standard to the levels recommended in 1974. By 2015 we will have lost the opportunity to prevent nearly 2,500 deaths.

4. When problems are found, we need to find solutions. The GAO report on OSHA standard setting correctly identifies many of the reasons OSHA rulemaking has slowed down, but the report falls far short on recommendations for improvement. A practical, effective action agenda should include at least the following:

- OSHA and NIOSH should be required to work together to establish a shared priority list for rulemaking. This should be done with substantial stakeholder input, similar to the priority process OSHA began in the mid-1990s but later abandoned.
- OSHA should work more closely with NIOSH and EPA on risk assessments and feasibility analyses that are required for rulemaking. This should include a new national survey of workplaces to get detailed information on worker exposures and control measures for hazards on the priority list.
- OMB should acknowledge that OSHA's public hearing process is especially robust, going well beyond the requirements of the Administrative Procedure Act. An independent administrative law judge presides. Witnesses present information, analysis and opinions and are challenged through cross-examination. All issues of concern to OMB are discussed and debated on the record—including the need for regulatory action, economic impacts, potential alternatives, and technological and economic feasibility. OSHA then makes decisions based on the evidence and testimony. If challenged it must be able to prove in court that its actions are "supported by substantial evidence in the record considered as a whole." Given this openly deliberative process the OMB review only slows down the rulemaking without adding substantial value. OMB should limit itself to very cursory reviews or simply exempt OSHA from the review requirements of Executive Order 12866.
- OSHA's rules for more than 400 dangerous chemicals have not been updated for almost 40 years. Congress should direct OSHA to update these obsolete permissible exposure limits (PELs) using an expedited process to adopt contemporary consensus standards that have received widespread support by reputable national or international organizations.
- Congress should be more willing to step in when the normal rulemaking process fails in a timely way to protect workers from dangers. This approach has worked well recently in Washington State where two safety and health rules were required by statute. In one of these the Legislature directed the State OSHA program to develop rules to protect health care workers from exposure to chemotherapy and other hazardous medicines. The rules had to be consistent with but could not exceed provisions in existing NIOSH Guidelines. The second rule requires employers who are

[3] Phenolic resin dust explosion, CTA Acoustics plant, Corbin, TN.
[4] Polyethylene dust explosion, West Pharmaceutical Services, Kinston, NC.
[5] U.S. Chemical Safety and Hazard Investigation Board. November 2006. Combustible Dust Hazard Study. Washington, DC. Report # 2006–H–1.

cited for violating safety and health regulations to correct the hazards promptly even if they have appealed the citation unless they seek and are granted a stay. In both cases the State OSHA program was able to complete the process in a 12-month period.

• Improving standard setting is necessary but not sufficient. Public employees in 31 States and territories are completely exempted from the protections of the OSHAct. While public employees in the other 27 States and territories may experience long delays, they at least enjoy protections once rules have been adopted. The rest have remained out in the regulatory cold for 38 years. This is a gap that Congress can and should close.

5. A bad situation could become worse. Several proposals on regulatory process currently before Congress will predictably slow OSHA's standard setting process even further. For example, the Regulatory Accountability Act will require cost-benefit analysis for all conceivable alternative approaches to a proposed new rule, a requirement that will grind a slow process to a virtual halt. We need to be moving in the other direction. Most OSHA rules adopted before 1981 were completed with greater speed than is now routine. The rules for asbestos, coke oven emissions, arsenic, cotton dust, and lead were all adopted within 1 to 4 years. There is simply no evidence that any of these was less protective, more burdensome, more costly, less effective or less supported by scientific evidence than subsequent rules subject to the current procedures. We created barriers based on false alarms and the need now is to lower them so that worker protection can proceed again without delay. It is no exaggeration to say that lives are at stake.

RULEMAKING IN SLOW MOTION: THE GAO REPORT ON OSHA STANDARD SETTING DOCUMENTS A BROKEN BUREAUCRATIC PROCESS

It is disturbing but not surprising that GAO's central finding in its report on OSHA standard setting is that between 1981 and 2010 it has taken OSHA an average of 7 years 9 months to adopt a workplace safety and health standard. More troubling is that over 25 percent of 58 rules completed during these years took more than 10 years with several being delayed for nearly 20 years.

And still more distressing is that there have been even longer delays for some important rules that didn't make it into the GAO report at all because they have yet to be completed. Most notably, workplace exposure to silica dust (the basic ingredient in common sand) has been known since ancient times to cause chronic, life threatening scarring of the lung. OSHA's standard for airborne silica was adopted in 1972, grandfathered in from an older consensus standard. Just 2 years later NIOSH issued a formal statement declaring OSHA's rule to be inadequate and recommending that it be strengthened.[6] OSHA agreed and started rulemaking in 1974 by issuing an Advance Notice of Proposed Rulemaking but now 38 years later OSHA has still not been able to publish a proposed rule and schedule public hearings.

During this long period the need for a stronger rule has become more compelling. The International Agency for Research on Cancer (IARC) and the National Toxicology Program (NTP) have both listed silica as a known human carcinogen. The Bush administration designated silica as a high priority in its Fall 2002 regulatory agenda. A draft proposal was reviewed in 2003 by a small business panel under the Small Business Regulatory Fairness Enforcement Act (SBREFA). In February 2011 another draft and a peer reviewed risk assessment were submitted for OMB review under Executive Order 12866. After 4 months of OMB silence Senators Harkin and Murray and Representatives Miller and Woolsey wrote to OMB Director Jacob Lew expressing frustration with OMB's "paralysis by analysis" and urging that the proposal move forward for full public review. After 6 more months I wrote a letter, in my capacity as Chair of NACOSH, to the Secretaries of Labor and HHS expressing distress at the extraordinary delay and urging them to enhance their efforts to get OMB to finish its review.

Now, as this hearing proceeds, 4 additional months have gone by and the silica proposal still sits handcuffed within OMB. Let's presume a best case scenario following this hearing—the OMB handcuffs are removed, the proposal is immediately published by OSHA, and the rulemaking then continues without further exceptional delay. Given the average time of 3 years and 3 months from the publication of a proposed rule to final adoption, a new silica rule would not be completed until July 2015—*41 years* after the process started!

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[6] National Institute for Occupational Safety and Health. 1974. Criteria for a Recommended Standard: Occupational Exposure to Crystalline Silica. Washington, DC. DHHS (NIOSH) Publication No. 75–120.

REGULATORY INERTIA HAS DEADLY CONSEQUENCES

This record of regulatory stupor is troubling because of ample evidence that lost time means lost lives. OSHA's preliminary risk estimate was that 60 worker deaths a year would be prevented by reducing the silica exposure limit to the level recommended by NIOSH in 1974. Forty-one years of delay means a lost opportunity to have prevented 2,461 deaths.

Similarly, a significant number of lives and injuries could have been prevented by more timely adoption of OSHA's cranes and derricks rule that was published in 2010. This began in 2003 with a negotiated rulemaking process. During the 6 years before the process began there were 512 crane-related fatalities. Unanimous agreement among the stakeholders on a new rule was reached in 2004, but extra procedural steps delayed adoption until 2010. During the 6-year delay after agreement had been reached there were nearly 500 more crane deaths. During this period the State of California adopted its own rules for certification of crane operators and crane fatalities dropped from 10 during the 3 years before the California rule to 2 during the 3 years after the rule.

OSHA RULES, ONCE ADOPTED, PREVENT INJURIES AND SAVE LIVES

Additional studies have shown that once adopted and enforced, OSHA rules effectively prevent injuries, illnesses and deaths.

OSHA adopted its Lockout/Tagout rule[7] in 1989 after 12.7 years of rulemaking. Prior to the rule adoption OSHA determined that approximately 144 fatalities per year were due to unexpected activation of machinery. In 2000 OSHA conducted a look-back review of the first 7 years of the rule pursuant to the Regulatory Flexibility Act and Section 5 of Executive Order 12866. The review found that the rule resulted in a 20 percent to 55 percent reduction in fatalities, or the prevention of 29 to 79 fatalities per year. If the rulemaking had taken half the actual time of 12.7 years this would have meant saving this many fatalities in each of 6.35 years, or 184 to 502 fewer fatalities.

Other OSHA rules have been equally effective. Between 1978 when the OSHA cotton dust rule was adopted and 2000 when OSHA evaluated its impact the rate of byssinosis (or "white lung" disease) among textile workers dropped from 12 percent to less than 1 percent. Similar reductions in injury, illness and death have followed adoption of OSHA rules for confined space entry, grain elevator safety, lead exposure, and bloodborne pathogen protection.

Additional evidence comes from the SHARP research unit within the Washington State Department of Labor and Industries, which for 20 years has been studying the effectiveness of workplace safety regulations. For example, after the State OSHA program adopted a new fall protection rule for the construction industry SHARP examined injury rates before and after construction companies were inspected for compliance with the new rule. When companies were cited for failure to comply and were required to come into compliance there were subsequent decreases in fall related injuries greater than in comparable companies that had no inspection.

Washington's SHARP program has also recently completed a 10-year analysis of worker compensation claims in the year following safety and health inspections. When companies were cited for failure to comply with safety and health rules and were required to come into compliance, there was a significant drop in serious injuries over the next year. This drop was 20 percent greater than in comparable workplaces that were not inspected.[8]

THE GAO FINDINGS WARRANT MORE ROBUST RECOMMENDATIONS

The evidence clearly indicates that finding ways to speed the rulemaking process even modestly would have significant positive impact on employers, employees and

[7] "Lockout/Tagout (LOTO)" refers to specific practices and procedures to safeguard employees from the unexpected energization or startup of machinery and equipment, or the release of hazardous energy during service or maintenance activities. According to OSHA compliance with the lockout/tagout standard (29 CFR 1910.147) prevents an estimated 120 fatalities and 50,000 injuries each year.

[8] Foley M, Fan ZJ, Rauser E, Silverstein B. 2011. The Impact of DOSH Enforcement and Consultation Visits on Workers' Compensation Claims Rates and Costs, 1999–2008. SHARP Technical Report Number: 70–5–2011. *http://www.lni.wa.gov/Safety/Research/Files/OccHealth/DoshEnforce19992008.pdf.*

This study evaluated changes in the kinds of injuries most closely related to the rules that were being enforced. For example, falls and amputations were included because they are related to fall protection and machine guarding rules. But cumulative musculoskeletal disorders like tendinitis were not covered because there is no ergonomics rule that covers the risks that cause these injuries.

communities. The strength of the GAO study is in the detail and analytic depth with which it identified multiple causes of regulatory delay and many options for speeding the process. It was surprising to find that it offered only a single recommendation and disappointing that this recommendation did no more than ask two agencies to work closely together, something that has been required by the OSHAct since 1971.

The findings in the report warrant a much more specific and substantive set of recommendations such as the following:

First, OSHA and NIOSH Should Improve Collaboration on Rulemaking:

• OSHA and NIOSH should work together to establish a shared priority list for rulemaking. This should be done with substantial stakeholder input, similar to the priority process OSHA began in the mid-1990s but later abandoned.[9] It should also be modeled on NIOSH's successful process for establishing its National Occupational Research Agenda (NORA).

• The OSHAct directs NIOSH to develop scientific criteria for OSHA rules and to publish such criteria annually. In its early years NIOSH developed a substantial number of detailed criteria documents with recommendations for new OSHA rules, but OSHA rarely acted on these recommendations and NIOSH stopped producing them. NIOSH should work with OSHA to develop new criteria documents that will provide the kind of details on exposures, risks, technological and economic feasibility that OSHA needs to support new rules.

• From 1981–83 NIOSH conducted an on-site survey of establishments in general industry to provide national estimates of potential exposures to chemical, physical and biological agents (National Occupational Exposure Survey or NOES). The survey also provided data on management's health and safety practices and policies. The NOES, and its predecessor National Occupational Hazard Survey (NOHS) from 1972–75, represented the most comprehensive source of data on the number of U.S. workers potentially exposed to specific hazards and the distribution of these hazards by industry and occupation. OSHA and NIOSH should work together on a new national survey that is specifically designed to provide information on worker exposures and feasible control measures for hazards on the regulatory priority list.

Second, OSHA Should Take Additional Actions:

• OSHA should work more closely with the Environmental Protection Agency on rulemaking. OSHA and EPA have similar requirements to base rulemaking on scientific assessments that estimate the nature and level of risks from exposure to environmental chemicals. EPA's Integrated Risk Information System (IRIS) contains information on human health effects for more than 540 chemical substances. This information could potentially be very useful to OSHA. OSHA and EPA have written agreements on cooperation for enforcement activities but not rulemaking. They need to adopt formal arrangements to work together on risk assessments for rulemaking in a way that is mutually supportive and avoids redundancies.

• As noted in the GAO report OSHA's principle method for evaluating the feasibility of compliance with proposed new rules is extensive on-site evaluations. These are extremely lengthy, labor intensive and costly, but it is not clear that they yield information substantially superior to that which can be derived from well-designed surveys. In Washington State scientifically designed stratified, random sample surveys of businesses are routinely used to support safety and health rulemaking. These have been found to meet the statutory requirements for assessment of small business impact, cost-benefit analysis, and technological feasibility determinations. By relying more heavily on survey data OSHA could proceed more quickly while still meeting the "best available evidence" test in the OSHAct. Since, according to OSHA, it currently takes at least 1 year for survey approval by OMB, as required under the Paperwork Reduction Act, this approach will only be fully effective if OMB would agree to expedite review for these rulemaking surveys or if Congress were to grant a Paperwork Reduction exemption to OSHA for these surveys.

• With a few notable exceptions[10] OSHA has adopted rules for one safety or health hazard at a time. This is like seasoning your food one grain of salt at a time. Even if each individual rulemaking could be completed more quickly than the current average of 7 years, the sheer volume of hazards would render this approach futile. OSHA could use its limited rulemaking resources more efficiently by concen-

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[9] See OSHA Web site at *https://www.osha.gov/pls/oshaweb/owadisp.show__document?p__table=NEWS__RELEASES&p__id=1151.*

[10] Successful efforts include rules for process safety management, personal protective equipment, and respiratory protection. An unsuccessful effort was rulemaking to update all the permissible exposure limits, which was rejected by the 11th Circuit Court of Appeals.

trating on some rules with broad, general impact. OSHA's current regulatory priority of rulemaking for Injury and Illness Prevention Programs is an example of this approach and deserves support. Other examples would be general rules for exposure assessment, medical surveillance and training.

Third, OMB Should Allow OSHA Proposed Rules to Move Forward:

• One of the steps in rulemaking that has repeatedly resulted in long delays is the review of proposed OSHA rules by the OMB Office of Information and Regulatory Affairs (OIRA) as required by Executive Order 12866. This review covers the need for regulatory action, an assessment of potential costs and benefits, the anticipated effect on functioning of the economy and private markets, and an assessment of possible alternatives to the planned regulation. However, the OSHA public hearing process is especially robust, going well beyond the requirements of the Administrative Procedure Act and providing an open forum in which all issues of concern to OMB are discussed and debated on the record. An administrative law judge presides, agency officials participate, witnesses deliver testimony and are subject to extensive cross-examination, data and documents are introduced and discussed, and a formal record is kept. OSHA then makes decisions based on the evidence and testimony. If challenged it must be able to prove in court that its actions are "supported by substantial evidence in the record considered as a whole." Given this openly deliberative process the OMB review only slows down the rulemaking without adding substantial value. OSHA's process should be considered sufficient to warrant relatively cursory review, if not outright exemption, by OIRA.

Fourth, Congress Should Provide More Direction For Worker Protection:

• OSHA attempted to update the PELs for more than 400 chemicals in a single rulemaking in 1989. The 11th Circuit Court of Appeals vacated OSHA's new rule 1992, finding that OSHA failed to analyze and provide evidence of significant risk, economic and technological feasibility for each of the individual chemicals. This decision has proven administratively insurmountable. As a result almost all of these PELs remain significantly obsolete and are widely judged to be insufficiently protective. Congress should direct OSHA to update these PELs by using an expedited process to adopt contemporary consensus standards that have received widespread support by reputable national or international organizations.

• As noted in the GAO report when statutes or court orders require OSHA to undertake rulemaking, the average time to adoption is 4 years, 7 months or about half as long as other OSHA rules. Congress should be more willing to step in when the normal rulemaking process fails to act in a timely way to protect workers from significant dangers. Congress, for example, should direct OSHA to act where another Federal agency, within its own statutory mandate, has recommended that OSHA's rules be improved and where OSHA has refused. This would apply, for example, to standing recommendations from the U.S. Chemical Safety Board regarding the hazards of combustible dust. Congress has done this before with good results, including statutory requirements for OSHA to strengthen its bloodborne pathogen standard, adopt rules to protect workers engaged in hazardous waste operations, and adopt a lead standard for the construction industry. In two other recent cases important safety and health rules were adopted in Washington State following statutory direction. In the first, the 2011 Legislature directed the State OSHA program to develop rules protecting health care workers from exposure to chemotherapy and other hazardous medications, specifying that the rules would be consistent with but would not exceed provisions in the 2004 NIOSH Guidelines (as updated in 2010). Also in 2011 the Washington Legislature ordered rulemaking to require employers who have been cited for violation of safety and health regulations to correct the hazards promptly even if they have appealed the citation unless they seek and are granted a stay until the appeals process is completed. In both cases, the Washington Department of Labor and Industries was able to complete the process in a 12-month period, including informal stakeholder meetings, publication of proposed rules and formal public hearings.

• Congress should give flexibility to OSHA to complete rulemaking in a more timely fashion without sacrificing quality by providing an option for the agency to adopt rules that are technology based, with affected industries shouldering the burden of proof to demonstrate infeasibility.

CLOSING REMARKS

In conclusion, successive waves of legislation, executive action and case law have created barriers to safety and health rulemaking resulting in significant delay with consequences that are demonstrably harmful and, in many cases, deadly. While GAO is to be commended for a reasonably thorough description of these problems,

the report has failed to articulate meaningful solutions. Also, by limiting its assessment to the years since 1981 the report also has failed to identify two important problems that become apparent when assessing the full history of OSHA since its establishment in 1971.

• Most of the OSHA rules adopted before 1981 were completed with much greater speed than has now become routine. The rules for asbestos, vinyl chloride, coke oven emissions, DBCP, inorganic arsenic, cotton dust, acrylonitrile, lead, commercial diving, fire protection, roof guarding, and electrical systems were all adopted within 1 to 4 years of initiation. There is simply no evidence that any of these rules was less protective, more burdensome, more costly, less effective or less supported by scientific evidence than subsequent rules experiencing the added procedural steps documented by GAO. This historical perspective suggests that we created barriers based on false alarms and that there is nothing to be lost by lowering them in the interest of worker protection.

• Perhaps the most glaring and indefensible example of regulatory delay is a feature of the OSHAct that is more basic than its particular provisions on rulemaking. Public employees in 31 States and territories are completely exempted from the protections of the OSHAct. While public employees in the other 27 States and territories may experience long delays, they at least enjoy protections once rules have been adopted. The rest have remained out in the regulatory cold for 38 years—a much more extreme failure than anything reported by GAO. This is a gap that Congress can and should close.

The CHAIRMAN. Thank you very much.

Ms. Rabinowitz, please proceed.

STATEMENT OF RANDY S. RABINOWITZ, DIRECTOR, REGULATORY POLICY, OMB WATCH, WASHINGTON, DC

Ms. RABINOWITZ. Mr. Chairman, members of the committee, thank you very much for the opportunity to testify today on delays in OSHA rulemaking. My name is Randy Rabinowitz, Director of Regulatory Policy at OMB Watch, an independent, nonpartisan organization that promotes open, accountable government and health and safety standards that protect people and the environment.

Congress passed the Occupational Safety and Health Act to ensure that every working man and woman in the Nation had safe and healthful working conditions. Under the act, OSHA cannot issue rules unless it has thoroughly researched the impact of its rules, shown that the rule would reduce a significant risk in the workplace, would reduce that risk at a reasonable and affordable cost, relying on technology already in use or in development.

OSHA may do so only after an open and transparent rulemaking process in which workers, unions, scientists, small and large businesses, and others regularly participate. If OSHA's analysis is weak on any of these points, courts will strike down its standard.

In the years since its creation, OSHA's ability to protect workers from harm has been undermined by Kafka-esque demands for additional reviews of proposed and final rules mandated by new statutes and Executive orders. Many of these additional analytic requirements overlap with, duplicate, and/or conflict with the requirements of the OSHA Act and serve no apparent purpose other than to delay and burden the rulemaking process.

As new analytic requirements have been imposed on OSHA, the time needed to complete a rule has increased. GAO has calculated that, on average, it takes almost 8 years to promulgate a standard. But before all these new added reviews were required, it took OSHA just a few months to a few years.

As we've heard, rules for asbestos, lead, vinyl chloride, and arsenic and others were developed far more quickly than would be

possible today. And each of these standards has made a huge difference in the health of workers at costs which studies show were substantially below what was estimated at the time the rule was established.

Today it takes OSHA almost a decade to set a standard. Much of this delay is caused by the cumulative impact of the various regulatory analyses OSHA is required to complete. These requirements have crippled OSHA's ability to protect workers in a timely fashion.

We need to update workplace health and safety standards, not to bury them. To do so, Congress should limit OMB's ability to interfere in rulemaking. It should make certain that OMB does not impose a cost-benefit test on OSHA standards when the U.S. Supreme Court has ruled that such a test is improper. In our view, cost-benefit analysis simply cannot properly value what it means to workers of avoiding disabling injuries and what it means to their families to avoid having a loved one killed too soon.

Congress should require that OMB review, if any, be based on the same rulemaking record that OSHA must rely on, and OMB should be required to explain the reasons for any changes it makes to a rule. OMB should no longer be able to develop a secret record in private, closed-door meetings held mostly with industry opponents of regulation.

Pending regulatory reform proposals would move in the wrong direction. Four separate regulatory reform proposals are pending in the Senate. They are the Regulatory Accountability Act, the Regulations from the Executive in Need of Scrutiny Act, the Regulatory Flexibility Improvements Act, and the Regulatory Time-Out Act.

None of the pending regulatory reform proposals would fix the OSHA standard-setting process. Each would further delay or shut down the process. Passage of these bills would hurt workers and make them less safe. They should be rejected.

Finally, I think it's worth noting that if you look at the testimony here this morning, there are several things about which there is wide acceptance and which Congress could do that would improve the standard-setting process. And some of the suggestions I'm about to mention are drawn from the testimony of my colleague, Mr. Sarvadi, with whom I rarely agree on these matters.

It is unfortunate that GAO's recommendations on improving the standard-setting process are so limited. So I think that OSHA should pick a few hazards, devote resources to reducing worker exposures, and see these priorities through without shifting gears so often.

OSHA should rely more extensively on comprehensive scientific evaluations by EPA or NIOSH. Once one agency of government thoroughly evaluates the hazards of a substance, other agencies should not have to repeat that analysis. And I would note that one of the reasons MSHA has been able to move more quickly than OSHA, in addition to knowing the mining industry inside out, is that they often follow other agencies and rely on their scientific evaluation so they don't have to redo the whole scientific analysis.

OSHA should have better mechanisms to get data voluntarily from business about the impacts of its rules. Right now, OSHA must wait months for OMB to approve requests for surveys under

the Paperwork Reduction Act. And Mr. Sarvadi suggests that OSHA should consult with business more frequently and earlier in the process. One thing that would help improve such a dialog is if industry was willing to share with OSHA concrete data that it needs for the rulemaking process.

OSHA spends, in my mind, too much time quantifying risks. This is one of the real downsides of OMB's approach. OSHA should make sure that a hazard it seeks to regulate poses a real risk large enough to warrant government action, but it doesn't really matter whether asbestos causes 1,200 mesotheliomas a year or 1,500. The important point is we know asbestos causes cancer, and we know that worker exposure to asbestos should be reduced or eliminated.

And, finally, OSHA should be able to update outdated rules where contemporary consensus exists. That would include industry consensus standards, negotiating rulemakings, or some kind of private dialog between labor and industry where they come up with an agreement. We should be able to get a proposal out in the public for further debate more quickly than has been the case in the past.

I think all of these things would improve OSHA rulemaking and make the workplace more safe for the people who work there every day.

Thank you.

[The prepared statement of Ms. Rabinowitz follows:]

PREPARED STATEMENT OF RANDY S. RABINOWITZ

SUMMARY

Congress passed the Occupational Safety and Health Act of 1970 (OSH Act) to ensure "every working man and woman in the Nation safe and healthful working conditions." Under the OSH Act, OSHA cannot issue a rule unless the impact of its proposal has been thoroughly researched and shown to address significant risks in the workplace at a reasonable and affordable cost. And, it may do so only after an open and transparent rulemaking process which encourages participation by a broad group of stakeholders.

In the years since its creation, OSHA's charge to protect workers from harm has been undermined by Kafka-esque demands for additional reviews of proposed and final rules mandated by new statutes and Executive orders. Many of these additional analytic requirements overlap with, duplicate, and/or conflict with the requirements of the OSH Act and serve no apparent purpose other than to delay and burden the rulemaking process.

As new analytic requirements have been imposed on OSHA, the time needed to complete a rule has increased. GAO has calculated that, *on average*, it now takes almost 8 years to promulgate an OSHA standard. Cumulatively, these requirements have crippled OSHA's ability to set new safety and health standards in a timely and responsive fashion.

We need to update workplace health and safety standards, not bury them. To do so, Congress should limit OMB's ability to interfere in rulemaking. It should make certain that OMB does not impose a cost-benefit test on OSHA standards, when the Supreme Court has ruled that such a test is improper. Cost-benefit analysis simply cannot properly value some of the most important benefits of worker protections. Congress should require that OMB review, if any, be based on the rulemaking record and OMB should be required to explain the reasons for any changes it makes to a rule. Secret meetings by OMB with industry opponents of regulation should stop.

The process for issuing workplace health and safety standards is broken and needs to be fixed. We need to update workplace health and safety standards, not bury them. Pending regulatory reform proposals would move in the wrong direction. Four separate regulatory reform proposals are pending in the Senate: the Regulatory Accountability Act (S. 1606), the Regulations from the Executive in Need of Scrutiny (REINS) Act (S. 299), the Regulatory Flexibility Improvements Act (S. 1938), and the Regulatory Time-Out Act (S. 1538). None of the pending regu-

latory reform proposals would fix the OSHA standard setting process. Rather, each of these proposals is designed to further delay or shut down the regulatory process. Passage of these bills would hurt workers and make them less safe.

Mr. Chairman and members of the committee, thank you for the opportunity to testify on delays in standard setting at the Occupational Safety and Health Administration (OSHA). My name is Randy Rabinowitz, director of Regulatory Policy at OMB Watch, an independent, nonpartisan organization that promotes open, accountable government and health and safety standards that protect people and the environment. OMB Watch has monitored the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA), OSHA, and their interactions for more than 25 years. We co-chair the Coalition for Sensible (CSS), an alliance of more than 75 consumer, small business, labor, scientific, research, good government, faith, community, health, and environmental organizations joined in the belief that our system of regulatory safeguards is essential to maintaining our quality of life and building a sustainable economy that works for all. Time constraints prevented the coalition from reviewing my testimony in advance, and today I speak only on behalf of OMB Watch.

I am a nationally recognized expert on OSHA standard setting. I have served as co-chair of the American Bar Association's (ABA) OSH Law Committee; as the editor-in-chief of the ABA's treatise on OSHA Law and author of the section on standard-setting; and as an adjunct professor teaching OSHA law. I have been lead counsel for labor unions on close to a dozen challenges to OSHA rules, and I have worked for or advised Congress, OSHA, and other Federal and State health and safety agencies on regulatory issues.

OSHA'S MISSION HAS BEEN UNDERMINED BY TOO MUCH REGULATORY ANALYSIS

Congress passed the Occupational Safety and Health Act of 1970 (OSH Act) to ensure "every working man and woman in the Nation safe and healthful working conditions."[1] OSHA protects workers by setting workplace standards and enforcing those standards through inspections. Every year, millions of workers are protected from the hazards posed by grain elevator explosions, dangerous equipment, toxic chemicals and materials, and dozens of other workplace hazards because of OSHA's work.

Unfortunately, OSHA's rulemaking process is now so burdened by requirements for regulatory analysis that the agency is incapable of issuing timely standards to protect workers. New workplace hazards and new scientific evidence about the health effects of exposure to a variety of toxic chemicals should result in the prompt issuance of new OSHA standards, but OSHA is finding it more difficult to respond to these threats to workers because the agency is now required to complete an ever increasing array of onerous, duplicative, and unreasonable regulatory analyses. These analyses require staff time and agency resources that would be better spent identifying new threats to workers' health and enforcing existing safety standards.

Protecting worker safety is the clear and overriding goal of the OSH Act. The primacy of this objective has been upheld by the U.S. Supreme Court. In 1981, the Court ruled that worker safety, not cost-benefit analysis, should determine whether or not a workplace safety standard is warranted. Yet OIRA insists that OSHA conduct time-consuming, expensive, and duplicative studies of the "costs to industry" beyond those required by the OSH Act before issuing rules to protect the health of American workers. These studies allow OIRA to judge OSHA standards against a cost-benefit test the Supreme Court has held is improper. This needs to stop. Congress needs to explicitly limit OIRA's review powers.

THE PROCESSES REQUIRED TO ISSUE RULES UNDER THE OSH ACT ARE THOROUGH AND BALANCED

Under the OSH Act, before OSHA can issue a new rule or standard, it must:

(1) comprehensively evaluate the nature and extent of the health and safety risks to workers;

(2) determine whether those benefits are significant;

(3) ensure that the necessary technology exists to comply with its rules; and

(4) assess the economic impact of those rules on (a) industry profits, (b) consumer prices, and (c) intra-industry competition.

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[1] 29 U.S.C. § 651(b).

In short, OSHA cannot issue a rule unless the impact of its proposal has been thoroughly researched and shown to address significant risks in the workplace at a reasonable and affordable cost.

Moreover, the OSHA rulemaking process permits members of the public greater opportunities to participate than other regulatory agencies that only operate under the Administrative Procedure Act (APA).

After this careful process, if the health and safety standard is challenged in court—and most OSHA standards are challenged—OSHA's analyses will be scrutinized more carefully by the courts than rules issued by other agencies. If a court rules that OSHA got the analysis wrong, the courts can stop the standard from going into effect. Thus, the bar for getting a rule implemented is higher at OSHA than for most other Federal regulatory agencies because the OSH Act and OSHA's internal processes require it.

In the early days of its existence, it took OSHA from 6 months to 2 years to develop major rules—even controversial ones that addressed asbestos and vinyl chloride hazards. The preambles for both of those standards were 5 to 10 pages, and the courts ruled OSHA's analysis was adequate. What is more, these standards have been effective in protecting workers from harm. Now, with the extra-statutory analyses that have been added to this process, it can take over a decade to upgrade or issue a new health and safety standard.

ANALYTIC REQUIREMENTS ADDED IN THE PAST 40 YEARS SLOW HEALTH AND SAFETY PROTECTIONS UNNECESSARILY, DUPLICATE EFFORT, AND WASTE PUBLIC RESOURCES

In the years since its creation, OSHA's charge to protect workers from harm has been undermined by Kafka-esque demands for additional reviews of existing rules mandated by new statutes and Executive orders. Many of these additional analytic requirements overlap with, duplicate, and/or conflict with the requirements of the OSH Act and serve no apparent purpose other than to delay and burden the rulemaking process.

As new analytic requirements have been imposed on OSHA, the time needed to complete a rule has increased. GAO has calculated that, *on average*, it now takes almost 8 years to promulgate an OSHA standard. Cumulatively, these requirements have crippled OSHA's ability to set new safety and health standards in a timely and responsive fashion.

PROCESS REFORMS THAT SLOW HEALTH AND SAFETY STANDARDS

In 1980, the Paperwork Reduction Act (PRA) created a new office in the Office of Management and Budget (OMB), the Office of Information and Regulatory Affairs (OIRA), and tasked it with serving as a central clearinghouse for all government forms. The PRA was supposed to reduce the burden of government paperwork on citizens and non-governmental entities. Ironically, centralization and review by OIRA generated new paperwork and delays for government agencies as they waited for the office to review and approve their requests to collect the information necessary to support new standards.

Shortly after OIRA's creation, President Ronald Reagan issued an Executive order requiring rulemaking agencies to submit every regulation to OIRA for review and approval, and the office was tasked with determining whether the benefits of each rule outweighed its costs. Congress has never given OIRA this authority. Since the 1980s, the process has slowed so much that several significant OSHA health standards were issued after courts or Congress ordered the agency to move forward. (For example, it took 6 years and a lawsuit before OSHA issued a formaldehyde standard.)

In 1993, in Executive Order 12866, President Bill Clinton established the current regulatory review process, which encourages the use of cost-benefit analysis, risk assessment, and performance-based standards, and gives OIRA authority to coordinate rulemaking among agencies and ensure they align with the President's priorities. Agencies must submit drafts of proposed and final "significant"[2] rules to OIRA.

Under the presidency of George W. Bush, OIRA interfered even more aggressively with agency rulemaking activities. With Executive Order 13272, OIRA imposed rigorous guidelines for cost-benefit analyses, including peer review (adding more time to the process) and began commenting on agency drafts before they had even been

[2] Significant regulatory actions under Executive Order 12866 are those: (1) with an annual effect on the economy of $100 million or more; (2) inconsistent with a rule or action taken by another agency; (3) which would alter budgetary impact of government program or recipients of such; or (4) raise novel legal or policy issues. OIRA views all OSHA standards as "significant."

submitted for review. The Obama administration has continued this regime of regulatory review.

In addition to the requirements for regulatory analysis imposed by Executive Order 12866, between 1976 and 1984, Congress passed a series of laws designed to ensure regulations did not unduly burden small businesses. These laws added yet another set of analytic requirements to rulemaking. An Office of Advocacy was established within the Small Business Administration (SBA) in 1977 and was tasked with monitoring the impact of regulations on small business. Eventually, the Regulatory Flexibility Act (RFA) required all agencies to include an assessment of small business impacts as a key part of the rulemaking process and to use a "less burdensome alternative" if the rule would have significant impact on or affect a substantial number of small enterprises. By 1980, the law required agencies to solicit the views of small entities and the Office of Advocacy and to publish an initial and/or final analysis of the impact in the *Federal Register* or certify that the proposed rule would have no impact on small businesses. RFA requirements meant an agency would have to not only assess the benefits and costs of a new rule on the overall economy and regulated industries, but also assess its impact on small businesses. The burdens of analysis were growing, increasing the time and resources needed to propose new health and safety standards.

THE OSH ACT REQUIRES AN EVALUATION OF THE BENEFITS AND COSTS OF PROPOSED RULES

The original OSH Act requires OSHA to thoroughly examine the costs of the rules it imposes. Section 6(b)(5) of the OSH Act requires OSHA to determine, before it issues a final rule, that a standard is feasible, both technologically and economically. Before it can decide whether a standard is feasible, OSHA must make a "reasonable assessment of the likely range of costs and the likely effects of those costs" on each affected industry.[3]

OSHA standards protect hundreds of thousands of workers, in multiple industries, from harm. Obviously, the more workers and industries affected by a safety standard (for example, a sprinkler system for fire prevention), the higher the aggregate costs of a rule. Recognizing this, the courts have ruled that OSHA should "examine those [aggregate] costs in relation to the financial health of the industry and the likely effect of such costs on the unit consumer prices."[4] To ensure that it does not place an undue burden on small business, OSHA must make sure that its standard does not "threaten[ ] the competitive stability of an industry," increase inter- or intra-industry competition, or create "undue concentration."[5]

OIRA COST-BENEFIT ANALYSIS AND RISK ASSESSMENT REQUIREMENTS CONTRADICT THE OSH ACT AND THE SUPREME COURT'S INTERPRETATION OF THE LAW

In addition to assessing the economic impact of its standard, OSHA must also complete a detailed scientific analysis of the nature and extent of the hazards posed to workers. When it can do so, OSHA quantifies this risk, but it is not required to do so by law.[6] Sometimes the science is not yet conclusive about the health effects on workers; in such cases, the courts have ruled that "OSHA cannot let workers suffer while it awaits the Godot of scientific certainty."[7] Instead, OSHA's scientific judgments must be supported "by a body of reputable thought."[8] In fact, after rigorous testing through the rulemaking process, OSHA's scientific determinations have been overwhelmingly upheld by the courts.

Significantly, the Supreme Court has weighed in on the use of cost-benefit analysis in OSHA standard setting. It held:

> Congress itself defined the basic relationship between costs and benefits, by placing the benefit of worker health above all other considerations save those making attainment of this benefit unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in section 6(b)(5).

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[3] *United Steelworkers of America* v. *Marshall*, 647 F.2d 1189, 1266 (D.C. Cir. 1980).
[4] *Id*. at 1265.
[5] *Id.*
[6] *Industrial Union Dep't.* v. *American Petroleum Inst*., 448 U.S. 607, 655 (1980); *Nat'l Maritime Safety Ass'n.* v. *OSHA*, 649 F.3d 743 (D.C. Cir. 2011).
[7] *United Steelworkers of America* v. *Marshall*, 647 F.2d at 1266.
[8] *Industrial Union Dep't* v. *American Petroleum Inst*., 448 U.S. at 656.

Thus cost-benefit analysis is not required by the statute because feasibility analysis is.[9]

OIRA's demand that an OSHA rule meet a cost-benefit test is incompatible with the OSH Act. OIRA should be prohibited from evaluating and rejecting OSHA standards on the basis of a cost-benefit test. Any analysis by OIRA that uses a different standard than the one described above is improper. We believe that cost-benefit analyses simply cannot properly value some of the most important benefits of worker protections. Without adequate measures of benefits, and with the insistence on measuring aggregate and cumulative costs, cost-benefit analysis becomes a tool for blocking worker protections. Delaying worker protections by using an inherently flawed methodology is unjustifiable.

OIRA should not be permitted to second guess OSHA's scientific judgments or to demand scientific certainty before OSHA moves to protect workers. OIRA analysts are not qualified to assess the complex toxicological, epidemiological, and quantitative judgments OSHA makes when it evaluates workplace risks.

THE OSHA RULEMAKING PROCESS IS OPEN AND PARTICIPATORY; OIRA REVIEWS ARE SECRETIVE AND SUBJECT TO UNDUE INFLUENCE BY REGULATED ENTITIES

OSHA rulemaking provides greater opportunity for comment and participation than is required by most agencies that operate under the Administrative Procedure Act. The procedures mandated by the OSH Act, commonly referred to as "hybrid rulemaking" procedures, ensure that OSHA's scientific, technical, and economic analyses are fully vetted. By contrast, OIRA reviews rules away from public scrutiny, in closed rooms with representatives of regulated industries. These industries typically argue against new rules.

OSHA usually begins the rulemaking process by publishing a request for information and/or advanced notice of proposed rulemaking—in other words, public input is sought early in the rule development process. For major rules, numerous stakeholder meetings are held in various locations around the country. If an OSHA standard will impact small business, OSHA is one of two agencies that must establish a special panel to get early input from small entities, as required by the Small Business Regulatory Enforcement Fairness Act (SBREFA). Once a proposed rule is issued, interested parties can submit written comments and evidence.

If any party requests a hearing during rulemaking—and a hearing is almost always requested—OSHA must hold one. An administrative law judge presides at the hearing. During the public hearing, interested parties may present testimony and any participant can cross-examine all witnesses. OSHA hearings are often held in several locations across the country and can go on for several weeks. Workers, public health officials, scientists, small business owners, union representatives, and business groups actively participate in these hearings. At the end of the hearing, OSHA provides the public with an opportunity to file post-hearing comments and post-hearing arguments.

All of the evidence on which OSHA's proposed rule is based, pre- and post-hearing comments, and hearing transcripts are included in a public docket. OSHA must base its final decision on information in this public rulemaking record. OSHA's explanation for its final rule must be supported by substantial evidence in the record.

By contrast, the OIRA review process is neither transparent nor open. Most meetings on proposed rules at OIRA are with industry opponents of regulation, not injured workers. Unlike the broad participation in OSHA rulemaking, only a select few get to meet with OIRA. While OIRA is supposed to make the list of individuals who attend such meetings public, it does not disclose what is discussed. While OSHA must base its regulatory decisions on the evidence it gathers and explain its regulatory choices, OIRA is not required to do so. Typically, neither OIRA nor the regulatory agencies disclose the changes in agency rules demanded by OIRA.

We believe the narrow, secretive OIRA review process undermines the public participation guarantees in the OSH Act. If OIRA is going to have a regulatory review role—and we believe that role should be substantially more limited than it currently is—it should be limited to reviewing OSHA's record and ensuring that the agency has reasonably carried out its statutory duties. OIRA should also have to publish the rule changes it demands with a written justification for why it is asking for those changes.

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[9] *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 509 (1981) (emphasis added).

OIRA DELAYS SHOULD NOT BE ALLOWED TO BURY WORKER PROTECTIONS

Executive Order 12866 mandates that OIRA complete its review of any proposed rule within 90 days (with a possible extension of another 30 days). OIRA staff have not been adhering to these deadlines.

The proposed rule limiting the amount of silica allowed in factories and other worksites is an example of the human costs of delay. In the decades this rule has been under consideration, thousands of workers have died and thousands of others have contracted a debilitating lung disease. According to Centers for Disease Control statistics, as many as 1.7 million workers are exposed to dangerous levels of silica in the workplace each year and researchers estimate that 3,600 to 7,300 of them develop silicosis. Approximately 200 workers die of silicosis each year.[10] Their illnesses were preventable.

In 2003, OSHA completed a preliminary regulatory impact analysis of a draft proposed rule on silica and convened small business review panels. But, under the Bush administration few worker protections moved forward and the silica proposal was scrapped. Early in the Obama administration, OSHA revived its effort to reduce worker exposure to silica. It revised its regulatory impact analysis and sought peer review of its risk assessment. It drafted a proposed rule and sent it to OIRA for review in February 2011. OIRA is still reviewing a *proposed* rule, 14 months later (as of today, 430 days, or 310 days past the deadline). OIRA has offered no explanation for this delay. By delaying publication of this proposal, OIRA has made it impossible to proceed to public hearings. Regulatory review should not become a graveyard for burying rules.

THE BENEFITS OF HEALTH AND SAFETY STANDARDS

Given the enormous investment of agency resources required to issue a standard, OSHA does not initiate the process without strong evidence of health risks or dangerous conditions that need to be rectified. Too often in the heated business rhetoric of today, this basic fact is lost: **workplace health and safety regulations save the lives, lungs, limbs, and health of American workers.**

Unfortunately, while the costs of lost wages, health care, and worker compensation due to exposure to workplace threats can be estimated, it is difficult to put a dollar value on the hardship and suffering of a family when a father dies on the job or a mother develops a chronic disease. Because of this, the benefits of health and safety regulations tend to be underestimated.

Meanwhile, independent analyses of the economic impact of various standards demonstrate that industry estimates of the costs of complying with new health and safety rules are often exaggerated. The costs of compliance rarely turn out to be as high as industry claims. In fact, the General Accounting Office (now the Government Accountability Office) conducted a retrospective review of the costs of Federal regulations on 15 representative companies. It concluded that industry representatives have no reliable method of estimating the incremental cost of regulation, and Federal agencies have no reliable method of verifying industry's cost estimates.[11]

Costs of compliance studies also fail to take into account the positive role that new standards can play in encouraging innovation and the use of new technologies by firms and industries. A 1995 review of major OSHA rules by the now defunct Office of Technology Assessment found that OSHA almost always *overestimated* the costs of rules because advances in technology were not factored into the analysis: "the actual compliance response that was observed included advanced or innovative control measures that had not been emphasized in the rulemaking analyses, and the actual cost burden proved to be considerably less than what OSHA estimated."[12] By way of example, OSHA's cotton dust and vinyl chloride standards were not only less costly than predicted, but led to technological innovations that made the covered industries more productive.

A comprehensive review of the relationship between industry regulations and job growth within those industries conducted by the Economic Policy Institute found that most regulations result in modest job growth.[13] Even researchers at the

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[10] OMB Watch, "Worker Safety Rule Under Review at OIRA for Over a Year: A Tale of Rulemaking Delay," Feb. 22, 2012, *available at http://www.ombwatch.org/node/11984.*

[11] U.S. Gen. Accounting Office, *Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies*, GAO–GDD/97–2, Nov. 1996.

[12] U.S. Office of Technology Assessment, *Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health: An Appraisal of OSHA's Analytical Approach*, OTA–ENV–635, Sept. 1995.

[13] Isaac Shapiro & John Irons, *Regulation, Employment and the Economy: Fears of Job Loss are Overblown*, Economic Policy Institute (2011).

Mercatus Center, a conservative regulatory policy center, acknowledged in written comments to House Oversight and Government Reform Committee Chair Darrell Issa, and in testimony to that committee, that there is little evidence that at a macro level, regulations have caused massive job loss in the United States.[14] There is no evidence that occupational safety and health regulations issued by OSHA have cost America jobs.

PENDING REGULATORY REFORM "SOLUTIONS" WOULD EXACERBATE DELAYS AND UNDUE INFLUENCE BY REGULATED INDUSTRIES

Unfortunately, recent regulatory reform proposals would do nothing to ensure workers are protected from hazards; instead, they would slow or stop the rulemaking process. Four separate regulatory reform proposals are pending in the Senate: the Regulatory Accountability Act (S. 1606), the Regulations from the Executive in Need of Scrutiny (REINS) Act (S. 299), the Regulatory Flexibility Improvements Act (S. 1938), and the Regulatory Time-Out Act (S. 1538). These bills, and others like them, would change the regulatory process in different ways but would have the same ultimate result: more delay, fewer standards to protect workers, and more illness and injury among exposed workers.

Regulatory Accountability Act (S. 1606)

The Regulatory Accountability Act (RAA) is a breathtakingly broad bill that would fundamentally rewrite the Administrative Procedure Act (APA). Currently, there are more than 110 separate procedural requirements in the rulemaking process[15]; the RAA would add more than 60 new procedural and analytical steps. Commentators have estimated that the RAA would add at least 21 to 39 months to the rulemaking process for the most important rules, meaning that **the average OSHA rulemaking would take more than 12 years to complete**—potentially spanning four different presidential administrations.[16]

OSHA rulemaking already includes a process that gives participants many opportunities to present their views and to challenge those with opposing views. It does so in an open process. The RAA would supplant these proven procedures with a more adversarial process. It would mandate cost-benefit analysis, overturning the Supreme Court's ruling in the *Cotton Dust* case. It would require that OSHA always use the lowest cost rule, leaving workers with less protection, probably nothing more than a dust mask to protect themselves from known carcinogens. Further, it authorizes the courts to disrupt the rulemaking process before it has been completed. Each of these changes would complicate rather than simplify rulemaking, and delay worker protections.

Regulations From the Executive in Need of Scrutiny (S. 299)

The Regulations from the Executive in Need of Scrutiny, or REINS Act, would reinsert Congress into the rulemaking process by requiring that both houses of Congress approve each major rule, with no alterations, within a 70-day window. If either chamber fails to approve the rule, it will not take effect and cannot be reconsidered until the next congressional session. Given the polarized character of Congress today, this law is a recipe for a freeze on new rules.

Such an affirmative approval requirement would turn the current process upside down. Congress already has substantial power to influence agency rulemaking: through its oversight power; through the appropriations process; and under the Congressional Review Act of 1996. There is no reason to require an affirmative vote of Congress before a rule takes effect.

The REINS Act would waste agency resources. For example, it took OSHA more than 10 years to publish a standard regulating the operation of cranes and derricks at construction sites, even though both industry and unions agreed a standard was needed. If the REINS Act became law, inaction by Congress would block the rule from going into effect, wasting the significant resources OSHA had invested in developing the rule.

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[14] Letter from Richard Williams, Ph.D., Dir. of Policy Research, Mercatus Ctr, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Jan. 5, 2011) (on file with author); Testimony of Jerry Ellig, *Regulatory Analysis: Understanding Regulation's Effects*, before the H. Comm. on Oversight & Gov't Reform (Feb. 10, 2011).

[15] *See* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 Fla. St. L. Rev. 533 (2000), *available at http://www.law.fsu.edu/journal/lawreview/downloads/272/Seid.pdf.*

[16] Testimony of Sidney A. Shapiro, University Distinguished Chair of Law, Wake Forest School of Law, at Hearing on H.R. 3010, The Regulatory Accountability Act of 2011, before the H. Comm. on the Judiciary, 112th Cong. 4 (Oct. 25, 2011) at 6.

Regulatory Flexibility Improvements Act (S. 1938)

The Regulatory Flexibility Improvements Act would expand range of rules covered by the Regulatory Flexibility Act to include those that have a reasonably foreseeable indirect effect on small businesses; establish more onerous requirements for the initial and final regulatory flexibility analyses, including an estimate of cumulative impacts on small businesses; allow the Chief Counsel for Advocacy of the Small Business Administration to issue rules to govern Federal agencies' rulemaking procedures; and establish a more onerous requirement for the notice that Federal agencies must give the Small Business Administration prior to publishing a proposed rule.

OSHA is already required to analyze the impacts of its standards on small business, consult with small business owners and the SBA about those impacts, and make changes to its rules where appropriate to minimize those impacts. Additional analysis of small business impact duplicates the requirements in existing law. Workers in small businesses face the same hazards as those in larger business. This bill would do little to protect workers in small businesses or to help their employers reduce such hazards. Moreover, it concentrates enormous power in the hands of one appointed official in the Office of Advocacy, while the OSHA hearing process gathers information from a host of small business owners from all over the country.

Regulatory Time-Out Act (S. 1538)

The Regulatory Time-Out Act, which would prohibit agencies from issuing most significant regulations for a year, is one of several bills which would prohibit new rules. These laws would simply keep Federal agencies from carrying out their legally defined missions of protecting the health and safety of the American people.

When Congress passed the OSH Act in 1970, it promised workers that OSHA would protect them from workplace hazards. Too many chemicals and other hazards remain unregulated. The Environmental Protection Agency has listed more than 62,000 chemicals in its Toxic Substance Control Act Chemical Substance Inventory, but OSHA regulates worker exposures to only 400 of them.[17] Too many of OSHA's existing standards are based on outdated science. They need to be upgraded to reflect current scientific and medical research. The current rulemaking process makes this impossible.

STREAMLINING IMPROVEMENTS IN HEALTH AND SAFETY PROTECTIONS

The process for issuing workplace health and safety standards is broken and needs to be fixed. We need to update workplace health and safety standards, not bury them. None of the pending regulatory reform proposals would fix the OSHA standard setting process. Rather, each of these proposals are designed to further delay or shut down the regulatory process. Passage of these bills would hurt workers and make them less safe.

Instead of following this low road, Congress should streamline the rulemaking process so that standards can move forward in a reasonable amount of time, after thoughtful scrutiny of the need for new protections and their costs, without unnecessary and duplicative reviews and analysis. Congress should limit the role of OIRA and non-technical experts in standard setting. Only with such reforms will workers gain the protections Congress promised them when it passed the OSH Act more than 40 years ago.

Appendix A: Table of Relevant Statutes and Executive Orders

Administrative Procedure Act (5 U.S.C. § 551 et seq.)

Passed in 1946

• The Administrative Procedure Act is the bedrock of the regulatory process. It offers baseline procedures for both "formal" (on the record) and "informal" (notice-and-comment) rulemaking.

Paperwork Reduction Act (44 U.S.C. §§ 3501–3520)

Passed in 1980, significantly amended in 1986 and 1995

• The Paperwork Reduction Act requires that OSHA, and other agencies, obtain approval from the Office of Information and Regulatory Affairs (OIRA) for any survey or "collection of information" designed to help the agency determine the eco-

[17] Occupational Safety and Health Administration, "Hazardous and Toxic Substances," *http://www.osha.gov/SLTC/hazardoustoxicsubstances/index.html* (last visited Apr. 16, 2012).

nomic impact or practical implication of proposed rules. (OIRA was created by the Paperwork Reduction Act.)

Regulatory Flexibility Act (5 U.S.C. §§ 601–612)

Passed in 1980

• The Regulatory Flexibility Act requires OSHA, and other agencies, to specifically analyze the effect of its regulations on small entities. OSHA must publish the reason it is considering regulating, a description of the small entities which will be affected, a description of the proposed rule's compliance requirements, and a list of alternative actions.

Executive Order 12291

Signed in 1981

• President Reagan's Executive order was the first to require rulemaking agencies to submit all regulations to the then-newly created OIRA. OIRA was tasked with reviewing and approving rules to ensure they met a cost-benefit test. (This Executive order has been supplanted by later Executive orders on regulatory review.)

Executive Order 12866

Signed in 1993

• President Clinton's Executive order restricted OIRA to reviewing only "economically significant" (those with a $100 million economic impact) regulatory actions, as well as those which created conflict with another agency's rules; altered the budgetary impact of entitlements, grants, user fees, or loan programs; or raised novel legal or policy issues. This decreased the number of rules OIRA reviewed each year from between 2,000 and 3,000 to between 500 and 700. Executive Order 12866 set deadlines for OIRA reviews and established standards for agency and OIRA transparency.

Unfunded Mandates Reform Act (2 U.S.C. §§ 1532–1538)

Passed in 1995

• The Unfunded Mandates Reform Act requires OSHA, and other agencies, to analyze and minimize the costs a proposed regulation would impose on private parties and State and local governments. OSHA, and others, must also identify alternative actions and justify the reasons for selecting its preferred rule.

Small Business Regulatory Enforcement Fairness Act (110 Stat. 857, 5 U.S.C. § 601 note)

Passed in 1996

• The Small Business Regulatory Enforcement Fairness Act (SBREFA) permits judicial review of OSHA's, and certain other agencies', compliance with the Regulatory Flexibility Act. In addition, OSHA must now convene an "advocacy review panel" of representatives of small entities before it can publish a regulatory flexibility act analysis. SBREFA also requires OSHA, and certain other agencies, to assist small entities with understanding and complying with new and existing regulations, and requires that the agency waive some fines for noncompliant small entities.

The CHAIRMAN. Thank you, Ms. Rabinowitz.

And now Mr. Sarvadi. Thank you very much. Please proceed.

STATEMENT OF DAVID G. SARVADI, PARTNER, KELLER AND HECKMAN LLP, WASHINGTON, DC

Mr. SARVADI. Thank you, Mr. Chairman, for the invitation, and Ranking Member Enzi for the offer to participate. I'm here representing the Chamber of Commerce, which is the lead organization in the Coalition for Workplace Safety. You have my background and my written statement.

I want to just mention one experience that I had early on in my career. I was asked in the late 1970s to work with a small company that was manufacturing materials that were used to make dental molds. And the experience there was that they had a young person working in the facility who came down with acute silicosis, which is a very devastating disease that occurs very, very rapidly within

months of the initial exposure, and it comes from extraordinarily high exposure levels.

And the point I wanted to make about this is that the people who were working in that facility, including the management, didn't know about the effects of the material and were interested and demanded ways to correct the problem so they wouldn't be faced with it in the future. And so they hired me to come in as an industrial hygienist and look at their facility and help them make the improvements.

I would suggest that in the current situation with regard to standard-setting that our problem is more about making sure that the agency sets priorities and sticks to its list. My experience over the last 35 years in dealing with OSHA regulations—and my experience goes back to the lead standard, the vinyl chloride standard, and the early benzene standard in the 1970s—in submitting the data that Ms. Rabinowitz is requesting, we did submit the data, and the industry routinely submits data to help OSHA make those assessments.

The problem with the current system is they don't do that until after they issue what's called the risk assessment, the draft risk assessment. And that's the first time people really get a chance to sit down and talk about what data OSHA is relying on and how the data demonstrate either a significant risk or a risk for a particular industry.

And I would strongly recommend—and I've been pushing for this for a long time to, unfortunately, deaf ears—to have this process opened up to the public. OSHA needs to talk to people before they sit down and start writing the rule. They need to spend time with us, get the industry experts, the people that deal with these things day in and day out, to understand the vagaries of the application of the principles of safety that they have to face every day.

The second major point I want to make—and particularly in regard to silicosis—is OSHA has all the tools right now to eliminate the problem. The general duty clause requires that OSHA show that there's a hazard. I don't think anybody would disagree that excess exposure to silica dust is a hazard. They have to show that there are feasible means of abatement—and we heard Mr. Ward describe techniques that can be used to eliminate exposure to the dust—and OSHA has to then demonstrate that it's recognized in the industry.

I don't think there's anybody in the construction industry that doesn't know that silica can be a significant problem and that it can be dealt with. So with that information in hand, OSHA is fully empowered, using the general duty clause, to take enforcement action against any employer who is not doing those things.

And I know that in the Coalition for Workplace Safety and in the companies that I represent, they want OSHA to take that kind of step and that kind of action because it creates a level playing field. The companies that advance safety and health and have comprehensive programs want regulations that clearly define what should be done, that create an opportunity for everybody to compete on a level playing field, and to make sure that the regulations that are adopted make sense in the real world.

I want to make one other point about the discussions with OMB. Ms. Rabinowitz suggested that these meetings are conducted in private. To my knowledge, they are conducted in a public way, that is, there is a public announcement about them. The summaries from the meetings, the information that's provided, can be made available to the public.

But it's an important function, because OMB does have the responsibility to make sure that OSHA's single-minded focus on workplace safety doesn't overrule important but competing interests. It's sort of a reality check for the agency, and it's an important function.

The only way the agency can do that, that is, OIRA can do that is if they take into account not only what OSHA is saying, but if they hear from people who have to deal with these things on a day-to-day basis. I've been in these meetings. The last meeting I was involved in—there were eight OSHA staff members there who heard what we had to say. I think it's an important function that OIRA produces or makes—an important function they create in order to make sure that the regulations make sense and that they fit within an overall regulatory agenda.

Nevertheless, it's clear that OSHA has a job of establishing standards that have a high degree of protection for employees and that require employers to provide a safe workplace. And the last point I'd want to make about that is that employers are the ones and employees are the ones who have to implement these standards. OSHA can write them, but if we don't have people who voluntarily and enthusiastically implement those standards, they won't be nearly as effective.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Sarvadi follows:]

PREPARED STATEMENT OF DAVID G. SARVADI, ESQ.

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as State and local chambers and industry associations. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the Nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 States.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 115 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Chairman Harkin, Ranking Member Enzi, and members of the committee, thank you for the opportunity to testify today. My name is David Sarvadi. As an attorney, I assist employers in creating and administering occupational safety and health pro-

grams, complying with Occupational Safety and Health Administration regulations and standards, and in resolving disputes with OSHA as to the interpretation and application of those rules and standards in enforcement cases. Prior to practicing law, I managed safety and health programs in several companies, including a Fortune 500 company early in my career, and in a small construction company later. I am testifying today on behalf of the U.S. Chamber of Commerce and participate on its Labor Relations Committee and the OSHA Subcommittee.

I believe I was asked to testify today, because in addition to my experience in the field generally, I have been deeply involved in OSHA standards development since 1974. In the course of that time I have participated in OSHA's rulemakings on more than two dozen standards. On behalf of the companies I worked for and the trade associations to which they belonged, I wrote comments or participated in the development for such standards as the original lead standard, the vinyl chloride and benzene standards, and the 1983 Hazard Communication Standard (HCS) as well as its 1994 Amendment. In the benzene and HCS cases, the comments prepared by the trade association resulted in the adoption of a practical provision in the final rule. I also had a significant role in shaping the employer community's response to the ergonomics standard as it was being developed during the Clinton administration.

Prior to practicing law, I was an industrial hygienist in private industry and in consulting. I was certified in the practice from 1978 until 2010. Much of what I did in that practice is similar to what I do today.

I have practiced in the area of workplace safety and health law for more than 20 years at Keller and Heckman LLP. As part of my practice, I taught week-long seminars on all of OSHA's general industry standards all around the country, covering essentially the same material included in OSHA's 30-hour training course. Over the years, I estimate that more than 1,000 people participated in those classes. The attendees have been mostly the people who had to translate OSHA standards into actions, practices, and procedures in their companies, ranging in size from employers with fewer than 10 employees to those with hundreds of thousands of employees.

THE REQUIREMENTS GOVERNING OSHA'S STANDARD SETTING PROCESS WERE ESTABLISHED BY CONGRESS AND REFLECT IMPORTANT PUBLIC POLICY OBJECTIVES

Federal Government rulemaking and standard setting has long reflected a tension between having uniform standards to curb undesirable behavior and retaining the freedom and flexibility associated with limited government intrusion into business decisions. This tension drove the compromise that underlies the passage of the Administrative Procedure Act in 1947 that created a series of procedural checks in response to the largest perceived problem: unlimited administrative discretion. According to the Attorney General's Manual on the Administrative Procedure Act (1947), the purposes of the APA are (1) to require agencies to keep the public informed of their organization, procedures and rules; (2) to provide for public participation in the rulemaking process; (3) to establish uniform standards for the conduct of formal rulemaking and adjudication; and (4) to define the scope of judicial review. An important part of the public participation process is to help educate the government about the subject matter and to help craft regulations that achieve public policy goals while limiting impediments to commerce.

OSHA's standard setting process, as defined in its statute, is intended to achieve each of those aims but with additional requirements that reflect the impact of OSHA's standards which can take significant time to complete. We are here today to examine whether this has negative workplace safety ramifications and whether OSHA's rulemaking process should and can be improved.

To establish a safety standard, OSHA must establish, based on the evidence in the official rulemaking record, that current conditions pose a significant risk of material harm to workers, that the proposed rule would significantly reduce that risk, that the proposed rule is technically and economically feasible for each industrial sector and activity regulated by the rule and, at least in theory, that the proposed rule provides the most cost-effective approach for addressing that hazard. We believe those are the appropriate criteria for an OSHA safety standard. For health standards dealing solely with toxic materials or harmful physical agents, the OSH Act takes a more conservative approach. An OSHA health standard must, to the extent feasible and within reasonable bounds, reduce workplace exposures to a level below that which presents a significant risk of material impairment of health or functional capacity to employees.

As the U.S. Supreme Court recognized in the *Benzene* case, it is not practical, much less feasible to achieve zero risk in any aspect of life. The scope of the OSH Act standards must necessarily be limited to addressing significant risks of material harm. There is no justification for expending resources on a rulemaking or compli-

ance efforts in connection with a rule that does not offer a meaningful improvement in workplace safety.

Furthermore, in requiring OSHA to demonstrate that a rule was technically and economically feasible, Congress properly determined that an agency should not have the authority to effectively regulate an entire industrial sector or activity out of existence. As interpreted by the courts, OSHA's obligation is to demonstrate either that it has satisfied these criteria for each industrial segment or activity that would be covered by the standard, or that there is no material difference between the sectors or activities for purposes of applying the rule. Even so, Congress determined that the protections provided by the APA and the OSH Act were inadequate to provide small business with a meaningful opportunity to participate in OSHA rulemakings and, for that reason, adopted the Small Business Regulatory Enforcement and Fairness Act which requires OSHA to conduct small business review panels when a proposed regulation is estimated to have a significant economic impact on a substantial number of small entities.

The GAO report which is at the heart of this hearing was requested based on an underlying premise that OSHA has not been able to issue enough regulations to protect America's workers. And yet, we see that workplace fatality, injury, and illness rates have been declining steadily during the entire history of OSHA, even the recent period which is the focus of the report and is characterized as one with few new standards.

The Chamber recognizes the need for well developed, science and data driven safety standards. Such standards can be useful to employers in providing information and clarity about hazards and the proper approaches to controlling them. However, standards should not be issued merely for the sake of putting more rules on the books, where the hazards they seek to control are not well understood or the controls are unproven, or to establish new ways to control the workplace and issue more citations against employers.

A guiding principle to bear in mind is that improving standard setting does not require OSHA to take short cuts. The steps required in the standard setting process are vital to achieving important public policy objectives. These steps must not be curtailed as to do so would make OSHA's standards less effective and more impractical by reducing valuable information from the public. Rather, the process must be streamlined so that OSHA can accomplish each step in the standard setting process more efficiently.

RECOMMENDATIONS

We believe that OSHA can improve its performance in setting standards. While the task is not easy, there are several things OSHA can do to affirmatively improve the process.

• *Ensure That OSHA Standards Writers Have Practical, Hands-On Experience With The Hazards To Be Addressed and Involve Interested Parties More Substantially In The Standard Development Process Earlier.*

We all recognize that funding constraints limit OSHA's ability to develop information on its own. The process that is contemplated by OSHA standard setting provides an opportunity for the agency to educate itself fully on the matter about which it proposes to regulate. One way to do this is to maintain a continuous dialogue among trade associations, who are often involved as standards setting organizations, other professional associations, and members of industry. The Chamber has always been open to a productive dialogue about occupational safety and health issues. It has been at the forefront of debates over numerous standards, reflecting our members' concerns about the practical problems they face in managing safety and health programs and improving workplace safety practices. The Chamber now co-chairs, the Coalition for Workplace Safety, that has been active in representing a broad array of employer concerns on OSHA regulatory and legislative matters.

Too often there is a perception that OSHA is determined to pursue a new standard regardless of how it will impact employers or whether it is justified. When employers raise concerns, these are dismissed as not being consistent with protecting employees, instead of constructive input into the process. In reality, both OSHA and the employers who are subject to its regulations are interested in improving workplace safety. OSHA would do well to view comments in this light and take these comments seriously rather than just looking for ways to dispose of them.

OSHA has previously recognized the need for its compliance personnel to be knowledgeable about the industrial operations they are inspecting and the application of OSHA standards to those operations. We believe the same considerations are even more significant when one person or a small group of people are writing a

standard that will apply to 60 million workers at 5 to 8 million worksites across the United States.

One way to foster a more cooperative relationship would be for OSHA staff to participate in the professional societies and associations where people who actually have to implement OSHA's directives meet to discuss common problems. In all my years in the Washington area, I saw fewer than five OSHA headquarters professionals at local industrial hygiene or professional safety meetings. The result is a professional isolation that prevents the staff from learning about the practical problems, and more importantly the successes of the regulatory program.

To facilitate that, I believe OSHA staff, including specifically those who are tasked with writing standards, should be expected as a matter of professional development to participate in such groups. The government should fund that participation, as it is critical to effective public policy implementation.

Similarly, OSHA should not be conducting any part of the standards development process in secret. The procedure now is for the agency to issue requests for information and advance notices of rulemaking to collect information when the agency thinks there is a need for these extra steps. Then it works with contractors to develop the standard, risk assessments, and economic and technical feasibility analyses behind closed doors. The first time the public sees the results of these efforts is after the decisions have begun to set in concrete, generally at the panels conducted under the Small Business Regulatory Enforcement and Fairness Act (SBREFA) if OSHA decides it must conduct such a review and does not have a colorable argument for avoiding it. Even though this is before a regulation gets proposed, that is far too late. And too often, OSHA finds a reason to not conduct these reviews which means the first time anyone can see what they have in mind is the publication of the actual proposed rule and the supporting materials. Again, if OSHA regarded employer input as part of helping it develop a sound path forward, rather than objections to be overcome, the pre-proposal period could benefit OSHA's ultimate approach. OSHA should be encouraged, even required to have regular and frequent contact, both formally and informally, with interested parties. OSHA should request the meetings and not wait until interested parties do. And the peer review panels should conduct all their business in the open, similar to the process that EPA follows with reviews of their preliminary risk assessments.

Failure to open up the process and to get OSHA staff engaged on an individual level can produce anachronistic results and employer resentment of OSHA as the industry is subjected to standards with little relevance to the "real world."

• *Do Not Make "Perfect" The Enemy Of The "Good."*

In my view, OSHA has not been willing to do a good job, and come back later should it decide more needs to be done or after experience has shown the need for refinements. For that reason, standard development at OSHA takes decades. Often, the final standard is delayed because OSHA does not want to be accused—unfairly in my view—of overlooking something. But these programs and processes depend on people and people are imperfect. OSHA needs to be able to leave out the issues that take more time to resolve. Admitting more information is needed is not a failure, but waiting until all possible questions have been resolved can be a failure if it impedes moving forward with something that would be more practical and largely beneficial.

An excellent example of this problem is OSHA's confined spaces standard that was introduced in 1975. The final rule was issued in 1993—18 years later. Most of the provisions of that standard were in common practice in many industries and by many employers. OSHA excluded the construction industry from the scope of that rule, was sued by organized labor for that approach and agreed to quickly proceed with a rule for construction. That rule is pending and may be issued this year. Part of the reason it took so long to complete the general industry rule was OSHA's excessive preoccupation with the fine details of an entry. Almost 20 years later, the central problems remain the same—the failure to recognize a space to be a hazardous confined space, the failure to understand the potential hazards of the space, and the human tendency to rapidly respond when someone has collapsed in a space under the assumption that the person had a heart attack or fainted rather than recognizing the person was overcome by a hazardous atmosphere that will have the same effect on the rescuer.

Part of the reason it took so long to complete was in the details: when does an "entry" occur, for example. Most people in the industries that had such spaces knew when those procedures were required. Similarly, the Lockout/Tagout Standard took 12 years (1977–89). There are many other examples.

A more recent example is the revisions to the Hazard Communication Standard (HCS) to align it with the Globally Harmonized System of Classification and Label-

ing of Chemicals (GHS). Initially contemplated in 2002, OSHA finally issued an Advance Notice of Proposed Rulemaking regarding GHS on September 12, 2006. On September 30, 2009, 3 years later, a proposed rule was issued. OSHA then held public hearings for 6 months and the record was closed on June 1, 2010.

Unfortunately, the proposed rule went beyond the concept that had been envisioned and supported by both political parties and employers. It included two provisions that were controversial and likely made the rule harder to finalize: unclassified hazards (now call Hazards Not Otherwise Classified) and coverage of combustible dust. Combustible dust is a complicated, multi-factorial hazard which has not been previously regulated by OSHA's HCS. As there is no OSHA developed definition for combustible dust, OSHA was unable to provide a definition of combustible dust thereby leaving the regulation unclear and unexplained. OSHA's need to shoehorn combustible dust into the HCS regulation likely delayed the promulgation of the HCS regulation unnecessarily by almost 2 years, and more importantly, has created employer anxiety and uncertainty. I believe that some in OSHA management saw the GHS proposal as a shortcut way to incorporate a combustible dust standard. Unfortunately, the complex issues of how to define when the hazard exists and what should be done to mitigate a hazard that has varying degrees of severity—requiring less activity when risks are low—have now been left to the enforcement process. That is a recipe for litigation.

• *Increase Reliance On Established Science, And Real World Observations, Rather Than Seeking Out That Information Which Confirms The Agency's Preconceived Hypothesis.*

My experience has been that OSHA tends to rely on information that supports a preconceived idea, seeking that which will bolster its position on a given topic. In many of the risk assessments, OSHA credits studies that support its conclusions, while discounting studies that do not. The hexavalent chromium standard is an example. The discussion of the risk assessment contains long, technical commentary and summaries of studies, but in the end, OSHA could only conclude that even at the lowest level of proposed exposure limits, some risk remained. We all balance risks and rewards in our lives, and know from long experience that low probability risks deserve less attention and mitigation than those of more immediate concern. OSHA pays lip service to the Supreme Court's decision in the Benzene case about only regulating when it can show significant risk, but in reality the risk assessment OSHA uses, like many agencies, imposes assumptions that magnify the risk. That leads to conclusions such as in the chromium standard, where even at levels of exposure that are difficult to measure, employers are still required to mitigate the risk.

Another example is the silica standard. Industry made it clear that it was willing to accept a reasonable comprehensive silica standard based on the existing permissible exposure limit (PEL), 20 years ago. Instead, based on highly conservative modeling, OSHA insisted that it needed to reduce the PEL. In 2003 OSHA conducted a SBREFA review of its draft silica standard. At that time, industry pointed out that, based on NIOSH data, the incidence of silicosis had decreased dramatically, that the cost of compliance with the proposed rule would be billions of dollars per year and that it was impractical to treat a material that made up 12 percent of the earth's crust, covered the beaches from Maine to Florida, was naturally found in soil and in virtually all building materials under the same scheme governing asbestos. The SBREFA panel—including representatives of OSHA, OMB and SBA—recommended that OSHA go back to the drawing board on that initiative. Based on the status of the rule at OMB, it appears that OSHA largely ignored that panel report.

Assuming that the only acceptable level of risk is zero risk at zero exposure forces OSHA to lower and lower acceptable exposure levels, which in turn increases costs not only financially but in the additional time and management attention that restrictive rules require. This also makes finalizing such regulations increasingly difficult as justifying such increased compliance costs creates additional political difficulties. With silica, it cannot be that the only acceptable risk level is zero. Silica is ubiquitous, and we are exposed to it throughout our entire existence at some level. If OSHA accepts what some propose, every construction site in the country will become a regulated area, and many non-construction manufacturing facilities will as well. Lung cancer is the signal risk most would seek to reduce with the standard. Yet, we attribute the bulk of U.S. lung cancer experience to tobacco, leaving little room for the conclusion that exposure to crystalline silica is causing large numbers of cases of lung cancer to occur. Indeed, incidences of silica related lung disease have been declining steadily.

Too many in the occupational health field are blinded by the passion they bring to the work, and push OSHA to ignore inconsistent observations like this and pur-

sue unrealistic targets. The remedy is a culture change at OSHA, an acceptance to do what is achievable and widely supported rather than push the envelope beyond practicality.

• *Take Into Account Advice Provided By OMB.*

OSHA tends to act as an advocate for the employee representatives, and to develop standards from that perspective. However, it can often lose sight of the fact that there are competing interests at play and that a proposed standard may have unforeseen effects when viewed from only one perspective. OSHA can become so entrenched in its position that the employer community, on whom the obligation and burden of compliance will fall, often feels that it has no voice before the agency. For that reason, many employers seek to share their views with the Office of Management and Budget's Office of Information and Regulatory Affairs when OSHA's final rules, and even some proposed rules, are reviewed under various Executive Orders and statutes. OIRA's role is to assess the overall burden of a new standard and ensure regulatory consistency between different Federal agencies and adherence with rulemaking requirements like the Regulatory Flexibility Act. OIRA can be of assistance to OSHA in pointing out competing interests of other agencies and emphasizing the importance of industry views.

OIRA can sometimes soften the hard edge of OSHA's standards, and keep OSHA from adopting standards that impose unnecessary requirements when simpler or equally effective means will do. OSHA also sometimes glosses over economic and technical feasibility requirements, leaving the employer community no place to go to be heard. If OSHA were really listening, employers would not have to seek assistance from OIRA.

An example of the lack of rigor in OSHA's economic assessments is the recently adopted GHS revisions to the HCS. OSHA's estimates of the time to train employees on the standard were woefully inadequate. They estimated that employers were already training people on a periodic basis on HCS issues, and that the incremental time spent training on the GHS standards would be 60 minutes for most employees and 30 minutes for employees with minimal contact with hazardous chemicals. In my experience, the training will take longer, because the classification scheme will make some chemicals seem more hazardous. Many more chemicals will bear a skull and crossbones; some chemicals not previously deemed hazardous will now be treated as hazardous. A natural reaction to that change will be questions up and down the chain of distribution as to whether anything has changed. The answer is the classification changed, but the chemical did not, which will lead to discussions of what the classifications mean and how they compare to prior classifications.

Another example of OSHA's inadequate economic analysis, and OIRA's involvement, was the ill-fated MSD column proposal under the OSHA recordkeeping standard. OSHA estimated it would take 15 minutes to train supervisors on how the change would be implemented. In a meeting with OMB, I explained that this was unrealistic, because as part of its proposal, OSHA was abandoning an interpretation that allowed an employer to let an employee avoid activity that could aggravate muscular fatigue or minor discomfort without triggering a recordable case under the rules regarding transfer or change of jobs. The result would be that the number of incidences an employer would have to review to determine recordability would explode. I estimated it would take a retail store operator at least an hour of training of the store manager and assistant managers, who would be responsible for making these decisions. For an employer with 1,500 stores, the time involved would cost an estimate $400,000 or more. There are 7 million workplaces in the U.S., and assuredly, not all would have such a cost associated with it. But it would not be the minimalist and dismissive cost OSHA predicted. In January 2011, OSHA withdrew this regulation from review by OIRA claiming that it needed more input from small businesses. We think problems like this explain the difficulty OSHA had finalizing this regulation and why it is now on the long-term action list.

• *Accept The Results Of Negotiated Rulemaking.*

OSHA has tried negotiated rulemaking, but the results have been mixed at best. Negotiated rulemaking is a process by which a proposed rule is developed by a committee comprised of members who represent the interests that will be significantly affected by the rule. The goal of the negotiated rulemaking process is to develop a proposed rule that represents a consensus of all the interests. When parties agree, absent a major legal impediment, OSHA should not question their judgment.

One example of OSHA's insistence on imposing its judgment over the people who work in the industry is the Cranes and Derricks standard promulgated in 2010. In 1971 OSHA issued the original C&D standard based largely on industry consensus standards. In the intervening decades those industry standards were updated leading, ultimately, to a request by the industry that OSHA update its standard. In re-

sponse, OSHA's Advisory Committee for Construction Safety and Health established a workgroup to recommend changes to the C&D standard. The workgroup developed recommendations on some issues and, in particular, recommended that OSHA use a negotiated rulemaking process as the mechanism to update the C&D standard.

In 2002 OSHA announced plans to use negotiated rulemaking to update the C&D standard, and organized a committee, including representatives from the agency, from industry, and from other interested parties. The rules of the committee provided that no consensus could be achieved if OSHA dissented. As acknowledged by OSHA, the members had vast and varied experience in cranes and derricks in construction, which gave them a wealth of knowledge in the causes of accidents and other safety issues involving such equipment. The members used this knowledge to identify issues that required particular attention and to devise regulatory language that would address the causes of such accidents.

At its final meeting in 2004 the committee reached consensus agreement on all issues. OSHA then proceeded to issue a proposed rule modifying the C&D standard. However, OSHA identified several problems in the committee's report such as provisions that appeared inconsistent with the committee's purpose, or that were worded in a manner that required clarification, causing OSHA's proposal to deviate from the committee's report. The standard finally was issued on August 9, 2010. Whether the extra time was worth the effort is a matter of debate.

A similar situation arose in regard to steel erection standards. After 6 years of trying to revise the standards applicable to steel erection, OSHA established the Steel Erection Negotiated Rulemaking Advisory Committee in May 1994. Members of the committee included representatives from labor, industry, public interest and government agencies. OSHA served as a member of the committee, representing the Agency's interests.

Eighteen months of negotiations followed. Detailed reports were prepared and the committee met 11 times to debate the reports, hear submissions from interested parties, and negotiate to find common ground on regulatory issues. In December 1995 the committee put forth a proposed revision of the regulation. OSHA then drafted a preamble and Preliminary Economic Analysis for the proposed rule, but it was not until August 1998 that OSHA issued a notice of proposed rulemaking. In response, OSHA received 367 submissions. In response to the Notice of Hearing contained in the NPRM, OSHA received 55 responses. Following the December 1998 hearing a post-hearing comment period was established. Participants were allowed to submit additional data and information, briefs, arguments and summations. In December 1999 OSHA presented the committee with the Agency's draft final rule, seeking comments and feedback. On January 18, 2001 a final regulation was published.

Currently, OSHA has the opportunity to move quickly on changes to the beryllium standard. Having first issued a Request for Information regarding beryllium in 2002, the process stalled in 2010. OSHA has classified a beryllium standard as a "long-term" action unlikely to be addressed soon. In February of this year, the leading U.S. supplier of beryllium, Materion Brush Inc., teamed up with the United Steelworkers and two other unions that represent beryllium workers and proposed a standard to OSHA that would sharply limit airborne beryllium exposure in the workplace. The standard would cut the occupational exposure limit for beryllium by 90 percent and require feasible engineering controls in any operation which generates any beryllium dust or fume, even those which meet the exposure limit. The proposal details new Permissible Exposure Limits, engineering controls, personal protective equipment, monitoring and assessment, hygiene, housekeeping and medical surveillance and training requirements. Because the proposal contains ready-to-use language approved both by industry and by labor, OSHA could expedite the rulemaking procedure by simply proposing it. Given that the members of the industry think the proposed standard's provisions are appropriate, technical and economic feasibility should not be an issue, and the key parties have agreed that it mitigates an unreasonable risk in that industry. What else does OSHA need?

• *Recognize That OSHA Standards Are More Effective The More People Volunteer To Adopt Them.*

To no one's surprise, OSHA's Voluntary Protection Programs (VPP) achieve more success in terms of reducing injuries, illnesses, fatalities, and costs, than do its mandated standards. Implemented in 1982, the VPP was designed to encourage collegial relationships between labor, management, unions, and government with the goal, ultimately, of improving safety and health in the workplace. By engaging in OSHA's challenging application process, employers see a decrease in their lost workday injuries, injury and illness rates, and workers' compensation costs.

For example, the Washington State SHARP program recently issued a report in which they found that employers that participated in the voluntary consultation program had better outcomes compared to employers who were inspected by California OSHA inspectors. Some people think we should ignore this because this group is self-selected. I think the right answer is to get more people to self-select.

We all know intuitively that it is easier to get people to do something if they see the benefit and it makes sense to them. Getting people to volunteer to adopt programs and policies that go beyond OSHA's standards offers the opportunity to increase the benefits of safety and health programs at much lower cost. In addition, we all also know that when we are forced to do something, we are less enthusiastic and less effective. That is why the VPP program should not be a model for a mandatory standard as we will not see the benefit of the forced adoption of the programs. Instead we could invest more in the VPP program to encourage more employers to join, and thereby multiply the effect of the money spent.

OSHA should refrain from the following:

• *Stop Spending Time On Pet Projects And Take Into Account The Evidence Presented.*

OSHA's tendency is to act even when it has no evidence of a corresponding improvement in safety. Such is the case with OSHA's fall protection standard. The fall protection standard was promulgated in 1994 and has undergone no substantive changes since then. If the standard was substantially effective in improving workplace safety and health, we should expect to see that reflected in the Bureau of Labor Statistics Census of Fatal Occupational Injuries. Unfortunately, that is not the case. Rather, workplace fatalities from falls over the past 18 years have remained more or less constant. In 1994, approximately 600 deaths resulted from falls, while preliminary numbers for 2010, the most recent year for which data is available, show 635 fatal falls. The numbers increased during the building boom between 1997 and 2007, so the absolute numbers may be misleading. We did not have the numbers of employees in the affected industry to calculate rates, but what is important is that the impact of OSHA's emphasis on fall protection may not have had the intended effect. Could it be that OSHA is focused on the wrong causal relationship—the lack of personal fall protection or guardrails is not the cause of the deaths? It seems a good question to ask and to answer before imposing another enforcement policy.

• *Refrain From Regulating Through Interpretations.*

Perhaps as a way to get around the rulemaking process, OSHA tends to try to make changes in its rules via "re-interpretations" and enforcement rather than following the statutorily required rulemaking procedures. Agencies are making changes to existing rules, which have significant economic consequences and impose significant compliance costs without giving the public adequate notice, or informing them of the unintended consequences of the changes. OSHA should make a diligent effort to get away from the paradigm described in the following excerpt from the a frequently quoted 2000 opinion issued by the D.C. Circuit [1] because, as long as OSHA continues down that path, industry will be understandably reluctant to support the agency's rulemaking efforts:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L.REV. 59,

[1] *Appalachian Power Company* v. *Environmental Protection Agency*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

85 (1995). [footnote omitted] The agency may also think there is another advantage—immunizing its lawmaking from judicial review.

A clear example of this approach was the unilateral "re-interpretation" of the term "feasibility" under the OSHA noise standard that OSHA announced and then was forced to withdraw in response to the strong adverse reaction from the Congress and the business community. As with many occupational hazards, there are many ways to protect employees from noise. Based on dogma, OSHA has a long-stated preference for engineering controls, as opposed to personal protective equipment. Since 1983, OSHA has interpreted its regulation to require employers to install engineering controls when noise levels are extraordinarily high, and to allow use of a hearing conservation program using periodic testing of employees hearing and ear muffs and plugs below a certain level. While there have been proponents of changing this policy for many years, the scientific data on whether such programs work and what makes them successful has been missing; meanwhile, technology has changed. We now have noise-cancelling ear muffs, and better ear plugs. We have the capability to test the effectiveness of each individual's hearing protection to make sure that the reduction in noise levels is sufficient based on current knowledge. And we surely have the techniques to determine if the use of such programs over the last nearly 30 years has been effective. All we have to do is look.

Yet OSHA did not take any of this into account when it announced that feasibility under the noise standard would now mean only if implementing an engineering or administrative control would put the employer out of business would it be considered infeasible. This would have required that employers spend excessive amounts of money on engineering and administrative controls without regard to whether they were sufficiently effective to eliminate the need for ear muffs and plugs and all the other aspects of hearing conservation programs. OSHA would have required employers, who already have hearing protection programs in place, all over the country to spend resources without considering whether the people whom OSHA claims it is protecting would receive any benefit. One estimate put the figure at over $1 billion for one large company meaning that the overall cost for all employers that would be covered would have been astronomical. OSHA did absolutely no analysis to determine the impact or whether spending these amounts would produce better outcomes. Since this was a mere interpretation, the agency was not required to satisfy any of the normal feasibility or economic analyses that are part of rulemaking. Thankfully, this created such an outcry from many sources that OSHA was forced to withdraw the proposed reinterpretation.

Similarly OSHA has been using enforcement to advance positions that should otherwise be done through rulemaking. Just last month, a memo went out to the regional administrators instructing them on what constitutes violations of OSHA's protections for whistleblowers. Among the scenarios was one that now means an employer with a safety incentive program, such as rewarding employees for remaining injury free for a period of time, will be considered in violation of the whistleblower protections. Nowhere does OSHA say that such programs are not allowed, but under the guise of a memo to the field, OSHA has now implemented a policy with enforcement consequences for any employer who uses an incentive program.

CONCLUSION

Despite these criticisms of how OSHA operates, employers and the agency are seeking the same goal: safer workplaces. OSHA standards clearly have benefits and can help employers understand hazards and appropriate approaches to mitigating them. However, more standards is not always the answer to safer workplaces, and unless standards are done with proper adherence to key procedural steps and sensitivity to concerns from those who will have to implement them, there can be significant unintended consequences. To the extent that OSHA believes it needs to expedite its rulemaking process, the solution is not fewer steps but using more of the available expertise and interest in particular safety issues.

Thank you for your time today and I look forward to responding to your questions.

The CHAIRMAN. Thank you very much, Mr. Sarvadi.

Thank you all, and we'll begin a round of 5-minute questions here.

I must admit that I was not fully aware of all of the problems with OMB and OIRA and how they were operating. And I think this aspect of it, at least from what I heard from three of you here, should be an area that maybe we ought to really look at and see if there's some way of streamlining that—the ability of OMB.

Now, Ms. Rabinowitz, I think you stated that you thought that maybe Congress needs to legislatively—or do something to limit how long or what OIRA can do.

I think, Mr. Sarvadi, you suggested that they—correct me if I'm wrong—be more open, get more people in, and act expeditiously, something like that. That's my own language.

Mr. SARVADI. Yes. I'm suggesting that OSHA should get more people in earlier and act more expeditiously. OMB's review typically is 90 days at most, and it really doesn't add to the length of time it takes to get these standards through.

The CHAIRMAN. Well, now we're hearing about OMB holding things up for years. We've got one now that says the silica thing has been there since—it's been there for 14 months now—at least from what I've heard.

Dr. Silverstein, do you have any response to that? I mean, it seems to me OIRA and OMB is kind of doing again what OSHA already did in the first place, so you're duplicating it. I don't know. Am I wrong on that?

Ms. RABINOWITZ. I think there are three things that it would be very worthwhile for Congress to consider. OMB discloses who it meets with, but these are oral meetings. It does not disclose what is discussed at those meetings on the public record so that people have an opportunity to rebut it. And that would be very helpful and make the process more transparent.

Second, the agency sends a rule to OMB. OMB may insist on certain changes during its review process, and then the rule is published in the Federal Register. There is no disclosure of what that give and take between the two is, what changes were made at the behest of OMB, and what the nature of those changes were. Disclosure of the changes that OMB insists on would be very helpful.

And I think equally as important, the way this process, this rulemaking process, works is it's open to everybody, and you build a record, and the agency is supposed to act on the basis of that record. An OMB review allows a secret record to be created after the fact, and the process is only open to some, not to everybody.

For example, while Mr. Sarvadi has been to lots of meetings at OMB, I've worked on almost a dozen OSHA standards, and neither I nor my clients have ever been invited to any. So it creates a lopsided record that's imbalanced. And I think that undermines the process we have at the agency.

The CHAIRMAN. Mr. Sarvadi, you suggested opening up OSHA's internal processes to greater public participation. OK. I'm all for that. Ms. Rabinowitz, however, says that the process at OIRA—OMB is a closed thing. Would you advocate that both of them be opened?

Mr. SARVADI. I think they are, Mr. Harkin. In fact, I suspect the reason Ms. Rabinowitz hasn't been to OMB is because she hasn't asked to go. Every time that I know of that we've asked to have a meeting about a particular topic, they've been willing to talk to us.

My point about opening up the OSHA process so—it's a little bit different than just simply opening the process. Part of the problem is the people on the staff at OSHA who get involved in these things have a very narrow and parochial view of the world. And they don't

have enough information and they don't have enough real-world experience to be able to integrate all of the information that they get in an effective way. And that's my personal opinion. It's something that I've observed for the last 35 years.

Part of the reason is these people are not engaged professionally. In my written comments, I talked about having the OSHA staff who do these kinds of things, that are supposed to be professional safety and industrial hygiene staff, participate in the professional societies where they can get to know people and hear about the kinds of real-world problems that they face. That would help a lot. And the trade associations that are around would be available to help the agency talk to the people in the industry.

The CHAIRMAN. I don't know about the specificity of OMB's OSHA dealings. But I will tell you that this chairman has had dealings with OMB in the past—under both Democratic and Republican administrations, I might add—in which people came in to visit with OMB officials, and the only way I found out who they were is I asked for the log of who was invited.

What they discussed I could never find out. There was no record kept, none whatsoever. And none of my staff or no one was ever invited to sit in on these meetings, either. So OMB—I've got a little thing there about OMB being this super secret kind of organization down there that's getting involved in stuff.

But I'm running out of time. I have run out of time. I'll follow that up later.

Senator Enzi.

Senator ENZI. Thank you, Mr. Chairman. I'll follow up for you.

Ms. Rabinowitz, you're advocating for a substantial limitation on the Office of Information and Regulatory Affairs. But the OIRA activity that you object to is prescribed by the Administration, not by Congress. Are you in discussions with the Administration on your suggestions? Is the President considering limiting the regulatory review or making the record more open? If not, why not?

Ms. RABINOWITZ. I'm, personally, not involved, but the organization with which I work and which I joined very recently has had discussions over the years with the Administration on various Executive orders. I do not believe there are any ongoing discussions with the current Administration about changing the process.

Senator ENZI. So before we do a law, maybe we need to talk to the Administration and see if they'll just do it administratively. They're doing everything else administratively.

A question for Mr. Sarvadi, OSHA had used national consensus standards as permitted under the OSH Act to create a uniform standard across certain industries. Other witnesses today have advocated adopting more consensus standards wholesale. These standards are developed by national groups such as the American Society of Safety Engineers. But not all groups have an open and scientifically reliable process for creating those standards. Therefore, some of these consensus standards groups don't actually capture the consensus of the field.

Do you have concerns about OSHA adopting national consensus standards? And how can we determine which national consensus standards are appropriate and based on professionals?

Mr. SARVADI. Yes, I think I can help with that. There's a definition of a national consensus standard in the statute. OSHA would have to determine that a particular standard was adopted in accordance with those criteria. And if it did, I think the issues that OSHA has to address when it adopts a rule, that is, significant risk, feasibility in both economical and technical, would be largely dealt with because of the fact that the people involved represent all of the people who have an interest in a topic.

So, for example, an American National Standards Committee that has a proper process in place to develop a standard will have representatives from academia, from government, from labor, from industry, and from consultants and insurance companies as well. And I think it's possible to use consensus standards. I think it could be done more quickly if they did.

But I do have concerns about certain consensus standards where the situation has been overtaken by people who have a parochial or a financial interest in having the standards drafted in a certain way and then push those standards. I think we've seen that in some cases, perhaps not as much in the safety area, but in other areas where there are consensus standards. So OSHA does need to look to those, and they could, I think, expedite the process. But they need to make sure that they are true consensus standards.

Senator ENZI. Thank you. Another question for you: The stakeholders have described the recent OSHA final rule on hazard communication standards as a missed opportunity, do you agree?

Mr. SARVADI. I think it was in the sense that it could have been done a lot more quickly. And the problem with keeping or adding combustible dust to the mix, I think, was an example of what happens when OSHA latches onto a—I'll call it a pet project.

I don't want to minimize the importance of dealing with combustible dust. But it got latched onto and added to the process very late, and it didn't resolve some of the very significant and important questions that have to be resolved now through the enforcement process, which is when do we have a situation where the combustible dust practices and procedures are required.

So I think it was a missed opportunity in that sense. But in the end, it's an important change in the standard. And, by the way, the standard does require that employers inform their employees about the chemical hazards that they're exposed to. And I know folks in the masonry industry now know that bricks contain silica dust, because bricks are hazardous chemicals that require a material safety data sheet that have crystal and silica identified on the data sheet.

Senator ENZI. Another question for you in a little different line here, recently, OSHA issued an enforcement memo concerning employers' use of safety and health incentive programs, the incentive programs. As you discuss in your testimony, this is a situation where OSHA is seeking to change its rules outside of the rulemaking procedure.

Do you think that employer incentive programs can contribute to a safe workplace? Is this memo an appropriate use of OSHA's authority? As evidenced by this enforcement memo, OSHA seems to believe that their own statistics are not legitimate, and there is an under-reporting of injuries. While the memo lists several isolated

anecdotes, what's the real basis, if any, for OSHA's belief that there is endemic under-reporting of injuries?

Mr. SARVADI. I'm not sure why that idea has persisted over the last 25 years. I'm aware of at least three separate instances where OSHA has actually gone out to look at injury and illness reporting in the workplace. They've actually gone out to employers, looked at the records that are available, talked to the employees, and gathered information on reporting. And to my knowledge, there has been no suggestion that the widespread under-reporting that is claimed has actually occurred.

Even if we're talking about a 10, 15 or 20 percent under-reporting, I think it's undeniable that the trends in workplace safety demonstrate continued improvement over the last 30 years. So even if we are looking at numbers that don't reflect the total reality, we are looking at trend lines and rates that show that we are on a track that can be improved.

In regard to the specific incentive programs you're talking about, I think what OSHA is worried about is situations where employees are discouraged from reporting their injuries and illnesses because they are afraid of their group or their company work site suffering from not having the benefit of whatever the incentive program is. Incentive programs are helpful. Getting people to voluntarily follow the rules is always better than trying to force people to do it, and so there is a place for them.

But I would not disagree that we need to be careful that we don't use incentive programs improperly. That's why a rulemaking on that would be more important, because then we would have an opportunity to find out what works and what doesn't.

Senator ENZI. Thank you. I've run over, but I may have to leave before the next round of questions are available. I do have questions for all of the witnesses. And you've been great on your testimony. I've read your testimony. It's very helpful, but it did bring up some other questions. So I hope if I don't get a chance to ask them that you'll respond in writing for me.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Franken.

Senator FRANKEN. First of all, Mr. Ward, I'm sorry I wasn't here for your testimony, but I was very touched by reading it.

Mr. WARD. Thank you.

Senator FRANKEN. I have a question for you and maybe for Dr. Silverstein. I've been to training facilities at various locations, for laborers, for carpenters, and one of the things they do emphasize is safety. I remember being at a carpenter training facility and talking—and the guys they were training had been nonunion before. And what they were doing now is they were working at a union site several days a week, and they get training 1 day or 2 days a week.

So I asked these guys what the difference was between working on a union site and a nonunion site. One of the things they said was the union site was safer, that when someone got hurt at a nonunion site, basically, no one cared. No one did anything. No one stopped. But at the union site, they made sure that you got care, that you got what you needed.

My question is—I know that you're doing training.

Mr. WARD. Yes, sir.

Senator FRANKEN. And I'm wondering—are you working at a union shop?

Mr. WARD. Yes, sir, with the Bricklayers.

Senator FRANKEN. Yes.

And this is for Dr. Silverstein. Do union shops tend to be safer than nonunion? And that can be for Mr. Ward as well.

Mr. WARD. Well, I've never worked for the other side. But I can tell you from what I see driving around town, in my city, the answer is without a doubt, without a doubt. The contractors—we have a lot of good ones. They are involved. The training we provide gives them an edge. And I don't have the numbers for you, but I could tell you my experience and what I've seen—absolutely.

Senator FRANKEN. Dr. Silverstein.

Dr. SILVERSTEIN. I would agree with that. And in my experience—and that's experience working for an international union, the Auto Workers, for a number of years, as well as my experience as an agency executive at both the Federal and State levels—I think that there is a difference in attention to safety at union represented sites——

Senator FRANKEN. But that's anecdotal and not borne out by statistics.

Dr. SILVERSTEIN. There have been a limited number of scientific studies that have tried to look at this in a very rigorous way. But to the extent that they have—and I think that Dr. David Wild has looked at this issue in the past and has published studies that indicate that union participation does enhance safety performance.

Senator FRANKEN. I'm getting a nod from a woman in the audience, but we can't call you, I don't think. I'm not the chairman.

Well, Dr. Silverstein, or anyone else who'd like to respond, we hear a lot about the cost of regulation all the time. They stifle the economy. They stifle growth. And I think we all agree that unnecessary regulation can do that. But not all regulations are created equal. The standards issued by OSHA do save lives.

Would you mind sharing with the committee the most compelling cases you've encountered in terms of data on OSHA standards saving lives?

Dr. SILVERSTEIN. I think there are a number, and there are a couple of examples in my full written testimony. But one involves the impact of OSHA's lockout/tagout standard, which was adopted, and then 7 years after—and this is a standard that was intended to protect workers from the danger of equipment being energized while maintenance or other work is being done on them.

OSHA did a look-back survey, as required under SBREFA, I believe, after 7 years and found that in the 7 years after the lockout/tagout standard was adopted, there was a 20 to 55 percent reduction in lockout/tagout deaths. That's one example.

In the State of Washington, the Department of Labor and Industries has done a number of well-designed studies looking at the impact of enforcement of OSHA standards on worker compensation cases. And what the department has found—and I'll give you just two examples.

One is that following the adoption of the Washington State Fall Protection Standard a number of years ago, when inspectors went in, did an inspection, found that the standard was being violated, they issued an order for corrections to be made. And so the standard was then—the company then came in compliance—that as the company came into compliance, that injuries from falls declined significantly.

In a similar way, the Department of Labor and Industries recently completed a 10-year review looking at what happens to worker compensation cases in the year after a State OSHA inspection took place. And while it is true that in all workplaces, even without inspections, there's a slow decline in worker compensation cases, in the instances where an OSHA inspection was done, violations were found, citations were issued, and the hazards were corrected, there was a 20 percent greater decline in the injuries than in other comparable workplaces. So there's a wide body of information. That's just some.

Ms. RABINOWITZ. If I could add, in the 1970s, OSHA issued a standard for cotton dust exposure. And at the time, it was very controversial. Industry said it was going to put the textile industry out of business. OSHA went forward with the standard. The case went to the U.S. Supreme Court, which upheld the standard.

There's been a dramatic decrease in the incidence of byssinosis among textile workers, and the investment in plant and equipment that was spurred by the need to comply with the standard increased productivity in the industry dramatically and allowed them to stay competitive for a while with international textile manufacturers in a way that they would not have been able to in the absence of that investment in plant and equipment.

Senator FRANKEN. Thank you.

And thank you, Mr. Chairman.

The CHAIRMAN. Senator Blumenthal.

STATEMENT OF SENATOR BLUMENTHAL

Senator BLUMENTHAL. Thank you, Mr. Chairman.

I want to thank all of you for being here today. And I want to say in recognition of the people here who have come with photographs that I am reminded of the tragedy that Connecticut encountered literally 25 years ago almost to the day at L'Ambiance Plaza. As a matter of fact, I'm going to be at a ceremony this coming Monday marking that 25th anniversary when 28 construction workers lost their lives as a result of a construction practice known as lift slab that was under review by OSHA.

In fact, it had been under review for some 5 years and was eventually found to be unsafe. And yet 28 people lost their lives on that day, April 23, 1987, as tons of steel and concrete from an unfinished building came crashing down on them. And it is a tragedy that we have recalled every anniversary since, this one being the 25th anniversary.

So as you have testified, Dr. Silverstein, and others have recognized very eloquently, these delays have real-life consequences. They have consequences not just in money and unnecessary medical costs. They have real-life consequences in lives lost—men and women not coming home from work after leaving their families

that morning, as these 28 individuals did that day 25 years ago, and not coming home to their families as the result of an accident and, really, a tragedy that could have been avoided.

Accident probably is the wrong word, because it was, in essence, preventable. And it could have been prevented if there had been prompt or even reasonable review within a period of time that everyone would agree is one that should be met.

I have read the GAO report, and I would simply ask, Dr. Silverstein, whether you think that this report adequately sets forth measures that we can take to address this problem.

Dr. SILVERSTEIN. Senator Blumenthal, I think that the GAO report did a pretty good job of identifying some of the reasons that OSHA standard-setting takes too long. I think it fell short with recommendations. We've presented a number of recommendations here that I think are worthy of consideration. It's unfortunate the GAO didn't make those in its own report. But I think that the report itself supports quite strongly some of the recommendations that we have made.

Senator BLUMENTHAL. So the report essentially identifies the problems and the reasons and thereby supports going farther than the recommendations it has made.

Dr. SILVERSTEIN. You know, even within the body of the report, a number of the recommendations that we've made explicitly here are noted, but they don't appear in the recommendation section. So the idea that Congress could direct OSHA to adopt a rule in a more expedited way than currently takes place is something that's in the GAO report as a possibility. It just wasn't listed as a recommendation, and I believe it should have been.

Senator BLUMENTHAL. Thank you.

I'll invite comments from any of the other witnesses if they have any.

Yes, sir.

Mr. SARVADI. I'd make the comment that I really think the problem with OSHA rulemaking is that they just don't stick to their priorities. And what the statutory recommendations that we're talking about here do is establish that priority. If OSHA wanted to get a rule done on silica, it could have done it in 1979 or 1978 without having to go through all of the exercise that we've gone through since then.

The reason it didn't happen is because I don't think they understood the significance and the importance of having established the rule. That doesn't, I don't think, change the problem that we have in front of us, which is to say the agency simply gets bogged down in its own processes.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

The CHAIRMAN. Well, again, if the agency gets bogged down in its own processes, Dr. Silverstein, what are your recommendations?

Dr. SILVERSTEIN. Well, I think that some of the points that Mr. Sarvadi is making are quite appropriate. I agree that stakeholders should be brought into discussions as early as possible, and often OSHA does that. So I think the rap on that is a bit unfair.

But I want to go back for a second to the discussion you were having about OMB. The real open process in which all the parties are brought to the table, have an opportunity to put their concerns

out publicly and have them discussed, debated, worked over—the open process is the public hearing process, OSHA's public hearings.

The CHAIRMAN. Right.

Dr. SILVERSTEIN. Those are incredible events which are open to anybody. There's an administrative law judge. They're on the record. Witnesses are able to come forward and present their views, present data, present either support or opposition, and then the witnesses are subject to cross-examination by anybody else who's in the room who is on the witness list. They're incredibly robust, interactive experiences. That's the public process that works.

Certainly, there are problems internally to OSHA with setting priorities. I agree with that. But the real problem is that it takes so long to get to the public hearing process. There are innumerable procedural delays, including the OMB delays, the SBREFA delays, and others, that really keep the process from getting to the point where it really matters—open public debate and discussion on the record.

The CHAIRMAN. But it doesn't—let me ask—that takes place before it goes to OMB, doesn't it?

Dr. SILVERSTEIN. No, it doesn't. It can't happen until it comes out of OMB.

The CHAIRMAN. So the silica rule, that's tied up in OMB right now.

Dr. SILVERSTEIN. Yes. It has not had a public hearing, and it won't until it comes out of OMB.

Ms. RABINOWITZ. OMB gets to look at the rules before a proposed rule is published in the Federal Register for comment. And then after the hearing process and the comment period, OMB gets to look at the rule a second time. When a final rule is drafted, it's sent to OMB before it's published in the Federal Register. So they look at it in the beginning and at the end.

The CHAIRMAN. Mr. Sarvadi.

Mr. SARVADI. Mr. Chairman, if I could add to this, the problem we're talking about right now is the time it has taken to get to this stage is the time period—I think in the GAO report they suggested they started in 1994. This is the time when OSHA has been doing all of its work internally and through contractors to gather information. And this is the time period where I'm suggesting we can shorten the time it takes to get to the rule.

We are going to have the opportunity to go through the robust process that Dr. Silverstein described only after OMB releases the proposed rule for discussion. I'm suggesting we need to have that discussion before it gets to OMB.

The CHAIRMAN. Well, OK. This is open for discussion. Why can't we have it before it goes to OMB?

Dr. SILVERSTEIN. Because the only truly open process that is on the record and is meaningful that OSHA has to base its record on and defend in court is the record of the public hearing. I agree that informal discussions with stakeholders that represent all views should take place very early on. But then having done that—we need to do that quickly, get past it, get to the public hearing process where it really counts.

The CHAIRMAN. Could you have a public hearing on a proposed rule—I don't know. Maybe you can't.

Dr. SILVERSTEIN. Well, OSHA does have public meetings. And often OSHA will conduct a public meeting of some kind very early on in the process. It could do more of that, and it could do it quickly.

The CHAIRMAN. But this open process—as I understand it, the meetings that OSHA has prior to that are open, on the record. They aren't?

Dr. SILVERSTEIN. No.

The CHAIRMAN. No?

Dr. SILVERSTEIN. Not the way that public hearings conducted under the requirements of the Administrative Procedure Act are.

Ms. RABINOWITZ. It varies. OSHA has pre-proposal stakeholder meetings. Sometimes they hire a court reporter and have transcripts of these meetings, and everyone is invited. Sometimes they'll meet with some business groups and then some labor groups. And the process is not regulated by any procedural statute, and it varies depending on the circumstances. And I don't think there is any way that you can generalize.

They do go out and speak to more people than I think Mr. Sarvadi has acknowledged, but there's not a consistent pattern. Sometimes they do it more frequently and more openly, and sometimes they do it less frequently and less openly.

The CHAIRMAN. Are you suggesting that maybe we need more legislative guidance?

Ms. RABINOWITZ. My suggestion would be that more analytic procedures would just bog down the process.

The CHAIRMAN. That's what I'm wondering about this suggestion that was made by GAO and, I think, others that somehow OSHA now get together with NIOSH and work together from the beginning. Aren't we adding another layer in there?

Dr. SILVERSTEIN. OSHA has worked closely with NIOSH for about 40 years.

The CHAIRMAN. Well, then——

Dr. SILVERSTEIN. And the suggestion that they try harder, I think—you can always try harder and do better, but that's not the delay. That's not the source of the problem.

The CHAIRMAN. They're already working with NIOSH.

Dr. SILVERSTEIN. Oh, yes.

The CHAIRMAN. I wonder why GAO was suggesting that. That's the only suggestion they made.

Dr. SILVERSTEIN. Right.

The CHAIRMAN. OK. Try me one more time. Dr. Silverstein, if you had a magic wand, if you were the dictator, and you could do one or two things that would speed up this process while at the same time making sure that there was adequate public input, stakeholder representation, time for public comments on the record, what would you do to speed up the process while protecting these other elements?

Dr. SILVERSTEIN. You're endowing me with extraordinary powers here.

The CHAIRMAN. That's right. I'm asking how you——

Dr. SILVERSTEIN. Under those circumstances, I would direct OSHA to engage in an expedited rulemaking to bring up to date the more than 400 chemicals for which the permissible exposure

limits are maybe 50 years out of date. And, second, I would direct OSHA to adopt a general rule that would require safety and health programs, injury and illness prevention programs in each workplace.

Ms. RABINOWITZ. I would say mandatory deadlines. Whatever the priorities are, when Congress has enacted deadlines and forced OSHA to go forward, they've actually had a pretty good record of meeting those deadlines, and they've been able to do it with the same public participation. So if silica is Congress' priority, if updating the permissible exposure limits is Congress' priority, they should require the agency—consolidate those procedures into a certain amount—a period.

And I think if we shorten the period between the end of the comment period and the time it acts—sort of what I like to call the hand-wringing process, where they—you know, should we do this, should we do that—if we could just force them to decide on the record, then we could move on to the next priority.

The CHAIRMAN. Mr. Sarvadi.

Mr. SARVADI. I think the last point that Ms. Rabinowitz just made is really important. There's a lot of hand-wringing that goes on over there. I'm not sure I agree with Dr. Silverstein that OSHA has worked that closely with NIOSH. They do have different orientations in the two agencies.

And, actually, my personal opinion, which, again, no one has listened to for about 30 years, is that NIOSH needs to be out of CDC. It's not a really good place for it. It's a poor stepchild over there.

Be that as it may, to try to fix the rulemaking, it's really about getting managers within the agency to stick to the deadlines that they set. They simply don't do it. They simply won't come to a conclusion.

The CHAIRMAN. But that's an administration problem. It seems to me that comes under the administration.

Senator Enzi.

Senator ENZI. Thank you, Mr. Chairman.

Dr. Silverstein, in my view, OSHA's Voluntary Protection Program that I talked about in my opening statement is an effective tool in terms of improving the workplace safety conditions and reducing injuries. Do you believe that the VPP sites are generally safer than the non-VPP sites? And do you support continuation of VPP or not?

Dr. SILVERSTEIN. Well, Senator Enzi, sure, they're safer, because that's the requirement for them to be able to be given the VPP star. They are recognition programs. The program is intended to identify and to recognize those employers who are doing the very best job. They've been mischaracterized, I think, as programs which cause workplaces to become safe. In fact, they recognize those that are already safe, and, in that sense, I do support them.

During the 10 years that I was director of the State OSHA Program, I was very proud to be able to go out to workplaces where we awarded the VPP star and to talk with the companies and the unions or the workers on the nonunion sites about the great things they were doing.

Senator ENZI. Well, they have some requirements for hiring safety people as well as doing the incentive programs, don't they?

Dr. SILVERSTEIN. It's a high bar. Now, with regard to incentive programs, we could have a longer discussion about that. But we certainly—I don't think it's appropriate to award a VPP star to a site that encourages in any way workers not to report injuries and illnesses.

Senator ENZI. No. That wasn't the incentive I was referring to. You referred to VPP as an incentive program where they get their star and they can be proud of it.

Dr. SILVERSTEIN. Yes.

Senator ENZI. It's more than that. They actually have to do something in order to get that star.

Dr. SILVERSTEIN. Companies generally have worked very hard over a number of years to get to the point where they can be recognized.

Senator ENZI. Thank you.

Mr. Ward, I want to express my sympathy for the loss of your father and your health conditions. I appreciate the comments that you made. I do believe that we can attribute the progress in improving workplace safety both to employees and employers, and that needs to be a constant working relationship if we're going to have a safer workplace for everyone.

That's why the OSH Act prohibits the penalization of employees for reporting safety violations and making complaints—the whistleblowing provisions. But some recent cases have raised a question that, apparently, a labor union can fine a member for doing that same kind of reporting on safety violations.

What do you think? Should a labor union be able to fine employees for reporting hazardous conduct that endangers everyone on the work site?

Mr. WARD. I've never heard of that.

Senator ENZI. Well, there are some cases that have happened that way.

Mr. WARD. I've never heard of that or experienced any of that. If I may——

Senator ENZI. Sure.

Mr. WARD [continuing]. Take a swing with that magic wand for just a second, in my opinion, if you want to speed it up, have everyone involved take a look at the simple, cost-effective control measures that we've known about for 70 years. It literally is adding water to what you're cutting, and you eliminate the hazard for gas-powered equipment. For the electrical powered equipment, they have vac systems which are readily available. Industry—the manufacturers have already—it's already out there. It doesn't have to be re-invented. It's just that simple.

If you really look at how much you're allowed to be exposed to and how simple the controls are, everyone would be on board, I'm almost certain. It really is way more simple than it appears.

Senator ENZI. That's why we want both the employees and the employers involved in the process. And I appreciate your comments.

Mr. WARD. Thank you.

Senator ENZI. Dr. Silverstein, in your testimony, you mentioned a shared priority for rulemaking between OSHA and NIOSH, and we touched on that just a few moments ago as a possible solution.

Specifically, you mentioned how a similar process was started in the 1990s but ultimately was abandoned. Could you discuss some of the reasons why the formal priority process didn't work and what could have been done differently today?

Dr. SILVERSTEIN. I don't know that it didn't work.

Senator ENZI. Oh.

Dr. SILVERSTEIN. I indicated in my testimony that it wasn't followed through on, and I don't have a full explanation of that. The priority planning process was something that I worked on during the 2 years that I was Director of Policy for Federal OSHA, and after I left, it diminished in its importance and was not followed through with. I think there were other competing demands that took over.

One of the challenges for the agency is figuring out how to respond from innumerable demands that are coming from the outside continually. And this is where I would agree with Mr. Sarvadi that the agencies respond to input and pressure from the outside. And it's really important that that input be balanced, that the agency is hearing from all sides.

This is one of the reasons why union participation has been so important. Where unions have been involved, the discussions are really full and complete. Where they're not, OSHA gets a one-sided set of demands.

Senator ENZI. Thank you, and we'll follow up a little more on why that process was abandoned. And, again, I have additional questions, but I will submit them in writing, because I have to leave.

The CHAIRMAN. Thank you, Senator Enzi.

Actually, you answered the question to him that I was going to ask you, Mr. Ward, because I haven't had a chance to ask you any questions about having the magic wand.

But I will close on this. For all the people who are sitting here with pictures of their loved ones that they have lost, I just said to my staff they're probably wondering what are they talking about up there and all this stuff. Sometimes experts—and I'll get into the fine tuning of all of this which we have to do—rules and stuff.

But my question to you is—you said things are simple. People out there working know what's safe. But they lose their lives. They get severe injuries. But if they know what to do, then why are rules—why do you need rules? If they know what to do to be safe, why do you need rules? Why even have rules if they know what to do? Why don't the employers just do it?

Mr. WARD. Well, although we do have many good employers, you know, the owner of the company isn't out there running the project. So the foremen, you know, who keep their job by making the boss money are the ones that set the tone. They really do set the tone for safety. And right now, with the economy and the few jobs available and so many looking for work, there isn't anybody that I know that would speak up on the job about workplace hazards.

In fact, when we do our OSHA training, now we have to spend 2 hours on introduction to OSHA, where we explain to them their rights in detail. We make them fill out a—well, not make them—we have them fill out a complaint, an official OSHA complaint. It's

probably the toughest piece to get through in 2 hours because of all the chuckles and sarcasms that comes back from the crowd.

They're like—there's no way they're going to say anything about the job, because construction is unique. It really is. It's simple. If somebody wants to get rid of somebody, if they're complaining about something, or for whatever reason, they'll just lay him off. The job slows down, or they'll say the job slows down, and they just lay them off and just don't call them back. It's unlike any other industry that I'm aware of.

The CHAIRMAN. And if I'm not mistaken, one of the top three industries by fatalities is construction.

Mr. WARD. It is.

The CHAIRMAN. Transportation, utilities and agriculture being the other two. I just wonder if it hasn't a lot to do with just—you know, human nature wants to cut corners. Don't we all want to cut corners? We all try to get through that yellow light, you know?

Mr. WARD. In some cases, I'm sure. In a lot of cases, masons are—they've been around for a while, you know. Some of the companies have been around for 60, 70 years, way before OSHA was around. And in some cases, they just don't know.

The CHAIRMAN. And in some cases, we do know, like the PELs, the permissible exposure limits, on these chemicals and stuff—been around for a long time. I don't know why we can't finally definitively put out a rule on that. It's just mind-boggling on that.

Well, any other input that any of you want to put on the record right now before I close the hearing?

Did you, Dr. Silverstein?

Dr. SILVERSTEIN. Yes. I'm sorry that Senator Enzi left, because some memory is coming back to me, some history with regard to OSHA's standards priority process. And so I would just add this from my recollection.

This was all happening in the period from 1993 to 1995. As you'll remember, Congress changed significantly in 1994, and the standards came under intense scrutiny and criticism. The regulatory process was under intense criticism after OSHA had begun to develop its priority list. And so it became almost impossible to move forward with any priorities.

The debate became kind of trivialized in some ways. OSHA had adopted or was trying to adopt its blood-borne pathogen standard, which resulted in protection of healthcare workers from needle sticks and protection from HIV and AIDS. But the debate became a debate about whether or not OSHA had killed the tooth fairy. That dominated the public airwaves for weeks and months at a time, and under those circumstances, it became very difficult to stick to OSHA's priority list.

The CHAIRMAN. Well, my recollection is that during the 1970s, 1980s, 1990s, every once in a while, that story would pop up about how ridiculous OSHA was. I remember out my way, a farmer would put a toilet in the middle of the field that said, "Thanks, OSHA," that they had to put toilets in their fields and stuff, which was not really true. But, nonetheless, it evoked a lot of pictures and a lot of inflammatory types of comments and stuff.

But there was always something that someone would pick out that they thought was a ridiculous rule or—I don't remember the

tooth fairy issue, but I do remember others. And then that always seemed to then just keep us from really promoting OSHA and promoting this kind of rulemaking, much to the detriment of all the people whose pictures we see out here today.

Well, I thank you all very much. I think this has been a good session.

Mr. Ward, thank you.

Dr. Silverstein, Ms. Rabinowitz, Mr. Sarvadi, thank you very, very much for your testimony and input.

The record will remain open for 10 days for other submissions. With that, the committee will stand adjourned.

And, again, I want to thank all of the people who came here today. I just want you to know your presence has not gone unnoticed. We've noticed it, and, believe me, it has an impact on what this committee does. And this committee is going to move ahead on some OSHA things, I can assure you.

Thank you.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF THE AMERICAN COMPOSITE MANUFACTURERS ASSOCIATION [1]

Chairman Harkin and Ranking Member Enzi, we appreciate the opportunity to submit this statement into the record of this important hearing on OSHA rulemaking.

The American Composites Manufacturers Association is the national trade group for the composites industry. Our members companies use combinations of styrene polyester thermoset plastic resin, glass and other materials to make underground gasoline storage tanks and pollution control equipment, wind turbine blades, modular tub/shower units and bathroom vanities, ballistic panels and armor for military vehicles, fiberglass recreational boats, automotive, truck and motorhome components, window lineal and ladder rail, bridge decks and concrete reinforcing bars, playground equipment, components for commercial and military aircraft, signs and building fascia, and thousands of other composites products, as well as the suppliers of raw material to this industry. Our industry is comprised of some 3,000 small- and medium-sized companies, many family-owned, employing over 250,000 Americans, with facilities in almost every congressional district.

The title of this hearing suggests a concern that OSHA's standard-setting process takes too long, and that the delay in issuing a standard results in additional injuries, illnesses and deaths that would have been avoided had the rule been issued sooner. With respect to the first premise, we agree that OSHA sometimes takes significantly longer than should be necessary to develop and issue a final rule. We respectfully disagree with those who suggest the delays are due to excessive legal requirements governing OSHA's standard-setting process. We believe those requirements are essential to protect employers, jobs, our economy and our quality of life from unreasonably burdensome and unnecessary regulatory mandates.

The premise that the delay in issuing rules results in a readily quantifiable harm to employees that would have been avoided by earlier adoption of the rule may be emotionally appealing, but, for many reasons, is overly simplistic. The idea that Congress should reduce or eliminate fundamental legal protections that interfere with more rapid agency action suggests an ends justify the means approach to the issue. Rather than taking away what are recognized as fundamental legal protections for the regulated community, OSHA, with help from NIOSH, needs to streamline the existing rulemaking process so that it is more efficient and makes more effective use of available resources.

The primary objectives of our statement are to assist the Congress and OSHA in identifying factors that lead to unreasonable delays and inefficiencies in the OSHA rulemaking process, and measures that would help to streamline the process. However, before proceeding to address those issues, we believe it is important to provide the Congress with an additional perspective on the complexity of assessing the potential impacts of a delay in issuing an OSHA standard.

THE POTENTIAL IMPACTS OF A DELAY IN ISSUING AN OSHA STANDARD

Despite assertions that OSHA has been unable to issue the standards needed to protect America's workers from workplace hazards, BLS statistics demonstrate that workplace fatality, injury, and illness rates have been declining steadily during the entire period of OSHA's existence. That includes the more recent period that is the focus of the GAO report presented to Congress today and is characterized as one with few new standards. Furthermore, statistics have consistently demonstrated that, on average, people are more likely to be injured at home than at work.

Efforts to convert OSHA's numerical guestimates of the benefits of a rule—in terms of injuries, illnesses or deaths that supposedly would be prevented—in a quantification of the harm that resulted from the absence of the rule are clearly misplaced. As part of the required showing that a proposed rule would result in a significant improvement in workplace safety, OSHA guestimates the annualized number of injuries, illnesses and/or deaths that would be prevented by adoption of the rule, and the courts defer to those estimates. However, there is no statistical validity to those numbers and it would be highly inappropriate to assert that those guestimated annualized benefits would be "lost" on a day-for-day basis for each day of "delay", even if one assumes a static situation.

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[1] 3033 Wilson Blvd., Suite 420, Arlington VA 22201. Contact: John Schweitzer, (703) 525–0511.

However, the period covered by the development of an OSHA standard is not a static situation. During that period, OSHA typically identifies and communicates its concerns about the safety of a practice or condition through various means, including OSHA guidance documents, initiation of an OSHA rulemaking and OSHA enforcement actions. When that occurs, employers will respond in a variety of ways to address the practice or condition of concern. They do not ignore the issue until OSHA adopts final rule. This point is clearly demonstrated by the extensive, ongoing activities at workplaces across the country to address the hazards of combustible dust. Employers have been active participants in a massive combustible dust education and outreach effort by OSHA, NFPA and many other organizations. Employers have adopted new engineering measures for new facilities and engaged in massive retrofits of equipment to control ignition sources and reduce dust accumulations. As a general rule, OSHA does not attempt to measure or take these material changes in the field into account during the course of a rulemaking because the agency understandably prefers to prepare its feasibility and cost analyses based on a snapshot or fixed point in time rather than attempting to model a dynamic situation.

If OSHA was permitted to take shortcuts to rush a rule through the process, we can reasonably expect it to lead to the adoption of an overly burdensome and possibly unnecessary rule. That rule would divert limited employer resources away from other safety and environmental needs, and quite possibly drive businesses and jobs overseas.

Finally, if OSHA determines that there is a hazard that needs to be addressed on an interim basis while a new rule is being developed, or an existing rule is being amended, OSHA may turn to enforcement measures based on application of the General Duty Clause as well as other existing standards. OSHA has made extensive use of the General Duty Clause and existing OSHA standards to address the hazards of combustible dust.

Extended delays in OSHA rulemakings can and have also imposed significant additional costs on employers. As the period of time over which OSHA develops a rule increases, so does the probability that personnel with expertise and institutional knowledge in the area of a particular rulemaking will no longer be available. This is true for both OSHA and an employer's in house personnel. For example, in the case of OSHA's Lockout/Tagout Standard, the project officer (lead technical person) for that rulemaking, in what is now the Directorate of Standards and Guidance, retired from the agency right after OSHA published the notice of proposed rulemaking. We believe that untimely change in OSHA personnel had a severe adverse impact on the utility of the final rule, and that OSHA, employers and employees continue to live with and work through the fundamental shortcomings of that rule with great frustration and mixed results.

THE CRITICAL ROLE OF OMB IN THE OSHA RULEMAKING PROCESS

OMB intervention in the OSHA rulemaking process remains crucial to protect the employer community from unanticipated and unnecessary regulatory mandates that would likely survive a court challenge. It is also important to note that the severe implementation problems posed by the Lockout/Tagout Standard probably would have been insurmountable if OMB had not intervened during its review of the final rule. That intervention resulted in the addition of a critical provision—commonly referred to as the "minor servicing exemption"—before the final rule was published in the Federal Register.

Some have asserted that the OSHA rulemaking process is more robust than the minimal protections found in the Administrative Procedures Act and, therefore, the interests of the regulated community are already adequately protected without OMB oversight. That view overlooks several fundamental considerations, the most significant of which is the principle under which the courts defer to an agency's interpretation of its ambiguous rule, even if the agency intentionally adopted the rule with ambiguous language to provide it with the freedom to effectively amend the rule without notice and comment rulemaking and to immunize its actions from judicial review.

This unfortunate and inappropriate practice is not unique to OSHA and was explicitly recognized by the U.S. Court of Appeals for the D.C. Circuit: [2]

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the

[2] *Appalachian Power Company* v. *Environmental Protection Agency*, 208 F.3d 1015,1020 (D.C. Cir. 2000).

> agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L.REV. 59, 85 (1995). [footnote omitted] The agency may also think there is another advantage-immunizing its lawmaking from judicial review.

What the D.C. Circuit understandably declined to say was that this unfortunate practice is the logical outgrowth of decisions by the U.S. Supreme Court holding that the courts should defer to an agency's reasonable interpretations of its ambiguous rules. OSHA must make a diligent effort to separate itself from this paradigm because, as long as OSHA continues to employ that strategy, the regulated community will be understandably reluctant to support the agency's rulemaking efforts.

Furthermore, the process and procedural rules followed in the informal OSHA rulemaking are hardly what one would describe as robust. It appears that anyone, other than a minor, who takes the time to file a minimal notice of intent to appear may testify at an informal OSHA rulemaking hearing. On the other hand, an employer that did not recognize its interest in the matter in time to file a notice of intent to appear at the hearing is precluded not only from offering testimony or cross-examining a witness at the hearing, but, under the applicable OSHA rules, is arbitrarily precluded from filing post-hearing comments or post-hearing briefs in the proceeding.

At the hearing, witnesses are permitted to testify as to any matters relevant to the proceeding. There is no *Daubert* gatekeeping function to screen out the testimony of a witness who relies on hearsay anecdotes and lacks the expertise that would be required to testify on the subject in a trial court. The amount of time allowed for both direct testimony and cross-examination is limited. Witnesses are not placed under oath and are not subject to any sanctions if they evade or decline to answer the questions posed to them on cross-examination.

The official OSHA witnesses testify on the first panel on the first day of the hearings and do not make themselves available for further questioning on the record. During that initial OSHA panel testimony, when a question is posed to the OSHA witnesses as to how a particular provision will be interpreted by compliance personnel, the OSHA witnesses rarely if ever provide a substantive response. The typical response is along the lines of "we are still considering that question and would appreciate your input on it." There would never be adequate time during the time allotted for the OSHA panel at the informal hearing to go through a comprehensive discussion and evaluation of the economic impact and technical and economic feasibility issues raised by the proposal.

When a non-OSHA witness testifies, counsel for OSHA insists on conducting the final cross-examination of the witness after cross-examination of the witness by all other participants has been completed. That allows OSHA to conduct cross-examination of the witness after hearing all of the other cross examination while precluding any other participant from re-crossing the witness to address statements made by the witness during the DOL/OSHA cross-examination of the witness. In short, for the reasons noted above, and others, it is clear that the regulated community will continue to rely on OMB to provide the necessary executive branch oversight and relief from inappropriate agency actions.

RECOMMENDATIONS

We believe that OSHA can substantially improve the efficiency and effectiveness of the standards-setting process and urge the agency to carefully consider the following suggestions:

1. NIOSH Should, Consistent with its Statutory Mandate, Support OSHA Rulemaking by Providing OSHA With Both a Balanced Risk Assessment and Practical Research on What is Technically and Economically Feasible to Enable OSHA to Formulate and Adopt Necessary and Appropriate Occupational Safety and Health Standards in an Efficient Manner.

Through the OSH Act, "Congress charged NIOSH with recommending occupational safety and health standards." That means Congress charged NIOSH with recommending "occupational safety and health standards" as that term is used in the OSH Act and interpreted by the decisions of the U.S. Supreme Court. The term cannot mean one thing for NIOSH and another for OSHA. For both NIOSH and OSHA, this term refers to mandatory control measures that are technically, analytically and economically feasible, whether the measure is a standalone PEL, or a PEL in a comprehensive substance-specific standard that includes a PEL, an action level and the traditional ancillary requirements.

The process of developing a health standard would be far more cost-effective if NIOSH did what it acknowledges was expected of it under the OSH Act—if NIOSH recommendations were based on an integrated technical and economic feasibility analysis rather than the more theoretical technical feasibility analysis found in its traditional criteria documents. Research is not limited to reviewing toxicological studies and performing risk assessments. It also includes researching whether recommended control measures are technically and economically feasible.

For example, in the recently issued draft criteria document on diacetyl, NIOSH stated that engineering controls, such as general ventilation or dust collection, are feasible, without considering EPA requirements or combustible dust issues.

In its initial criteria document for hexavalent chromium, NIOSH recommended an airborne exposure limit (1 ug/m3, 8-hour TWA) that OSHA found to be technically infeasible—impossible for some sectors and requiring an unacceptably high use of respiratory protection for others (52 percent of affected employees). In its 2005 post-hearing comments in the OSHA chromium rulemaking (Item 9 on pp. 9–10), NIOSH did acknowledge the concern that a PEL of 1 ug/m3 would result in excessive use of respirators. However, that was very late in the process. Meanwhile, because NIOSH made a recommendation based on aspirations rather than a sound feasibility analysis, the business community lived with years of uncertainty that, as a practical matter, should have come to an end only in 2009 when the PEL of 5 ug/m3 and AL of 2.5 ug/m3 were upheld by the U.S. Court of Appeals Third Circuit. However, in 2008, for reasons that remain unclear, our understanding is that NIOSH issued a draft criteria document with a REL of 0.2 ug/m3 based on the same risk assessment OSHA had relied on in setting a PEL of 5 ug/m3. We believe NIOSH needs to collect and analyze all of the data needed to ensure its recommendations have real world application and are not academic risk assessment exercises that create unrealistic expectations, and needlessly expose the business community and the jobs they create to these kinds of uncertainties.

What is needed from NIOSH is an integrated technical and economic feasibility analysis based on the best available data. Under the current OSHA rulemaking process, OSHA, either directly or through a contractor, takes years to collect and analyze the minimum amount of data it believes is necessary to support a proposed rule. Industry then has only the relatively short time allowed by the rulemaking to organize and collect additional data. Agencies cannot expect industry to be continuously collecting and updating data from the time a NIOSH criteria document is issued. For example, the NIOSH criteria document on hexavalent chromium was issued in 1975 and the NPRM was issued in October of 2004.

Rather than continuing the current inefficient division of labor, NIOSH could facilitate and manage the operation of stakeholder groups working to prepare pre-rulemaking documents. The pre-rulemaking process and documents generated from it would provide OSHA a head start in promulgating a standard by:

- Summarizing and incorporating stakeholder-provided data on hazards, exposures, risk assessment and the technical and economic feasibility of various compliance options (rather than theoretical control measures) into its recommendations;
- summarizing relevant NIOSH-sponsored research or analysis, conducted to fill in data gaps on hazards and exposures, identify and characterize compliance options (rather than theoretical control measures), and/or evaluate their technical and economic feasibility;
- identifying points of agreement among stakeholders; and
- identify points of disagreement that will need to be resolved by OSHA during formal rulemaking.

Pre-rulemaking documents could serve as a resource for employers during the time it takes OSHA to promulgate final rules.

In short, we believe, at a minimum, NIOSH must address technical feasibility in a meaningful way that advances the cooperative development of occupational safety and health standards rather than suggesting theoretical approaches that create false expectations as to what is feasible. We also believe it is critical for NIOSH, in cooperation with OSHA and all stakeholders, to effectively address economic fea-

sibility. The examination of technical feasibility independent of economic feasibility tends to become an academic exercise that generates impractical if not misleading conclusions.[3]

2. Ensure That OSHA Standards Writers Have Practical, Hands-on Experience With the Hazards to be Addressed and the Industries.

OSHA has previously recognized the need for its compliance personnel to be knowledgeable about the industrial operations they are inspecting and the application of OSHA standards to those operations. We believe the same considerations are even more significant when one person or a mall group of OSHA professionals are developing a standard that will apply to as many as 60 million workers at 5 to 8 million worksites across the United States.

OSHA standards writers (developers) currently place too much reliance on surveys and site visits by its outside contractors. The OSHA standards writers need to go on more site visits and educate themselves to the point where they can understand and appreciate how the proposed rule would be implemented, the impact it would have on affected operations, whether it is feasible and practical, whether it would achieve the desired results, and whether it would provide the most cost-effective approach for controlling the hazard ("the Critical Assessments"). Every standards writer should have field experience as a compliance officer. If a standards writer does not have that field experience, the standards writer should be required to accompany one or more compliance officers on an appropriate number and type of inspections until the person develops sufficient knowledge to perform the Critical Assessments.

The rulemaking process contemplated by the OSH Act and the APA provides OSHA with an opportunity to educate itself fully on the matter it proposes to regulate and to obtain the best reasonably obtainable information needed to fully address the applicable legal criteria. Instead, it appears that OSHA typically settles for the minimally required "best available information" that it believes would be adequate to satisfy its legal obligations. We recognize that OSHA does not have unlimited funds to conduct studies, research and surveys. On the other hand, OSHA can be penny-wise and pound-foolish in limiting the number and scope of employer surveys and site visits (subject to OMB approval under the Paperwork Reduction Act) to the point where OSHA does not obtain the information needed to understand the adverse impacts of the proposed rule and proceed with an alternative and far more cost-effective approach.

3. Ensure Effective Involvement and Coordination Between the OSHA Standards Writers and the Directorate of Enforcement Programs.

Unfortunately, the Directorate of Standards and Guidance (DSG) develops and promulgates a standard with very limited and clearly inadequate involvement of the Directorate of Enforcement Programs (DEP) in developing the rule. DSG then turns the completed standard over to the DEP, and DEP develops a compliance directive for its inspectors to clarify, fill in the gaps and more fully complete the rulemaking. If that was not the case, there would be far less need for substantive interpretations of the new rule in subsequent filed directives and letters of interpretation. One or more professionals from DEP should be assigned to the project team for every OSHA rulemaking and, during the informal hearing, should be prepared to answer substantive questions on how the agency intended to interpret the provisions of the rule at the time they were drafted and whether there is any change in the agency's thinking.

DSG can and should more effectively utilize the knowledge and experience of OSHA compliance officers in assessing the practicality, feasibility and expected impact of a draft proposed rule. OSHA conducts approximately 40,000 inspections per year and should establish a protocol that would allow OSHA to take advantage of the opportunity to have its field personnel gather information and perform appropriate surveys and research during those inspections with the understanding that this aspect of the visit would be treated as a consultation visit. The employer would

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[3] Dr. Michael Silverstein, in his statement for the hearing, makes the following recommendation:

The OSH Act directs NIOSH to develop scientific criteria for OSHA rules and to publish such criteria annually. In its early years NIOSH developed a substantial number of detailed criteria documents with recommendations for new OSHA rules, but OSHA rarely acted on these recommendations and NIOSH stopped producing them. NIOSH should work with OSHA to develop new criteria documents that will provide the kind of details on exposures, risks, technological and economic feasibility that OSHA needs to support new rules.

ACMA shares this view. One of the primary reasons OSHA rarely acted on the NIOSH criteria documents is that the documents did not include the "kind of details on exposures, risks, technological and economic feasibility that OSHA needs to support new rules."

be required to abate any serious violations identified by OSHA during this consultation visit, but would not be subject to any enforcement action unless it failed to abate the violation within a reasonable time.

4. Ensure Effective Involvement and Coordination Between the Directorate of Standards and Guidance and the Directorate of Construction.

We recognize that there are major distinctions between most General Industry activities and most Construction activities and support the decision to maintain a separate Directorate of Construction. That being said, we believe the Directorate of Standards and Guidance (DSG) and the Directorate of Construction should have either joint or concurrent rulemakings whenever there is a hazard addressed by both directorates. Otherwise, there will be many situations (1) where it is unclear whether the General Industry or Construction rule applies, or (2) where both the General Industry and Construction rule will apply at the same time, depending on the specific task or employer involved, and they will have different requirements. In many cases, the hazards presented by construction work are identical to the hazards presented by General Industry maintenance work and the affected parties (i.e., employers, employees, and OSHA) are left to make an often arbitrary decision as to which rules apply. The pending OSHA rulemakings on fall protection in General Industry and confined spaces in construction illustrate these concerns. We congratulate OSHA for holding the concurrent pending rulemakings on electric power generation in General Industry and Construction in an effort to avoid these concerns.

5. OSHA Should Make a Diligent Effort to Separate Itself from the Rulemaking Paradigm Described in Appalachian Power Company.[4]

Rather than ducking the hard issues and intentionally drafting an ambiguous rule with the expectation that the courts will later defer to the agency's interpretation of that ambiguous rule, OSHA should have the courage to either explicitly resolve those issues or acknowledge that they are not addressed by the rule.

RESPONSE TO QUESTIONS OF SENATOR HARKIN AND SENATOR ENZI BY MICHAEL SILVERSTEIN, M.D., MPH

DEAR SENATORS: Below are my responses to questions sent after the April 19, 2012 hearing entitled: "Time Takes its Toll: Delays in OSHA's Standard-Setting Process and the Impact On Worker Safety."

Question 1. What quantifiable costs are passed on to society when a worker gets hurt?

Answer 1. In addition to worker compensation costs (medical bills, vocational rehabilitation, partial wage replacement, legal costs, pensions, and program administration) the quantifiable costs include the following: medical and disability costs above those covered by worker compensation; lifetime loss of earnings related to loss of function, skills and seniority; recruitment, training, wage and benefit costs for replacement workers; reduced productivity, product quality and profits; medical and wage loss costs for unreported work-related injuries and illnesses. Estimates for the ratio of indirect to direct costs range from 1:1 to more than 6:1. The most recent study (Leigh, see below) estimates total annual costs of $250 billion with $183 billion of this due to indirect costs such as those listed above, or an indirect to direct cost ratio of 2.7:1. The two best sources for more detailed information about these costs are:

- Cost-Benefit Analysis of the Ergonomics Standard, Washington State Department of Labor and Industries, May 2000. Available at *http://www.lni.wa.gov/Safety/Topics/Ergonomics/History/Documents/cba.asp*.
- Leigh, JP. Economic Burden of Occupational Injury and Illness in the United States. Milbank Quarterly, 89(4):728–772. 2011.

Question 2. Why are States sometimes able to act more efficiently than Federal OSHA?

Answer 2. There are at least three reasons. *First*, a few States address workplace safety and health as a constitutional right. Where this is the case there is a more forceful argument for equity for all workers. For example, this provided an effective argument for extending basic safety and health protections to agricultural workers in Washington State, something OSHA has been unable to accomplish. *Second*, the relationships among agency regulators, legislators and major stakeholders in the business and labor communities are generally better at the State than the Federal

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[4] *Appalachian Power Company* v. *Environmental Protection Agency*, 208 F.3d 1015,1020 (D.C. Cir. 2000).

level. While this is by no means always true there have been numerous examples where the State parties have been able to work through their differences to reach mutually agreeable decisions in a timely way. *Third*, under the OSHAct there is a requirement that State programs extend all their protections to public employees who are excluded in States where OSHA retains jurisdiction.

Question 3. Do you agree that Federal OSHA is still vitally important even though there are effective State agencies out there?

Answer 3. Yes, for two reasons. *First*, Federal jurisdiction is the only way to insure that workers in all States who are exposed to similar risks receive equal protection under the law. While not perfect, the current requirement that OSHA determine whether State regulations and enforcement are "at least as effective as" OSHA's provides authority for the Federal Government to hold all States to a common minimum. However, at the present time workers in some States get better protection than workers in others because their State program has acted where OSHA has been silent. Equal protection would require that when one State takes the lead OSHA steps in to expand protections nationwide. *Second*, while a few States have resources adequate for independent rulemaking at the State level most States find this impossible to do and rely on OSHA for rulemaking that can be simply copied at the State level.

Question 4. Is there any data on the number of injuries, illnesses, and fatalities that could be prevented with a more expeditious standard setting process?

Answer 4. I am unaware of any recent studies that have estimated this in a comprehensive manner. However, each time OSHA has developed a proposed rule it has estimated the numbers of injuries and illnesses that would be prevented and in some cases OSHA has done look-back studies to demonstrate actual prevention numbers. My full written testimony provides examples for silica and lockout/tagout and I will not repeat these here. The greatest opportunity for more injury reduction is in the area of work-related musculoskeletal disorders (WMSDs) that make up 30 to 40 percent of all reportable workplace injuries and illnesses and nearly 50 percent of worker compensation costs. The cost-benefit analysis for the Washington State ergonomics rule (that was eventually repeated in a voter initiative) estimated that the rule would have prevented 40 percent of WMSD injuries and 50 percent of WMSD costs.

Question 5. How can injury and illness prevention programs improve OSHA's responsiveness to workplace hazards?

Answer 5. OSHA's current regulatory paradigm is very inefficient, being limited to a small number of hazard specific rules supplemented by the "general duty clause" which in principle covers all other recognized hazards. However OSHA must justify each general duty citation with affirmative evidence that the hazard is "recognized" and that there is a feasible means of control. This essentially requires a fresh regulatory analysis for every general duty citation, a burden on the agency that renders this tool unworkable except in the most extreme circumstances. If, on the other hand, there was an OSHA rule requiring each employer to identify hazards and establish an injury and illness prevention program to address these hazards, the burden of proof would lie with the employer to justify why it was not implementing its own program.

Question 6. Is there, in fact, any solid evidence that responsible safety and health regulation costs jobs?

Answer 6. I am not aware of any such evidence. To the contrary a recent review for the Economic Policy Institute found a moderate association between regulation and job creation.[1] Moreover, an important new study in the prestigious journal Science found that the enforcement of OSHA regulations not only resulted in reduced worker injuries but also did so with "no evidence that these improvements came at the expense of employment, sales, credit ratings, or firm survival."[2]

Question 7. What action do you recommend to Congress to improve the OSHA standard setting process?

Answer 7. Require that OSHA periodically update its rules to bring them in line with generally accepted consensus standards such as the ACGIH threshold limit values, with reduced requirements for significant risk and feasibility analysis. Di-

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[1] Shapiro I. & Irons J. 2011. Regulation, Employment and the Economy: Fears of Job Loss are Overblown, Economic Policy Institute, Washington, DC.

[2] Levine D., Toffel M., Johnson M. Randomized government safety inspections reduce worker injuries with no detectable job loss. Science. 336, 907–11. 2012.

rect OSHA to adopt specific rules within a set time limit, such as rules for combustible dust, safe patient handling, silica and injury/illness prevention programs. Establish the presumption that NIOSH recommended exposure limits will become OSHA requirements unless OSHA has a defensible reason for not doing so. Extend applicability for all OSHA rules to all public employees.

Question 8. What are the most important things that OSHA can do to expedite standard setting in the absence of legislative changes?

Answer 8. Establish a short regulatory priority list, engage NIOSH's assistance, and then adhere to a fixed timetable for completion. This may not be possible without the cooperation of OMB.

Question 9. Are there any new Executive orders or modifications of existing Executive orders that you believe would improve OSHA's rulemaking process?

Answer 9. Exempt OSHA from the requirements of Executive Order 12866, based on the adequacy and robustness of the existing OSHA rulemaking process.

Question 10. Should Congress require that OSHA periodically update Permissible Exposure Limits?

Answer 10. Yes, see #7 above.

Question 11. How should OSHA use national consensus standards to update exposure limits?

Answer 11. See #7 above.

Question 12. Should OSHA have the ability to update standards en masse or must they do so one at a time?

Answer 12. See #7 above.

Question 13. Should Congress set a deadline for OSHA to issue a new silica standard? Are there any other hazards in which Congress should intervene and mandate OSHA action?

Answer 13. Yes, see #7 above.

RESPONSE TO QUESTIONS OF SENATOR HARKIN AND SENATOR ENZI
BY RANDY RABINOWITZ

OMB WATCH,
WASHINGTON, DC 20009,
May 25, 2012.

Hon. TOM HARKIN, *Chairman,*
Health, Education, Labor, and Pensions Committee,
U.S. Senate,
Washington, DC 20515.

DEAR SENATOR HARKIN: My responses to questions sent to me after the April 19, 2012 hearing entitled: "Time Takes its Toll: Delays in OSHA's Standard-Setting Process and the Impact On Worker Safety" are included with this letter. I have grouped my responses to questions from Senator Harkin separate from my responses to questions from Senator Enzi.

If you have any further questions, please feel free to contact me.

Very truly yours,

RANDY RABINOWITZ,
Director of Regulatory Policy.

SENATOR HARKIN

Question 1. Success of earlier OSHA standards.

Answer 1. Dr. Silverstein's testimony describes the health benefits of several early OSHA health and safety standards, from those reducing lead exposure to those mandating lockout/tagout of energized equipment. In a 1995 study, "Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health," the now-defunct Congressional Office of Technology Assessment conducted retrospective case studies for eight past OSHA rulemakings—five involving health standards and three involving safety standards. The cost estimates for OSHA's 1974 vinyl chloride standard considered during rulemaking exceeded $1 billion, but a survey of the polyvinyl chloride production industry conducted after the standard went into effect concluded that the actual compliance costs were in the $228–$278 million range. OSHA's final cost estimate for its 1978 cotton dust standard projected annual com-

pliance costs of $283 million, but OTA concluded that actual costs amounted to only about $82.8 million per year because as a result of the standard the textile industry modernized and productivity at its plants improved. OSHA estimated in the early 1980s that its occupational lead exposure standard would cost the industry $125 million, but actual costs as assessed retrospectively by OTA amounted to only around $20 million. Similarly, OSHA estimated in 1987 that its formaldehyde standard would impose $11.4 million in costs on the industry, but actual costs were only $6.0 million, in part because the industry moved rapidly to substitute low-formaldehyde resins. In each of these instances, OSHA achieved significant health benefits at a fraction of the predicted cost.

Question 2. Public input into OSHA rulemaking.

Answer 2. OSHA rulemaking affords stakeholders, and particularly business, many opportunities to voice their support or opposition to any standard the agency is considering. Informally, OSHA often consults with interested parties in deciding whether a hazard should be the subject of regulation and sometimes holds public meetings or Web chats to get input from interested parties. For construction regulations, OSHA is required to consult with the Advisory Committee on Construction Safety and Health. Often, OSHA will publish a Request for Information or Advanced Notice of Proposed Rulemaking to obtain stakeholder input on regulatory issues before moving forward with a proposal. When OSHA prepares an assessment of a hazard's risks, OMB requires that it seek peer review of its scientific assessment. For significant regulations, OSHA must convene a small business review panel and respond to its concerns before publishing a proposed rule. And, OSHA must seek OIRA review of any proposed rule under Executive Order 12866. OIRA logs make clear that the review process presents an opportunity—more often for opponents of rules than supporters—to urge OIRA to insist on changes. Most of these procedures, with the exception of SBREFA panels and review by the Construction Advisory Committee are not mandated by statute.

Once OSHA publishes a proposed rule, the OSH Act requires that it provide at least 30 days for public comment, although in practice OSHA always allows more time for comment. If any party asks for a public hearing during the comment period, the OSH Act requires that OSHA hold one. OSHA regulations provide that during the hearing, an ALJ presides and any party may present testimony or question witnesses. By practice, OSHA provides a period for post-hearing comment and a separate period for post-hearing arguments. After the rulemaking record closes, but before a final rule is published, OSHA must again seek review of its rule by OIRA under Executive Order 12866. OIRA review usually offers industry, but not labor, yet another opportunity to comment on the rule.

OSHA's final rule must be accompanied by a statement of reasons for the rule. The statement of reasons, or preamble, must demonstrate that OSHA's standard addresses a significant risk of material impairment in the workplace, the standard would reduce or eliminate that significant risk, and is both technologically and economically feasible for industry to implement. OSHA must respond to all significant comments and objections to its rule. Any party may seek judicial review of an OSHA standard. Courts will vacate a standard if OSHA has not adequately explained its rationale or demonstrated that substantial evidence in the rulemaking record supports its conclusions.

Question 3. Regulatory reform proposals would further delay OSHA rulemaking.

Answer 3. Unfortunately, recent regulatory reform proposals would make the OSHA standard-setting process more burdensome. Four separate regulatory reform proposals are pending in the Senate: the Regulatory Accountability Act (S. 1606), the Regulations from the Executive in Need of Scrutiny (REINS) Act (S. 299), the Regulatory Flexibility Improvements Act (S. 1938), and the Regulatory Time-Out Act (S. 1538). These bills, and others like them, would change the regulatory process in different ways but would have the same ultimate result: more delay, fewer standards to protect workers, and more illness and injury among exposed workers.

Regulatory Accountability Act (S. 1606)

The Regulatory Accountability Act (RAA) is a breathtakingly broad bill that would fundamentally rewrite the Administrative Procedure Act (APA). Currently, there are more than 110 separate procedural requirements in the rulemaking process[1]; the RAA would add more than 60 new procedural and analytical steps. Commentators

[1] See Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 Fla. St. L. Rev. 533 (2000), available at *http://www.law.fsu.edu/journal/lawreview/downloads/272/Seid.pdf*.

have estimated that the RAA would add at least 21 to 39 months to the rulemaking process for the most important rules, meaning that **the average OSHA rulemaking would take more than 12 years to complete**—potentially spanning four different presidential administrations.[2]

OSHA rulemaking already includes a process that gives participants many opportunities to present their views and to challenge those with opposing views. It does so in an open process. The RAA would supplant these proven procedures with a more adversarial process. It would mandate cost-benefit analysis, overturning the Supreme Court's ruling in the *Cotton Dust* case. It would require that OSHA always use the lowest cost rule, leaving workers with less protection, probably nothing more than a dust mask to protect themselves from known carcinogens. Further, it authorizes the courts to disrupt the rulemaking process before it has been completed. Each of these changes would complicate rather than simplify rulemaking, and delay worker protections.

Regulations From the Executive in Need of Scrutiny (S. 299)

The Regulations from the Executive in Need of Scrutiny, or REINS Act, would reinsert Congress into the rulemaking process by requiring that both houses of Congress approve each major rule, with no alterations, within a 70-day window. If either chamber fails to approve the rule, it will not take effect and cannot be reconsidered until the next congressional session. Given the polarized character of Congress today, this law is a recipe for a freeze on new rules.

Such an affirmative approval requirement would turn the current process upside down. Congress already has substantial power to influence agency rulemaking: through its oversight power; through the appropriations process; and under the Congressional Review Act of 1996. There is no reason to require an affirmative vote of Congress before a rule takes effect.

The REINS Act would waste agency resources. For example, it took OSHA more than 10 years to publish a standard regulating the operation of cranes and derricks at construction sites, even though both industry and unions agreed a standard was needed. If the REINS Act became law, inaction by Congress would block the rule from going into effect, wasting the significant resources OSHA had invested in developing the rule.

Regulatory Flexibility Improvements Act (S. 1938)

The Regulatory Flexibility Improvements Act would expand a range of rules covered by the Regulatory Flexibility Act to include those that have a reasonably foreseeable indirect effect on small businesses; establish more onerous requirements for the initial and final regulatory flexibility analyses, including an estimate of cumulative impacts on small businesses; allow the Chief Counsel for Advocacy of the Small Business Administration to issue rules to govern Federal agencies' rulemaking procedures; and establish a more onerous requirement for the notice that Federal agencies must give the Small Business Administration prior to publishing a proposed rule.

OSHA is already required to analyze the impacts of its standards on small business, consult with small business owners and the SBA about those impacts, and make changes to its rules where appropriate to minimize those impacts. Additional analysis of small business impact duplicates the requirements in existing law. Workers in small businesses face the same hazards as those in larger business. This bill would do little to protect workers in small businesses or to help their employers reduce such hazards. Moreover, it concentrates enormous power in the hands of one appointed official in the Office of Advocacy, while the OSHA hearing process gathers information from a host of small business owners from all over the country.

Regulatory Time-Out Act (S. 1538)

The Regulatory Time-Out Act, which would prohibit agencies from issuing most significant regulations for a year, is one of several bills which would prohibit new rules. These laws would simply keep Federal agencies from carrying out their legally defined missions of protecting the health and safety of the American people.

When Congress passed the OSH Act in 1970, it promised workers that OSHA would protect them from workplace hazards. Too many chemicals and other hazards remain unregulated. The Environmental Protection Agency has listed more than 62,000 chemicals in its Toxic Substance Control Act Chemical Substance Inventory,

[2] Testimony of Sidney A. Shapiro, University Distinguished Chair of Law, Wake Forest School of Law, at Hearing on H.R. 3010, The Regulatory Accountability Act of 2011, before the H. Comm. on the Judiciary, 112th Cong. 4 (Oct. 25, 2011) at 6.

but OSHA regulates worker exposures to only 400 of them.[3] Too many of OSHA's existing standards are based on outdated science. They need to be upgraded to reflect current scientific and medical research. The current rulemaking process makes this impossible.

Question 4. No evidence shows OSHA standards reduces employment.

Answer 4. A comprehensive review of the relationship between industry regulations and job growth within those industries conducted by the Economic Policy Institute found that most regulations result in modest job growth.[4] Even researchers at the Mercatus Center, a conservative regulatory policy center, acknowledged in written comments to House Oversight and Government Reform Committee Chair Darrell Issa, and in testimony to that committee, that there is little evidence that at a macro level, regulations have caused massive job loss in the United States.[5] There is no evidence that occupational safety and health regulations issued by OSHA have cost America jobs.

Question 5. Recommendations for change.

Answer 5. I agree with the recommendations made by Dr. Silverstein.

SENATOR ENZI

Question 1. Prior consulting work.

Answer 1. Below is a list of the State and Federal agencies for whom I have worked as a consultant during the past 10 years. This list is based on my recollection of projects and dates because I no longer have supporting documentation to verify the dates for these projects. None of the consulting work involved OSHA standards discussed at the hearing on April 19, 2012.

- 2000–2002—Consultant to Washington State Department of Labor & Industries
- 2005–2006—Consultant to the Secretariat on Labor Cooperation
- 2006—Consultant to Washington State Department of Ecology
- 2009–2010—Consultant to Ruth Ruttenberg & Associates which had a contract with Michigan Department of Energy, Labor, and Economic Growth
- 2010—Consultant to Project Enhancement Corp. which had a contract with OSHA
- 2010–2012—Consultant to URS which has a contract with HHS

Question 2. Requests for OIRA meetings.

Answer 2. I began my employment as Director of Regulatory Policy at OMB Watch on March 16, 2012. In that capacity, I have not requested a meeting with OIRA.

Question 3. Setting OSHA priorities.

Answer 3. It is true that when OSHA's leadership decides to prioritize a hazard specific rulemaking, the process moves more quickly than would usually be the case. As I said during the hearing, I believe the standard-setting process would be improved by requiring OSHA to set a series of rulemaking priorities and to see those priority rulemakings through to a conclusion. Shifting regulatory priorities is one of many causes of delay in OSHA rulemaking.

The ergonomics example does not suggest, however, that setting regulatory priorities more effectively will eliminate delay. In the case of ergonomics, OSHA was able to move from proposed rule to final rule in just over 1 year because it had invested substantial efforts into preparing for rulemaking long before the proposed rule was published. In reality, the rulemaking effort had begun before 1995. Requirements for regulatory analysis imposed by Executive Order 12866, the Regulatory Flexibility Act, and the Small Business Regulatory Enforcement Fairness Act mean that it is, as a practical matter, impossible to complete a hazard specific OSHA rulemaking in 1 year. Further, by shifting, as you describe it, "50 staffers from other projects," OSHA was unable to move other standard-setting projects forward while debating ergonomics.

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[3] Occupational Safety and Health Administration, "Hazardous and Toxic Substances," *http://www.osha.gov/SLTC/hazardoustoxicsubstances/index.html* (last visited Apr. 16, 2012).

[4] Isaac Shapiro & John Irons, *Regulation, Employment and the Economy: Fears of Job Loss are Overblown*, Economic Policy Institute (2011).

[5] Letter from Richard Williams, Ph.D., Dir. of Policy Research, Mercatus Ctr, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Jan. 5, 2011) (on file with author); Testimony of Jerry Ellig, *Regulatory Analysis: Understanding Regulation's Effects*, before the H. Comm. on Oversight & Gov't Reform (Feb. 10, 2011).

RESPONSE TO QUESTIONS OF SENATOR ENZI BY DAVID SARVADI

Question 1. I am impressed by your long career in workplace safety, including working as a certified industrial hygienist safety consultant to many companies and now teaching OSHA compliance seminars. During your career have you had the opportunity to observe both unionized and non-unionized worksites? Have you noted any difference in safety observance between the two?

Answer 1. Overall, my experience is that the level of compliance with safety requirements is independent of whether the workers at a site are represented by a union. I have seen both excellent and poor safety-related practices in both environments. Unfortunately, the presence of a union sometimes leads to what I view as misuse of the workplace safety process. I've had both management and union safety representatives in my classes complain about the use of the grievance process to shield union members from discipline for safety infractions, and the use of safety rules to slow down production and harass employers with OSHA complaints during periods of labor disputes. Indeed, one critical piece of information to know in an OSHA inspection is whether there is an ongoing labor dispute.

On the other hand, I have seen less stringent adherence to safety practices in some non-union environments. In both cases, these seem to be the exception rather than the rule, and I view with skepticism published papers and comments suggesting that having a union results in greater compliance or necessarily a safer workplace. Of the papers I have reviewed, the authors do not take into account all of the variables that play into safety performance or compliance, and they typically overstate the role of having a union.

Question 2. You mention in your testimony, and the rest of the panelists seem to agree, that involving stakeholders earlier in the rulemaking process is going to be beneficial for the standard setting process. You suggest that this sort of input needs to be done long before a proposed rule is drafted, because once the Notice of Proposed Rulemaking (NPRM) is released that new standard is largely going to reflect that. When do you think is the appropriate time for OSHA and other Federal agencies to begin speaking with stakeholders?

Answer 2. I think it should be done informally from the earliest possible moment, and should continue up to the time that the proposal is formally published as a Notice of Proposed Rulemaking (NPRM).

I also think that every rule with a meaningful economic impact or compliance burden should go through the SBREFA process and, while limiting the official panel participation to SERs, OSHA should make public all documents provided to the panel, accept comments from all interested parties, and make those comments part of the official record. The *ex parte* rules really don't go into effect until the proposal is published, and an open door policy as well as a policy of reaching out to different affected groups up to the point where the *ex parte* rules become effective (when the NPRM is published) should be the norm. With organized labor representing only about 7 percent of the private sector workforce, I think OSHA should be making a more concerted effort to reach employees who are not in organized workplaces.

Most importantly, OSHA should not conduct the peer review of the draft risk assessment or the economic and technical feasibility documents in secret. By comparison, EPA puts its preliminary drafts out for public input, and holds public meetings with its peer review panels, at which interested parties are encouraged to submit data and make presentations, with open discussion between the scientists on the panels and the interested parties. EPA does conduct some sessions in private, but much, perhaps most, of the review is done in public. OSHA (under John Henshaw) initially announced its intention to proceed in that fashion with respect to crystalline silica, but reversed course without any explanation. OSHA's practice of not releasing the risk assessment and other critical documents until it issues the NPRM undermines the legitimacy of the rulemaking process and runs counter to commitments made by the administration to have an open and transparent rulemaking process that provides an adequate opportunity for public comment.

I mentioned in my testimony that OSHA could engage in a more effective way with the interested parties through the trade associations and professional societies that bring those interested parties together on a regular basis. Frequent discussions in groups of 10–15 people facilitates the kind of information transfer and understanding that I think would smooth the process. It shouldn't always be a meeting with all interests represented. Having only one interest group represented in the room will often make for a more candid and flexible discussion, as it is not always possible to concede a position with one's opponents in the room. OSHA would do well to consider how arbitration and negotiated settlements through intermediaries can facilitate reaching agreement, in contrast to the more common process of having

all parties present at all meetings. If OSHA meets with one side of an issue and feels it needs the views of the other side, it can always arrange a similar meeting to get that input.

In addition, the current conflict of interest rules often prevent the very people who have the most knowledge and experience with a particular subject from informing OSHA and other agencies on that subject during the time period when it would be most effective—simply because they are employed by employers who would be affected by a new or revised rule. This is short-sighted. Having such people participate in the entire conversation will assure that all relevant information is considered on a timely basis. Delaying their participation until after the risk assessments and other analyses are completed and made public places them in the enormously unfair position of having to overcome the bias that the people involved in making the decisions have in defending their work. Moreover, everyone involved in the process will know of the participant's relationship to the company and financial interest in the issue, and his or her opinion and comments will be judged in that light. The alternative is to disregard an important and often critical source of information, experience, and often, judgment.

Finally, the others on the panel mentioned closer cooperation with NIOSH. That would help if NIOSH did its analysis on the same basis as OSHA is required to do so. Currently, it is our understanding that NIOSH does not take into account economic or technical feasibility in its Recommended Exposure Limits (REL). That means, in my view, that the RELs are not very helpful when OSHA is required to do so. NIOSH has technical expertise in its Engineering Branch, among other branches, and is tasked with reviewing and developing technological advances in workplace hazard control. Shouldn't NIOSH's experts take practicality into account as well?

Question 3. Can you in general terms, describe the process in obtaining a meeting with the Office of Information and Regulatory Affairs (OIRA)?

Answer 3. These meetings are held by OIRA in connection with its pre-publication review of proposed or final rules under the Executive Order 12866. Once a rule is under review by OIRA (either proposed or final), Administrator Cass Sunstein has said that any meeting request will be granted. The process involves contacting the person at OIRA who is responsible for the topic in question and requesting that a meeting be scheduled. For these meetings, OSHA (or the relevant agency) is invited, and at the ones I have attended, they have been well represented. Since meeting requesters do not know the substance of what has been submitted for review, the format is usually to go over information previously provided, with the opportunity to emphasize and clarify in response to questions the positions and information being provided. Indeed, at one meeting, we discussed OSHA's economic impact analysis, and I was able to demonstrate that even a cursory assessment by someone with real world experience would come up with a practical calculation that was far different from OSHA's assessment. Cass Sunstein has said that he welcomes the input from those affected by regulations during these meetings so that his office has a clear understanding of the rule they are reviewing.

COALITION FOR WORKPLACE SAFETY (CWS),
APRIL 19, 2012.

Hon. TOM HARKIN, *Chairman,*
Hon. MICHAEL B. ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
SD–428 Dirksen Senate Office Building,
U.S. Senate,
Washington, DC 20510.

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: The Coalition for Workplace Safety (CWS), a broad coalition comprised of associations and employers dedicated to improving workplace safety through cooperation, respectfully submits this letter in response to today's hearing titled, "Time Takes Its Toll: Delays in OSHA's Standard-Setting Process and the Impact on Worker Safety."

The Occupational Safety and Health Administration (OSHA) has been criticized as unable to proceed quickly enough to implement its regulatory priorities due to the various requirements it must satisfy to issue new standards. The premise underlying this criticism is that this inability to issue more standards has somehow meant employees are less safe. Yet, during this period when OSHA has issued few new standards, workplace fatalities, injuries and illnesses have declined steadily to their lowest recorded levels.

We believe these criticisms are misguided. These critics fail to understand that the steps in OSHA's rulemaking process exist for a reason. Congress recognized that without first examining feasibility, economic impact, and small business impact, among other factors, OSHA would risk pushing out poorly designed and badly supported standards and that consequently such standards would not provide appropriate guidance to employers to assist them in protecting their employees from the designated hazards.

Employers and OSHA agree that workers need adequate safety and health protections on the job. CWS believes this can be best achieved by making agency standards as practical, science and data driven, cost-effective and performance-oriented as possible. We understand and value the importance of common sense policymaking based on sound scientific evidence, with meaningful attention paid to economic analyses and practical input from stakeholders. In addition, proper consideration must be given to potential conflict with other requirements outside OSHA's purview, such as environmental or transportation regulations.

Our members are committed to providing safe workplaces and striving to improve safety in their workplaces. Ultimately, everyone benefits when agencies work with the industries they regulate to identify and achieve mutual goals. CWS stands ready to work with OSHA and Congress to pursue policies that will help improve workplace safety.

Sincerely,

American Bakers Association; American Composites Manufacturers Association; American Feed Industry Association; American Foundry Society; American Hotel & Lodging Association; American Iron and Steel Institute; Associated General Contractors; Associated Builders and Contractors; Associated Wire Rope Fabricators; Brick Industry Association; Corn Refiners Association; Food Marketing Institute; Forging Industry Association; Heating, Air-Conditioning & Refrigeration Distributors International; Independent Electrical Contractors; Industrial Fasteners Institute; Industrial Minerals Association—North America; IPC—Association Connecting Electronics Industries; Leading Age; Motor & Equipment Manufacturers Association; National Association for Surface Finishing; National Association of Chemical Distributors; National Association of Convenience Stores; National Association of Home Builders; National Association of Manufacturers; National Association of Wholesaler-Distributors; National Cotton Council; National Cotton Ginners Association; National Council of Textile Organizations; National Federation of Independent Business; National Grain and Feed Association National Marine Manufacturers Association; National Oilseed Processors Association; National Roofing Contractors Association; Non-Ferrous Founders' Society; North American Die Casting Association; Printing Industries of America; Retail Industry Leaders Association; Shipbuilders Council of America; Textile Rental Service Association; Tree Care Industry Association; U.S. Chamber of Commerce.

RAND CORPORATION,
ARLINGTON, VA,
April 27, 2012.

Hon. TOM HARKIN, *Chairman,*
Hon. MICHAEL B. ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
428 Senate Dirksen Office Building,
Washington, DC 20510.

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: I am writing today to correct a statement made at the Committee on Health, Education, Labor, and Pensions recent April 19 hearing, *Time Takes Its Toll: Delays in OSHA's Standard-Setting Process and the Impact on Worker Safety*.

David Sarvadi, Partner at Keller and Heckman LLP in Washington, DC, was a witness in the hearing's second panel on behalf of the U.S. Chamber of Commerce. He also submitted written testimony on behalf of the U.S. Chamber of Commerce. In this written testimony, he refers to research that he attributes to the RAND Corporation regarding the greater effectiveness of consultations over inspections in preventing injuries. RAND has not conducted research on this topic and thus is not a source for this conclusion.

I believe he is mistaking this for research done by the Washington State Department of Labor and Industries' research organization, Safety and Health Assessment and Research for Prevention (SHARP). Consultations certainly have an important role to play, but as someone who is extremely familiar with studies in this area, I can state that Mr. Sarvadi's interpretation of the data is not valid. Because em-

ployers ask for consultations, those who get them are, on average, more motivated to improve and would have done so to some degree even without the consultation. We currently have no way of disentangling the effect of the consultation.

The RAND Center for Health and Safety in the workplace has done a number of studies on ways to help improve worker health and safety and reduce the economic costs of workplace accidents and illnesses. The Center provides rigorous, objective analysis and a neutral venue in which to convene stakeholders from government, industry, and labor. I am happy to discuss any of this research further and as always, please do not hesitate to contact me with any questions or concerns.

With regards,

JOHN MENDELOFF,
Director, RAND Center for Health and Safety in the Workplace (CHSW).

KELLER AND HECKMAN LLP,
WASHINGTON, DC 20001,
May 3, 2012.

Hon. TOM HARKIN, *Chairman,*
Hon. MICHAEL B. ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC 20510.

Re: Rand Corporation Letter on Voluntary Programs

DEAR SENATOR HARKIN AND SENATOR ENZI: Thank you for the opportunity to provide supplemental information for the record of the April 19 hearing. I was provided a copy of a letter from John Mendelhof, director of Rand Corporation's Center for Health and Safety in the Workplace, who wrote to you regarding a reference I made in my testimony to a study I mistakenly attributed to them. He is correct that the data on which I relied was from a report from the Washington State SHARP program. I have attached a PDF of the presentation that was the basis for my statement that employers who participate in the voluntary consultation have lower injury and illness rates than employers who are subject to enforcement by the State OSHA program.[1]

Several of the comparisons in the presentation show statistically significant decreases in compensable claims for employers participating in voluntary programs than those subject to enforcement, compared to employers who have neither, and to a larger extent than those who are inspected. Moreover, it is well-established that participants in the Federal Voluntary Protection Program (VPP) have far lower rates of injury and illness reported compared to general industry.

Mr. Mendelhof's categorical statement that my interpretation is "not valid" misinterprets the inference I took from the data. I believe my statement was that employers who voluntarily adopt strong compliance efforts produce far more effective programs. While it is true they are self-selected, the conclusion relevant to the policy issue that should be drawn is that there should be more effort and more incentives to get people into voluntary programs. We will get far more bang for the buck by creating real incentives to sign up than anything we do on the enforcement side. Clearly, such evidence supports the expansion of the VPP and other incentive programs for employers to induce them to voluntarily seek assistance and to adopt programs that go beyond the minimum. In other words, we need to get more people to "self-select" into such programs!

Moreover, my experience with the current enforcement attitude is that it is making people resent OSHA again, because the Agency is viewed as an adversary and not as a resource. We need a debate on how to get to the next level in our national occupational safety and health programs. I believe the model we are now using has reached the point of rapidly diminishing returns, and that stronger incentives for voluntary programs would be more productive in the long run.

Thank you for the opportunity to respond and to participate in this important discussion. I look forward to seeing the results of your efforts.

Respectfully submitted,

DAVID G. SARVADI.

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[1] The presentation was distributed at the Midwinter meeting of the Occupational Safety & Health Law Committee, part of the American Bar Association's Labor and Employment Section, in Sarasota, FL, in March 2012.

The Impact of DOSH Enforcement and Consultation Visits on Workers Compensation Claims Rates and Costs, 1999-2008

Michael Foley, Z Joyce Fan, Eddy Rauser, Barbara Silverstein

Safety and Health Assessment and Research for Prevention (SHARP) Program
Washington State Department of Labor and Industries

Washington State Department of Labor & Industries

SHARP

Study Questions

- How much impact did enforcement inspections and consultation visits have on the compensable claims rates?
- Did the impact of compliance activity differ by industry? By type of claim?
- Did inspections with citations have a greater impact?

SHARP

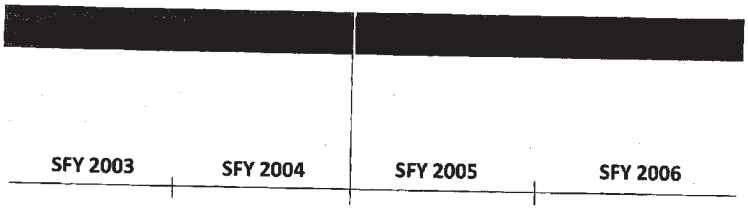
Criteria for Business Account Inclusion

- Reporting hours each quarter during 4 consecutive years (2 before DOSH activity year, activity year, year after DOSH activity)
- State Fund
- Single business location companies
- At least 10 FTEs per year
- No DOSH activity during 2 prior years

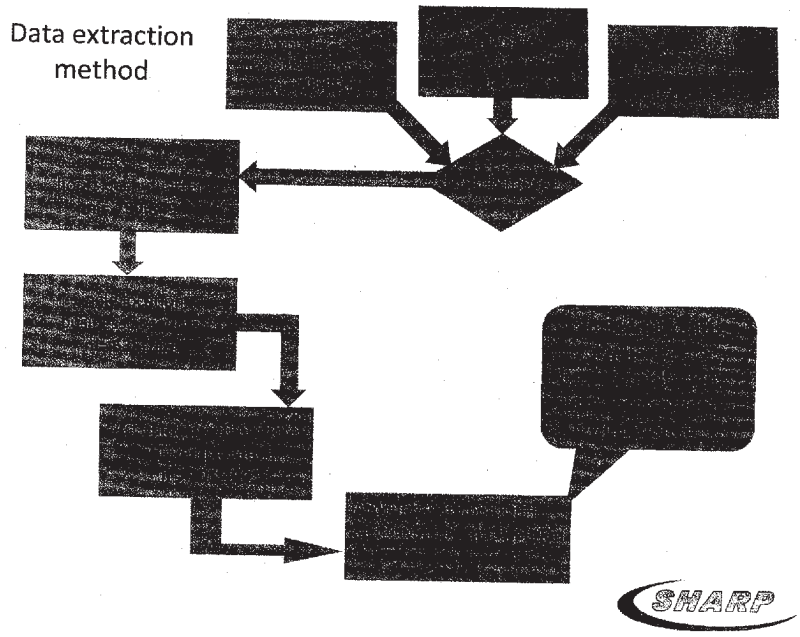
• **15% of all DOSH visits**

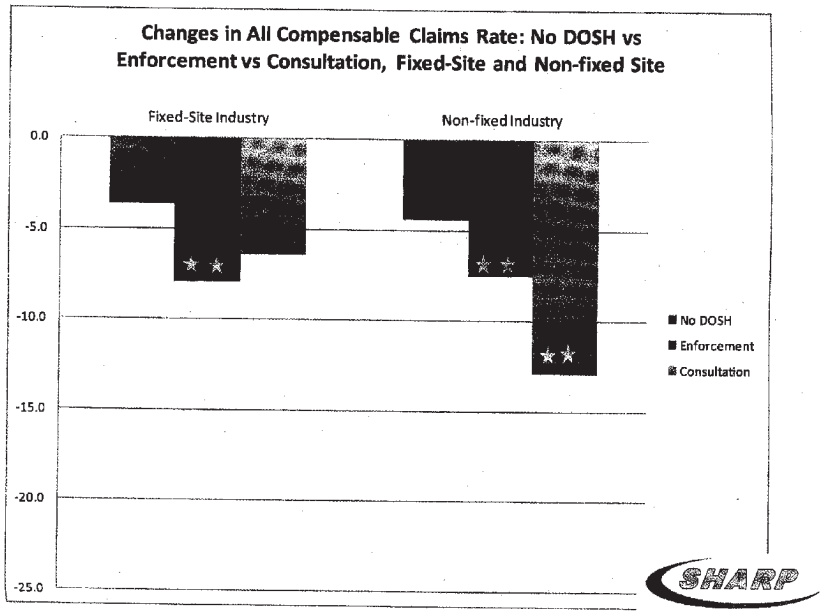
SHARP

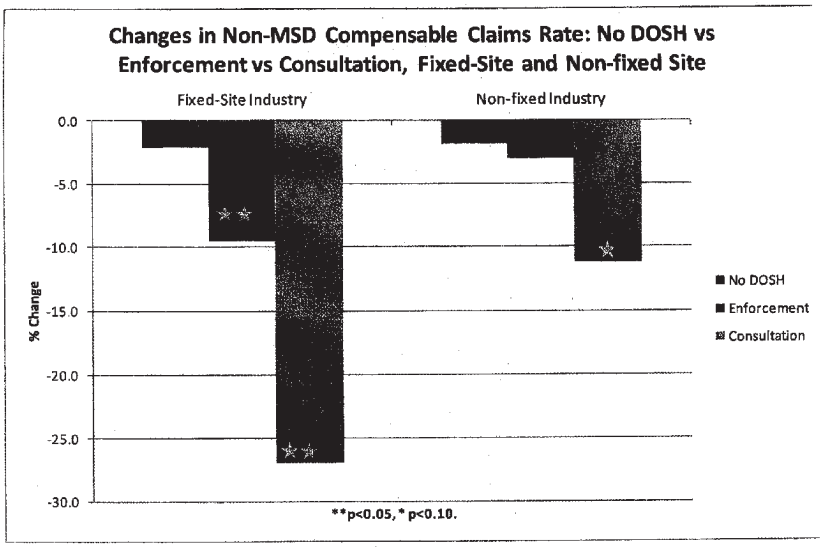
Study Time Periods
(DOSH Activity Year 2005)

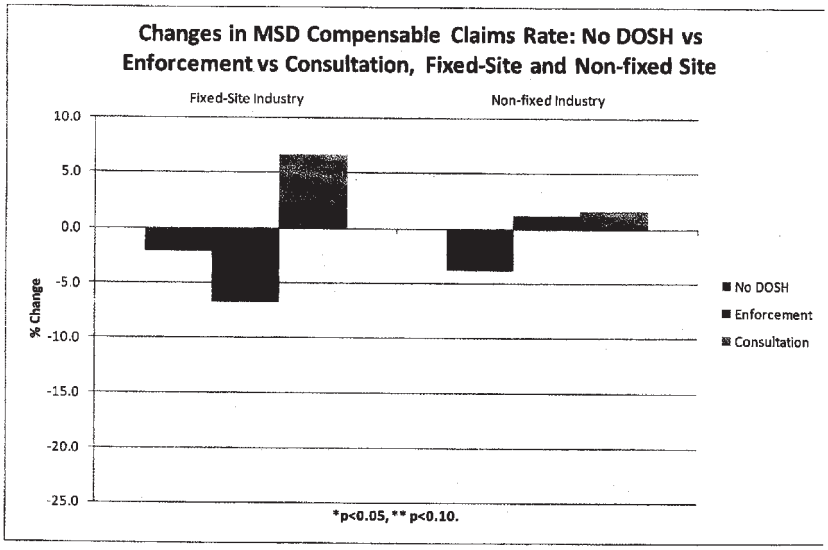


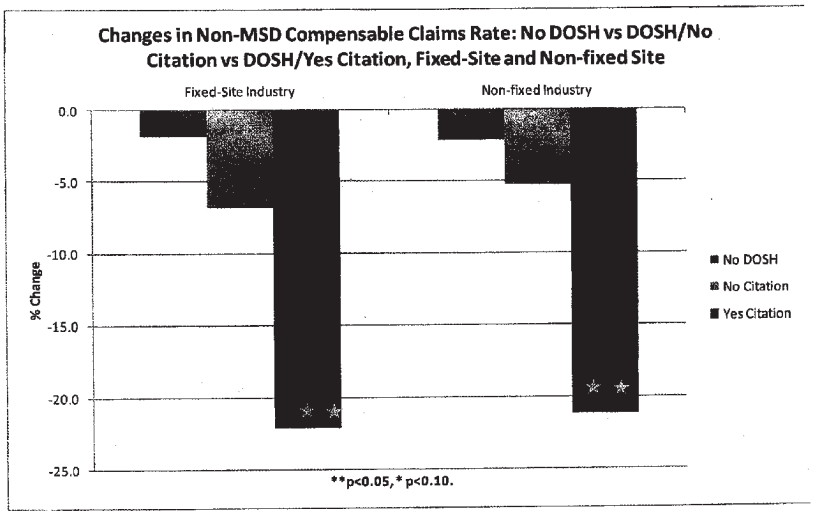
SHARP


Data extraction method
SHARP


Changes in All Compensable Claims Rate: No DOSH vs Enforcement vs Consultation, Fixed-Site and Non-fixed Site
Fixed-Site Industry
Non-fixed Industry
0.0
-5.0
-10.0
-15.0
-20.0
-25.0
No DOSH
Enforcement
Consultation
SHARP


Changes in Non-MSD Compensable Claims Rate: No DOSH vs Enforcement vs Consultation, Fixed-Site and Non-fixed Site
Fixed-Site Industry
Non-fixed Industry
0.0
-5.0
-10.0
-15.0
-20.0
-25.0
-30.0
% Change
No DOSH
Enforcement
Consultation
**p<0.05, * p<0.10.


Changes in MSD Compensable Claims Rate: No DOSH vs Enforcement vs Consultation, Fixed-Site and Non-fixed Site
Fixed-Site Industry
Non-fixed Industry
10.0
5.0
0.0
-5.0
-10.0
-15.0
-20.0
-25.0
% Change
No DOSH
Enforcement
Consultation
*p<0.05, ** p<0.10.



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Impact of DOSH enforcement and consultation on claims costs

Fixed site Industries

- **Enforcement:** $2.1 million savings per year
  - extrapolated to all DOSH enforcement = $19.8 million per year
- **Consultation:** not statistically significant, small numbers

Non-fixed-site Industries

- **Enforcement**: $1.8 million savings per year
  - extrapolated to all DOSH enforcement= $10.7 million per year.
- **Consultation:** $0.3 million savings per year
  - extrapolated to all consultation = $3.6 million per year

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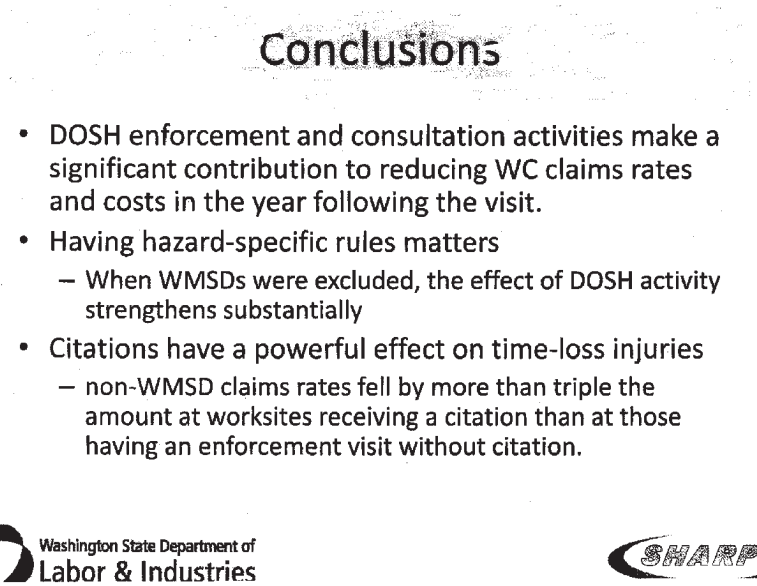

[Whereupon, at 12:03 p.m., the hearing was adjourned.]

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