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OSHA'S REGULATORY AGENDA: CHANGING LONG-STANDING POLICIES OUTSIDE THE PUBLIC RULEMAKING PROCESS

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

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OSHA'S REGULATORY AGENDA: CHANGING LONG–STANDING POLICIES OUTSIDE THE PUBLIC RULEMAKING PROCESS

Tuesday, February 4, 2014
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:02 a.m., in room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, Rokita, Hudson, Courtney, and Pocan.

Staff present: Janelle Belland, Coalitions and Members Services Coordinator; Ed Gilroy, Director of Workforce Policy; Nancy Locke, Chief Clerk; James Martin, Professional Staff Member; Daniel Murner, Press Assistant; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Alexa Turner, Legislative Assistant; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Jody Calemine, Minority Staff Director; Melissa Greenberg, Minority Staff Assistant; Julia Krahe, Minority Communications Director; Leticia Mederos, Minority Director of Labor Policy; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; Michael Zola, Minority Deputy Staff Director; and Mark Zuckerman, Minority Senior Economic Advisor.

Chairman WALBERG. A quorum being present, the committee will come to order.

Good morning. I would like to welcome our guests and thank our witnesses for joining us this morning.

In recent weeks there has been a great deal of discussion about the use of executive power. President Obama promised in his State of the Union address to go around Congress when necessary to advance his own agenda. The President's remarks fits a pattern we are all too familiar with under this administration and goes well beyond the attitudes and actions of past administrations of both parties.

Be it through non-recess recess appointments, waiving the work requirements in welfare reform, or unilaterally delaying parts of the health care law, time and again the administration has made

end-runs around Congress and the American people we represent to serve its own political interests. Today we will discuss instances of this executive overreach within the Occupational Safety and Health Administration.

Like most federal agencies, the Administrative Procedure Act, or APA, governs OSHA's regulatory process. Enacted during the Truman administration, the law requires agencies to issue a proposed rule, collect public feedback, and review and respond to comments before issuing a final rule.

In 1948 Senator Pat McCarran, Democrat from Nevada and chairman of the Senate Judiciary Committee, described the APA as a—and I quote—"bill of rights for those Americans whose affairs are controlled or regulated in one way or another by agencies of the federal government," end quote. Senator McCarran also said the law was designed to, quote—"provide due process in administrative procedure."

In addition to following the guidelines set forth in the APA, before moving forward with a proposed rule OSHA is also required to determine that a health and safety risk exists, examine the economic impact of the proposed rule, and evaluate the technical feasibility of compliance. These legal guidelines are in place to protect the public against excessive regulations, provide important transparency over work of federal agencies, and ensure the right policies are in place.

And so it is very troubling to see the administration circumvent the public rulemaking process in order to significantly alter health and safety standards. Assistant Secretary David Michaels has openly expressed his frustration with the rules he must follow before imposing new regulations on workplaces. Instead, he has promised to find, and I quote—"creative solutions," end quote, to adopt his policy priorities, and that is precisely what the agency is now doing.

For example, OSHA recently issued a letter of interpretation that dramatically changes policies surrounding nonemployee participation in workplace inspections. For years OSHA has prohibited nonemployees from participating in safety inspections of nonunionized workplaces. The only exception allows certain specialists to participate in order to conduct an effective and thorough physical inspection of the workplace.

Now the agency is allowing virtually anyone to accompany OSHA inspectors, including union organizers. This raises a number of important questions.

Who is responsible for ensuring the nonemployee receives the proper health and safety training? Is the employer liable for an accident involving this nonemployee? Should safety inspections provide a Trojan horse to union bosses who want to organize a workplace?

These and other concerns have not been addressed because the agency has refused to solicit public feedback.

OSHA is also denying the public the right to weigh in on its unprecedented decision to inspect family farms. Since 1978 Congress and the President have agreed to statutory language that prevents OSHA from inspecting farms with 10 or fewer employees. Yet with-

out any notice, public review, or change in the law, OSHA issued guidance that allows for the inspection of family farms.

To justify its new policy, OSHA's flawed logic suggests anything outside the growing of crops or raising of livestock is considered non-farming operations and therefore subject to inspection. It would surprise most farmers to learn the storage of grain, corn, or wheat is not a vital part of their farming operation. As Chairman Kline and I noted in a recent letter to Assistant Secretary Michaels, and I quote—"The guidance simply does not reflect the reality of family farming or the will of Congress and should be withdrawn."

I expect we will discuss in more detail these and other examples of OSHA's executive overreach during this morning's hearing. We all want to ensure America's workers are employed in safe and healthy workplaces, and that goes for both sides of the aisle.

Unfortunately, rewriting the law through executive fiat and circumventing the public rulemaking process undermines this goal, creating confusion and uncertainty for workers and job creators. I strongly urge the administration to reverse course.

With that, I now yield to my colleague, Representative Joe Courtney, the senior Democratic member of this subcommittee, for his opening remarks.

[The statement of Chairman Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Workforce Protections

Good morning. I'd like to welcome our guests and thank our witnesses for joining us. In recent weeks there has been a great deal of discussion about the use of executive power. President Obama promised in his State of the Union address to go around Congress when necessary to advance his own agenda. The president's remarks fit a pattern we're all too familiar with under this administration, and goes well beyond the attitudes and actions of past administrations of both parties.

Be it through non-recess recess appointments, waiving the work requirements in welfare reform, or unilaterally delaying parts of the health care law, time and again the administration has made end-runs around Congress and the American people to serve its own political interests. Today we will discuss instances of this executive overreach within the Occupational Safety and Health Administration.

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Senator McCarran also said the law was designed to "provide due process in administrative procedure."

In addition to following the guidelines set forth in the APA, before moving forward with a proposed rule OSHA is also required to determine that a health and safety risk exists, examine the economic impact of the proposed rule, and evaluate the technical feasibility of compliance. These legal guidelines are in place to protect the public against excessive regulations, provide important transparency over the work of federal agencies, and ensure the right policies are in place.

It's very troubling to see the administration circumvent the public rulemaking process in order to significantly alter health and safety standards. Assistant Secretary David Michaels has openly expressed his frustration with the rules he must follow before imposing new regulations on workplaces. Instead, he has promised to find "creative solutions" to adopt his policy priorities, and that is precisely what the agency is now doing.

For example, OSHA recently issued a "letter of interpretation" that dramatically changes policies surrounding non-employee participation in workplace inspections.

For years OSHA has prohibited non-employees from participating in safety inspections of non-unionized workplaces. The only exception allows certain specialists to participate in order to conduct an effective and thorough physical inspection of the workplace.

Now the agency is allowing virtually anyone to accompany OSHA inspectors, including union organizers. This raises a number of important questions: Who is responsible for ensuring the non-employee receives the proper health and safety training? Is the employer liable for an accident involving this non-employee? Should safety inspections provide a Trojan horse to union bosses who want to organize a workplace? These and other concerns have not been addressed because the agency has refused to solicit public feedback.

OSHA is also denying the public the right to weigh in on its unprecedented decision to inspect family farms. Since 1978 Congress and the President have agreed to statutory language that prevents OHSA from inspecting farms with 10 or fewer employees. Yet without any notice, public review, or change in the law, OSHA issued guidance that allows for the inspection of family farms.

To justify its new policy, OSHA's flawed logic suggests anything outside the growing of crops or raising of livestock is considered "non-farming operations" and therefore subject to inspection. It would surprise most farmers to learn the storage of grain, corn, or wheat is not a vital part of their farming operation. As Chairman Kline and I noted in a recent letter to Assistant Secretary Michaels, "The guidance simply does not reflect the reality of family farming or the will of Congress [and] should be withdrawn."

I expect we will discuss in more detail these and other examples of OSHA's executive overreach during this morning's hearing. We all want to ensure America's workers are employed in safe and healthy workplaces. Unfortunately, rewriting the law through executive fiat and circumventing the public rulemaking process undermines this goal, creating confusion and uncertainty for workers and job creators. I strongly urge the administration to reverse course.

With that, I now yield to my colleague Representative Joe Courtney, the senior Democratic member of the subcommittee, for his opening remarks.

Mr. COURTNEY. Thank you, Mr. Chairman. And I want to thank you for holding this morning's hearing on the Occupational Safety and Health Administration, which was created over 40 years ago to improve workplace safety.

Yet despite the fact that it has been around for 40 years, each year thousands of workplace deaths and millions of injuries impose needless suffering on people across the country and continue to take a huge toll on the American economy. We need to do far more to ensure that workers can come home to their families in the same condition that they left in the morning.

This is the first hearing that we have held on this issue in the 113th Congress impacting workplace health and safety protection since I joined this subcommittee back in January. Protecting workplace safety and health and helping federal and state agencies tasked with this mission can and should be a high priority for our committee. It is certainly worth our committee's time to consider, as recent incidents have demonstrated, whether OSHA maintains the necessary resources and modern standards needed to provide the workplace protections that Americans need and deserve.

For example, in the past year the New York Times reported that a large number of workers have been crippled from breathing excessive amounts of a neurotoxin solvent used in adhesives for making foam cushions. OSHA has no standard to protect these workers, nor do most states, though a well-respected scientific organization recommended exposure limits at a mere fraction of the levels to which workers today—every day, right here as we are sitting here—are now being exposed. After the story broke, OSHA was

limited to issuing nothing more than an alert bulletin, at least in the near term.

Incidents like these highlight OSHA's lack of capacity to address workplace safety adequately, which this committee should tackle. In 2012 the GAO reported that with existing requirements and resources it takes, on average, from 7 years to 19 years for OSHA to issue a new health or safety standard. Because of this delay, there have been only 16 new health standards established since the creation of OSHA 4 decades ago.

For example, there is very strong scientific evidence that OSHA's limits for exposure to beryllium are far too high to protect workers from developing chronic beryllium disease. Beryllium, which was first used in nuclear weapons production, is now used in products from electronics to golf clubs.

To address the widespread health problems caused by beryllium in the 1940s, two Atomic Energy Commission scientists agreed on the limit on the way to a meeting in a taxi that are still in place today. Sometimes referred to as the "taxicab standard," this standard was basically pulled out of thin air and does little to protect workers from contracting suffocating and eventually life-ending beryllium-induced disease.

Some industries now have voluntarily agreed to cut the limit on other substances, such as styrene, to one half of the now obsolete taxicab standard, and the beryllium industry and the United Steelworkers Union have jointly asked OSHA to cut this exposure limit by 90 percent. But voluntary efforts alone are insufficient. OSHA needs to have the resources and the capacity to update standards to do more.

As Dr. David Michaels, the OSHA administrator, recently stated, "simply complying with OSHA's antiquated permissible exposure levels will not guarantee that workers will be safe", but the cumbersome standard-setting process put into place by Congress, the courts, and OMB leaves workers with outdated and inadequate protections despite the best efforts of agency officials.

Our committee needs to focus on helping OSHA address the challenges of updating outdated and outmoded health standards, which in many areas, such as beryllium, consensus actually exists between management and workers. In 2 days we are going to celebrate a sad milestone in the state of Connecticut. On February 7, 2010 there was a nuclear—excuse me, a natural gas plant under construction and they were using basically natural gas to vent the pipes—something which, you know, the large manufacturers of this, like Siemens, had been warning people was highly dangerous and should not be used; they should be using oxygen or air to clean the pipes.

But that day in Middletown, Connecticut they used natural gas to clean the pipes. There was a weld torch that was nearby. An explosion occurred and six workers lost their lives.

The police and first responders who I talked to that day said it looked like basically a battle zone when they went in there to look at the, you know, the harm that was done to those people who were just there trying to build a power plant to create, again, a good source of clean energy for the state of Connecticut.

In the wake of that, the Chemical Safety Board, which again, had been putting up the warning flags about using natural gas for venting and purging the lines, basically told people, "We have been telling you about this for years," but OSHA's hands have been tied by, again, what GAO identified as a rulemaking process which is basically defunct.

So we have got basically an agency right now that is struggling to try and deal with the fact that new production methods are taking place because the economy and science changes, and yet we have a system that is basically trapped in a set of assumptions that were created decades ago. And that really should be what this committee should be focused on is a smarter, more effective agency, as opposed to basically crippling and handcuffing the agency from doing the basic level of protecting people from processes and workplace standards that we know are dangerous, and both sides know are dangerous.

Other workplace safety issues also merit our focus. In April 2013 a massive ammonium nitrate explosion at Adair Grain killed 15, injured 160, and leveled or damaged at least 150 buildings in the town of West, Texas. And again, those 15 were first responders. Those were firemen who were rushing to the scene to try and save lives.

The last time OSHA inspected that facility was in 1985 and requirements for proper storage of this explosive material was woefully out of date. There are fewer than 2,000 inspectors to monitor the health and safety performance at more than 8 million workplaces nationwide.

With these resources, OSHA can inspect a facility about once every 131 years. Again, isn't this an issue our committee should consider?

Yet the approach of today's hearing focuses on restraining OSHA rather than delivering workers the protections they need and deserve. Instead, I hope that we can determine guidance to help OSHA be more—to more effectively protect workers, which again, there is consensus out there in many industries from both management and the workers to try and come up with better standards that help both sides in terms of more effective and efficient production of goods and services.

I want to thank our witnesses for their testimony and the one—in the case of one for his travel all the way from South Dakota to be with us today. I look forward to hearing from all of you and yield back.

[The statement of Mr. Courtney follows:]

Prepared Statement of Hon. Joe Courtney, Ranking Member, Subcommittee on Workforce Protections

I want to thank you for holding this morning's hearing on the Occupational Safety and Health Administration, which we all know as OSHA. The Occupational Safety and Health Act, which created OSHA, has improved workplace safety significantly over the past 40 years. Yet, each year thousands of workplace deaths and millions of injuries impose needless suffering on people across the country and continue to take huge toll on the American economy. We need to do far more to ensure that workers can come home to their families in the same condition as they left.

This is the first hearing we have held on issues impacting workplace health and safety protection since I joined this subcommittee in January 2013. Protecting worker safety and health and helping the federal and state agencies tasked with this

mission can and should be a high priority for our committee. It is certainly worth our committee's time to consider, as recent incidents have demonstrated, whether OSHA maintains the necessary resources and modern standards needed to provide the workplace protections that Americans need and deserve.

For example, in the past year, The New York Times reported that a large number of workers have been crippled from breathing excessive amounts of a neuro-toxic solvent used in adhesives for making foam cushions. OSHA has no standard to protect these workers, nor do most states, though a well-respected scientific organization recommended exposure limits at a mere fraction of the levels to which workers are being exposed. After the story broke, OSHA was limited to issuing an "alert" bulletin, at least in the near term.

Incidents like these highlight OSHA's lack of capacity to address workplace safety adequately, which this Committee should tackle. In 2012, the Government Accountability Office reported that with existing requirements and resources it takes, on average, from seven year to 19 years for OSHA to issue a new health or safety standard. Because of this delay, there have only been 16 new health standards established since the creation of OSHA four decades ago.

For example, there is very strong scientific evidence that OSHA's limits for exposure to beryllium, are far too high to protect workers from developing chronic beryllium disease. Beryllium, which was first used in nuclear weapons production, is now used in products from electronics to golf clubs. To address the widespread health problems caused by Beryllium in the 1940s, two Atomic Energy Commission scientists agreed on the limit on the way to a meeting that is still in place today. Sometimes referred to as the "taxi cab standard," this standard was basically pulled out of thin air, and does little to protect workers from contracting suffocating, and eventually life-ending, beryllium-induced disease.

Some industries have voluntarily agreed to cut the limit on other substances, such as styrene, to one half of the now obsolete "taxi cab" standard. And the beryllium industry and the United Steelworkers Union have jointly asked OSHA to cut this exposure limit by 90 percent. But voluntary efforts alone are insufficient. OSHA needs to have the resources and support to do more.

As Dr. David Michaels, the OSHA Administrator, recently stated: "simply complying with OSHA's antiquated Permissible Exposure Levels will not guarantee that workers will be safe." But the cumbersome standard setting process put in place by Congress, the courts, and OMB leaves workers with outdated and inadequate protections, despite the best efforts of agency officials.

Our committee needs to focus on helping OSHA address the challenges of updating outmoded health standards, but instead, my colleagues on the other side of the aisle are trying to use this hearing and other actions to further undermine OSHA at the expense of workers across this country. After all, if credible scientific research tells us more protective health standards are needed, and it is clear that they are feasible but red tape stands in the way, isn't this a problem worth addressing on a bipartisan basis?

Other workplace safety issues also merit our focus.

In April 2013, a massive ammonium nitrate explosion at Adair Grain killed 15, injured 160, and leveled or damaged at least 150 buildings in the town of West, Texas. The last time OSHA inspected that facility was in 1985, and requirements for proper storage of this explosive material are woefully out of date. There are fewer than 2,000 inspectors to monitor the health and safety performance at more than eight million workplaces nationwide. With these resources, OSHA can inspect a facility only once every 131 years, on average. Again, isn't this an issue our committee should consider?

Yet, the approach of today's hearing focuses on restraining OSHA, rather than delivering workers the protections they need and deserve. Instead, I hope we can determine guidance to help OSHA more effectively protect workers.

I want to thank our witnesses for their testimony, and in the case of one, for his travel all the way from South Dakota to be with us today. I look forward to hearing from all of you and yield back.

Chairman WALBERG. I thank the gentleman. And you bring up valid points and we really expect this hearing to be more than just a piling on OSHA, but rather looking for ways that we can partner in a better way to protect employees and employers alike and our economy.

The Connecticut incident is a tragic day in history and you do well in reminding us that. We also can remember we did have a field hearing on that particular event, and hopefully we will continue improving.

Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted into the official hearing record.

It is now my pleasure to introduce our distinguished guests.

First, Mr. Bradford Hammock is a shareholder with the law firm Jackson Lewis in Reston, Virginia and is testifying on behalf of the U.S. Chamber of Commerce. Mr. Scott VanderWal is president of the South Dakota Farm Bureau, a third generation farmer from Huron, South Dakota.

Thank you for traveling to be here with us today in the warm climate of Washington, D.C.

Ms. Randy Rabinowitz—did I get that close? Want to do my best on that—is an attorney from Washington, D.C., and has worked with a number of federal agencies. Additionally, Ms. Rabinowitz served as counsel to the Committee on Education and Labor from 1991 to 1994 under another Michigander, Bill Ford.

Mr. Maury Baskin is a shareholder with the firm Littler Mendelson in Washington, D.C., and is testifying on behalf of the National Association of Manufacturers and the Associated Builders and Contractors.

Before I recognize each of you to provide your testimony, let me briefly explain our lighting system. A number of you have had experience with it already, not unlike a stoplight at an intersection.

You will have 5 minutes to present your testimony. We will try to keep it to that as close as possible.

If it gets to the point where you see a yellow light you know you have 1 minute remaining. And when it hits red, wrap up as quickly and succinctly as possible.

After you have testified, members of this committee will have an opportunity to ask you questions and again will be held to the 5-minute standard also.

And so, having identified that, let me turn to Mr. Hammock.

We appreciate you being here. We will recognize you for 5 minutes of testimony.

STATEMENT OF BRADFORD HAMMOCK, SHAREHOLDER, JACKSON LEWIS, P.C., TESTIFYING ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. HAMMOCK. Thank you, Mr. Chairman, Ranking Member Courtney. It is a pleasure to be here. Thanks for inviting me to talk on this very important issue.

As the chairman recognized, my name is Brad Hammock, and I manage the workplace safety and health practice group at the law firm of Jackson Lewis. And today I am appearing on behalf of the U.S. Chamber of Commerce.

Before coming to Jackson Lewis in 2008 I spent 10 years at the Department of Labor in the Office of the Solicitor's Occupational

Safety and Health Division working on various matters on behalf of OSHA, including OSHA's promulgation of the ergonomics program management standard and the employer payment for PPE standard.

I also worked closely with the agency on various non-regulatory initiatives—guidance, documents, variances, letters of interpretation, the things that we are going to be talking about during today's hearing.

As a result of my experience in the Solicitor's Office, I am very familiar with how far OSHA can go in issuing guidance. Today I want to talk about how OSHA has decided to push out new policies, and in some cases new requirements, without bothering to follow the requirements of rulemaking or involving those who would be affected by these changes.

We call these actions sub-regulatory because they exist at a lower level in the hierarchy of activities, but they still have significant impacts. By using sub-regulatory actions, OSHA has avoided having to justify its actions or do any sort of impact analysis. It has also avoided having to take comments from those parties that would object.

The following are examples where OSHA has used sub-regulatory actions that resulted, may result, or would have resulted in substantive changes to regulations, policies, or employer obligations.

On October 19, 2010 OSHA published in the Federal Register a proposed new interpretation of the term "feasible" as it applies to administrative and engineering controls under the noise exposure standard. Under the new interpretation, administrative and engineering controls would have been considered economically feasible if, quote—"implementing such controls will not threaten the employer's ability to remain in business," unquote.

An independent economic analysis concluded that the potential impact of this proposal on employers would have been more than $1 billion. OSHA did no economic analysis, however, nor did OSHA submit it to OIRA for review.

Imagine, an agency puts out a new policy with a predicted impact on employers of more than $1 billion and never substantively consults the White House. Fortunately, once the impact of this non-regulatory change became known to affected stakeholders and others in the administration, OSHA withdrew it.

On February 21, 2013 OSHA issued a letter, as the chairman referred to, saying that a union representative is permitted to accompany an OSHA inspector during a walk-around inspection at a non-union workplace. This dramatic reversal in policy opens the door for unions or other organizations to convert OSHA inspections from being focused on workplace safety to being part of these outside organizations' broader organizing campaigns. And I will let Mr. Baskin discuss this letter in more detail.

On March 12, 2012 OSHA issued a memorandum to regional administrators outlining four scenarios that would constitute violations of protections for whistleblowers. Among the scenarios is one where employers implement a safety incentive program that rewards employers based on maintaining a low rate of injuries or fatalities. The problem is that incentive programs are not mentioned

anywhere in the statute, regulations, or any place giving OSHA authority to impose this restriction.

The issue of what incentive programs work in what work environments and cultures is a complicated one. If there were ever an example of a policy issue that would benefit from robust stakeholder participation it is this one. The appropriate way for OSHA to proceed on this is through a rulemaking, not through issuance of various policy documents.

On December 27th of last year OSHA issued a memorandum to the regional administrators instructing them on how to enforce combustible dust requirements in the new GHS regulation. The problem with this is that OSHA does not have a definition for combustible dust. Indeed, they still list a rulemaking on their agenda where such a definition will be developed.

To have a combustible dust hazard several conditions have to come together and they are all unique to the specific material in question. Combustible dust is a hazard that is created by how something is used. The GHS regulation requires upstream producers and importers to anticipate all the various circumstances and conditions that will be present when something is used downstream and to predict whether there will be a combustible dust hazard associated with these conditions.

The net effect of OSHA's memorandum is to codify a variety of concepts in a de facto regulation without subjecting them to any of the critical questions and processes of an actual rulemaking.

And finally, last October OSHA posted on its Web site the annotated permissible exposure limits, or annotated PELs table, comparing OSHA's permissible exposure limits with various other sets of limits. In doing so, OSHA is being openly dismissive of its own standards, which is not what guidance is supposed to do. Guidance is supposed to help employers comply with OSHA's requirements.

Mr. Chairman, OSHA has broad statutory authority to promulgate new standards and regulations. The rulemaking requirements in the OSH Act and other relevant statutes are there for good reasons.

This OSHA, however, has aggressively pushed out new policies, imposing substantive changes on employers without satisfying these requirements. These actions undermine the credibility of the agency and the respect it should have, thus interfering with the agency's mission of working to improve workplace safety.

Thank you, Mr. Chairman.

[The statement of Mr. Hammock follows:]

Prepared Statement of Bradford Hammock, Shareholder, Jackson Lewis, P.C., Testifying on Behalf of the U.S. Chamber of Commerce

Good morning, I am Brad Hammock, and I manage the Workplace Safety and Health Practice Group at the law firm of Jackson Lewis. Today I am appearing on behalf of the U.S. Chamber of Commerce. Jackson Lewis is a member of the Chamber and I participate in its Labor Relations Committee and OSHA Subcommittee.

Introduction

Before coming to Jackson Lewis in 2008, I spent 10 years at the Department of Labor in the Office of the Solicitor's Occupational Safety and Health Division, working on various matters on behalf of OSHA. I worked specifically on OSHA's regulatory program, including serving as Counsel for Safety Standards for the last few years of my tenure there.

When I originally joined the Department during the administration of President Clinton, I spent most of my first few years working with OSHA to promulgate its Ergonomics Program Management standard. During my career, I also assisted OSHA in finalizing major regulatory initiatives such as the Employer Payment for PPE standard, OSHA's update to its electrical utilization standard, and others.

Of course, I also worked closely with the agency on various non-regulatory initiatives during my tenure with OSHA—guidelines, variances, letters of interpretation. I helped produce OSHA's ergonomics program guidelines and other compliance assistance materials.

As a result of my experience in the Solicitor's office I am very familiar with how far OSHA can go in issuing guidance. Generally speaking, "guidance" is anything short of a full regulation. Most importantly, OSHA cannot make new policy or create new obligations through guidance, and yet, in the examples I will describe, OSHA has repeatedly crossed that line.

Today I want to talk about how OSHA has decided to push out new policies and in some cases new requirements, without bothering to follow the requirements of rulemaking or involving those who would be affected by these changes.

We call these actions "subregulatory" because they exist at a lower level in the hierarchy of activities, but still have significant impacts. Subregulatory actions are substantive changes without transparency, input from affected parties, or accountability. They can include guidance documents like OSHA interpretations, new compliance directives, or memoranda to field staff. By using this approach, OSHA has avoided having to justify its actions or do any sort of impact analysis. It has also avoided having to take comments or any input from those parties that would object. The agency has also avoided having to get clearance from relevant offices in the Department of Labor or the administration that normally serve as a check on OSHA going too far.

These are executive dictates which are harder to challenge than regulations. The difficulty in challenging them is one of the key reasons that OSHA is not supposed to create new policy this way; accountability is at the heart of our system of government and if an agency is allowed to implement new policy in this manner, no less than the rule of law will be undermined.

The following are examples where OSHA has used subregulatory actions that resulted, may result, or would have resulted, in substantive changes to regulations, policies, or employer obligations.

Examples of Subregulatory Actions

- *Proposed Interpretation of "Feasible" Under Noise Exposure Standard*

On October 19, 2010, OSHA published in the Federal Register a proposed new interpretation of the term "feasible" as it applies to administrative and engineering controls under the noise exposure standard. Currently, OSHA's enforcement policy gives employers considerable latitude to rely on personal protective equipment (such as ear plugs or ear muffs) when noise protection is required rather than forcing employers to use engineering (such as sound dampening or other technology) controls, or administrative controls (such as use of regulated areas).

Under the new interpretation, administrative and engineering controls would have been considered economically feasible if "implementing such controls will not threaten the employer's ability to remain in business," in other words, anything that would not put the business out of business would have been considered "feasible." An independent economic analysis concluded that the potential impact of this proposal on employers would have been more than $1 billion. Because this was styled as only a reinterpretation, OSHA did no economic analysis.

The Chamber objected that such a major change warranted a full rulemaking rather than a mere reinterpretation without any of the protections associated with the regulatory process. This example is the exception in that OSHA published it in the Federal Register, but since it was only an interpretation, there were none of the usual elements of a rulemaking such as analyses of how much it would cost or the impact on small businesses. There was also no guarantee that any comments submitted would have had an impact or that OSHA would respond to them as with a proposed regulation. As this was merely an interpretation and not a rulemaking, OSHA also never bothered to submit it to the Office of Information and Regulatory Affairs for review.

Imagine—an agency puts out a new policy with the predicted impact on employers of more than $1 billion and never substantively consults the White House! Fortunately, once the impact of this non-regulatory change became known to affected stakeholders and others in the administration, OSHA was forced to withdraw it.

- *Letter of Interpretation Permitting Union Representatives to Accompany an OSHA Inspector at Non-Union Workplaces*

On February 21, 2013, OSHA issued a letter of interpretation saying that a union representative is permitted to accompany an OSHA inspector during a walk-around inspection at a non-union workplace. The LOI was in response to a request from the United Steel Workers.

This dramatic reversal opens the door for unions to convert OSHA inspections from being focused on workplace safety to being part of union organizing campaigns.

The relevant regulations explicitly state that any employee representative "shall be" an employee of the employer, unless the OSHA inspectors believe "good cause has been shown" to include someone with special expertise who can aid in the inspection. In practice, OSHA has restricted these non-employee third parties to people with specific qualifications such as industrial hygienists or safety engineers. OSHA blew right past this narrow exception and context to say that employees can now designate any union representative, community activist, or any other third party as their representative during OSHA inspections.

In issuing this LOI, OSHA contradicted the regulations, their own past practice, and other internal processes and procedures. And they did this with absolutely no input from outside sources except the United Steel Workers who asked for the LOI. I would also note that OSHA managed to issue this letter with unusual efficiency—the request was made in December 2012 and the letter was issued in February 2013, barely two months later and spanning the busy holiday season. The alacrity with which this letter was issued raises questions in my mind as to whether it was fully vetted within the Department prior to issuance. In my experience working inside the Department of Labor, letters of interpretation typically took several months and often years to finalize.

I am submitting, as part of my statement, a letter sent to Assistant Secretary Michaels from the Coalition for Workplace Safety raising detailed objections to this LOI. The letter is co-signed by 60 groups.

- *Whistleblower Memorandum Banning Employer Rate-Based Safety Incentive Programs*

On March 12, 2012, OSHA issued a memorandum to regional administrators outlining four scenarios that would constitute violations of protections for whistleblowers. Among the scenarios is one where employers implement a safety incentive program that rewards employees based on maintaining a low rate of injuries or fatalities. The problem is that incentive programs are not mentioned anywhere in the statute, regulations, or any place giving OSHA authority to impose this restriction. Despite this utter lack of authority and context, OSHA created a consequence for employers who maintain these programs.

By putting this in a memorandum to the regional administrators OSHA avoided possible involvement from those affected by this new policy. They also avoided getting clearance from any other office in the Department of Labor or the administration. The agency decided this was justified without providing any supporting authority, analysis about impact, or indications of benefits.

For the duration of this administration, OSHA has held the belief that employers are using rate-based incentive programs to suppress employees from reporting injuries. OSHA has used a number of "techniques" to try to prove its point, starting with its Recordkeeping National Emphasis Program, which also targeted incentive programs in the context of enforcement actions. Assistant Secretary Michaels has also spoken publicly on OSHA's concerns with certain safety incentive and bonus programs. Rhetorically, the agency has told employers to stop focusing on "lagging indicators" such as injury rates.

And yet, ironically OSHA is actually not encouraging employers to focus on leading indicators, but instead continuing to focus its energy on injury rates. The Department has proudly proclaimed that in corporate wide settlements with employers, they are holding management accountable for safety. This means that they are imposing responsibility on these employers for the number of injuries that occur in their workplaces—rate based incentive programs by another name. Virtually all of the enforcement programs issued by the agency are driven at some level by the reported injury rates of employers. OSHA never considers leading indicators in determining which employers it will inspect. And the agency takes a very narrow view of "success" of employers in addressing safety—and that success is solely based on lagging indicators such as injury rates.

The issue of what incentive programs work in what work environments and cultures is a complicated one. Incentive programs work within the broader rules and policies of establishments and cannot be pigeon-holed as good or bad in the abstract.

If there were ever an example of a policy issue that would benefit from robust stakeholder participation, it is this one.

If OSHA feels so strongly that rate-based incentive programs are being used to suppress injury reporting, the only way for OSHA to proceed is through a rulemaking where the agency cites to the authority they have to issue such a regulation, provides a clear and understandable definition of what they want to prohibit, provides data and supporting materials showing that these programs are a problem, and of course conducts the necessary feasibility, cost, benefit, and impact on small business analyses required by the Occupational Safety and Health Act of 1970 and other relevant statutes. This is bad policy, badly made.

- *Memorandum to Field Staff on Enforcing Combustible Dust Requirement Under GHS*

On December 27 of last year, OSHA issued a memorandum to the regional administrators instructing them on how to enforce the combustible dust requirement in the new Globally Harmonized System for Classification and Labeling of Chemicals (GHS) regulation that modified the old Hazard Communication Standard (HCS). The problem with this is that OSHA still does not have a definition for combustible dust—indeed they still list a rulemaking on their agenda where such a definition will be developed. Despite this obvious difficulty, OSHA inserted into the final version of the GHS regulatory language requiring manufacturers and shippers of materials that could create a combustible dust hazard to label their products and for users of these products to train their employees on the hazard. Not only is this regulatory requirement not supported by a clear definition, it was not even included in the proposed rule.

As even OSHA must concede, combustible dust is not a simple hazard, which is why they have a specific rulemaking underway to determine how it should be defined and regulated. To have a combustible dust hazard, several conditions have to come together and they are all unique to the specific material in question. Combustible dust is also unlike any other hazard covered by the GHS/HCS, as it is not intrinsic to the substance. Under the GHS/HCS, chemicals and substances are classified by their intrinsic characteristics—an acid is always an acid, a corrosive is always a corrosive, something flammable like gasoline is always flammable. But combustible dust is a hazard that is created by how something is used—a block of wood does not present a combustible dust hazard until it is cut and creates sawdust in sufficient quantity, and an ignition source like a spark is present to set off an explosion. The GHS regulation requires upstream producers and shippers to anticipate all the various circumstances and conditions that will be present when something is used downstream and to predict whether there will be a combustible dust hazard associated with these conditions.

To get around the fact that OSHA does not have a properly developed definition of combustible dust, along with other criteria necessary to enforce this provision, OSHA's memorandum relies on various outside standards and protocols such as those from the American Society for Testing and Materials (ASTM) and the National Fire Protection Association (NFPA). OSHA also references an earlier National Emphasis Program that had an "operative definition." But none of these have been properly reviewed or tested so that OSHA can rely on them or cite them for enforcement purposes. The net effect of this memorandum is to codify these various concepts in a de facto regulation without subjecting them to any of the critical questions and processes of an actual rulemaking, least of all public comment. In addition, these standards are only available by purchasing them from the groups that produce them. OSHA is expecting companies to go buy these standards.

OSHA violated the requirements for issuing a standard when they included the combustible dust requirement in the final text without proposing it and without having an adequate definition or appropriate support for how this hazard is to be handled. And now they have compounded that error by relying on outside standards and protocols without providing any opportunity for comment or demonstrating that these have been subjected to the necessary questions of feasibility and reliability. Ironically, OSHA already has the necessary rulemaking underway where all of these issues should be handled.

OSHA's inclusion of combustible dust in the GHS is the subject of a legal challenge to this rule.

The memorandum is attached as an appendix to my statement.

- *Guidance on Alternative Exposure Standards Other Than OSHA PELs*

Last October, OSHA posted on its website the Annotated Permissible Exposure Limits, or annotated PELs tables. OSHA's goal is to promote the use of these lower

limits even though employers will only be held accountable for complying with OSHA's official limits.

The annotated PELs tables provide a side-by-side comparison of OSHA PELs for general industry to the California Division of Occupational Safety and Health PELs, the National Institute for Occupational Safety and Health recommended exposure limits, and the American Conference of Governmental Industrial Hygienist threshold limit values. OSHA is being openly dismissive of its own standards which is not what guidance is supposed to do; guidance is supposed to help employers comply with OSHA's requirements.

The Chamber agrees that many of OSHA's PELs are out of date and need to be reexamined. We are concerned however, by the way OSHA has chosen to promote these alternative limits. While Assistant Secretary Michaels has said OSHA is reluctant to use the General Duty Clause to enforce these other limits, the threat still exists. One criterion for using the General Duty Clause is that OSHA must prove that a given hazard is well understood. These new tables showing the alternative exposure limits could be used by OSHA to satisfy its burden.

Were OSHA to enforce these alternative standards through the General Duty Clause, it would be the equivalent of another de facto rulemaking where the agency would be codifying standards that have not been put through the rigors of rulemaking, including notice and comment and reviews of economic and technological feasibility.

Once again, if OSHA believes that new health standards are necessary, they have a process available to them to make those happen.

Conclusion

OSHA has broad statutory authority to promulgate new standards and regulations. The rulemaking requirements in the OSH Act and the other relevant statutes are there for good reasons—to make sure the agency only implements new policies and obligations after it has demonstrated the need, provided adequate supporting data, conducted the necessary reviews for impacts and feasibility, and provided interested parties ample opportunity to submit comments and other forms of input.

This OSHA, however, has aggressively pushed out new policies, imposing substantive changes on employers, without satisfying these requirements. For any administration this would be a troubling pattern. For an administration that came into office promising to be the most transparent, this is both troubling and hypocritical. These actions undermine the credibility of the agency and the respect it should have, thus interfering with the agency's mission of working to improve workplace safety.

APPENDIX

June 12, 2013

The Honorable David Michaels, PhD, MPH
Assistant Secretary
Occupational Safety and Health Administration
United States Department of Labor
200 Constitution Avenue, NW, Room S2315
Washington, DC 20210

By electronic transmission

RE: Letter of Interpretation Endorsing Union Representatives on Walk-Around Inspections at Non-Union Workplaces

Dear Dr. Michaels:

OSHA's February 21, 2013 letter of interpretation addressed to Mr. Steve Sallman of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (LOI) that explicitly endorses union representatives and other non-employee third parties accompanying OSHA inspectors on walk-around inspections at non-union workplaces is very alarming. It has quickly become a matter of high concern among members of the Coalition for Workplace Safety, their employers, and attorneys representing employers on OSHA issues. Similarly, the LOI is also generating significant anxiety among companies, and the attorneys representing them, who are concerned about being targeted by unions in either the organizing or contract negotiating contexts. In addition to being inconsistent with the statute and regulations, this letter of interpretation is bad policy implemented through a non-transparent closed process.

The overwhelming consensus is that this will undermine the safety focus of these inspections and turn them into opportunities for unions or other parties with agendas contrary to the employer to enhance campaigns against the employer, gain entry to the employer's premises to develop more information for the campaign, or even glean proprietary information. It will place OSHA in the middle of organizing drives or labor contract negotiations and will put the Compliance Safety and Health Officer (CSHO) in an untenable position: either he/she rejects the employee's request to have a union representative on the walk-around, contrary to this letter of interpretation, or he/she permits it, which would make OSHA appear to be taking sides in an organizing campaign contrary to the Field Operations Manual.

Marc Freedman mfreedman@uschamber.com / Josh Ulman josh@ulmanpolicy.com
Sean Thurman thurman@abc.org / Amanda Wood awood@nam.org
www.workingforsafety.com

Other complications of this policy are making sure the union representative, community organizer, or third party has adequate workplace safety protection, does not present a risk to the safety or security of the facility, and does not have access to confidential business information. Many workplaces have explicit policies preventing anyone not specifically authorized from entering the workplace. Is the employer expected to provide PPE for a non-employee to accompany a CSHO on a walk-around inspection? How is the employer to know whether this individual has adequate knowledge of the potential hazards that may be present? Who is responsible if the third party non-employee is injured? Who is responsible for conducting background screening of the third party for security risk, criminal background, and other factors, especially in facilities that are subject to Department of Homeland Security regulation? Since there will be no workers' compensation coverage for the non-employee third party, can the employer require the third party to sign a waiver holding the employer harmless for any injury or other consequence of being in the workplace?

While the statute and regulations permit employees to designate a representative to accompany the OSHA inspector, they do so in the context of the representatives being included "for the purpose of aiding such inspection." (29 U.S.C. 657 (e)). OSHA's letter would permit union representatives, or other third parties, to accompany OSHA inspectors on walk-around inspections at any workplace, including those without a union, for reasons far beyond this context, indeed without any relationship to this context.

OSHA's regulations are clear that the employee representative must also be an employee of the company: "The representative(s) authorized by employees shall be an employee(s) of the employer." (29 CFR 1903.8(c), emphasis added). The only circumstances under which a non-employee would be included in the inspection process would be "if in the judgment of the CSHO, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection." (29 CFR 1903.8 (c), emphasis added). In the more than 40 years since 29 CFR 1903.8 was issued[1], during which time OSHA has conducted approximately 30,000 – 40,000 inspections *per year*, the agency has consistently followed a practice of bringing in (neutral) third parties to participate in inspections *only* when that third party had special expertise that was beyond what the CSHO possessed and was "necessary to the conduct of an effective and thorough physical inspection of the workplace." These third parties were selected by OSHA, *not* the employees, to be part of the inspection.

The letter of interpretation ignores the explicit requirement indicated by "shall be an employee"[2] and focuses on the narrow circumstances in which non-employees have been used by OSHA. However, the letter expands those circumstances well beyond the context of

[1] See, 36 Fed. Reg. 17850, September 4, 1971.

[2] The letter of interpretation dismisses this by noting that "the regulation acknowledges that most employee representatives will be employees of the employer being inspected." "Most employee representatives will be employees" is not at all consistent with the regulatory mandate that employee representatives "shall be employee(s) of the employer." The LOI language suggests that whether employee representatives are also employees of the employer is a matter of chance rather than a requirement.

providing for someone who can aid the inspection, and puts the selection in the hands of the employee rather than OSHA, while also diminishing the CSHO's ability to control who is involved in the inspection, thereby substantively altering the meaning of 29 CFR 1903.8(c):

> Therefore, a person affiliated with a union without a collective bargaining agreement or with a community representative can act on behalf of employees as a walkaround representative so long as the individual has been authorized by the employees to serve as their representative….
>
> The Secretary's regulations, 29 C.F.R. § 1903.8, qualify the walkaround right somewhat, but only in order to allow OSHA to manage its inspections effectively.
> (Letter to Steve Sallman, February 21, 2013, page 2, emphasis added.)

Finally, the Field Operations Manual gives CSHOs explicit instructions to avoid creating the impression that OSHA is taking sides in any labor dispute during unprogrammed inspections such as those occurring because of an accident, fatality or complaint: "During the inspection, CSHOs will make every effort to ensure that their actions are not interpreted as supporting either party to the labor dispute." (Field Operations Manual, Chap. 3, (IV)(H)(2)(c), emphasis added). Allowing union representatives to accompany a CSHO during an inspection triggered by a complaint, such as what happens during organizing campaigns and during contract negotiations, would be absolutely contrary to this instruction.

The fact that this significant change in policy was done through a letter of interpretation and not a rulemaking, although it substantively changes the regulation, means that affected parties had no opportunity to provide input, and OSHA had no obligation to present any data or evidence demonstrating the need for this change. Using this approach to circumvent the protections of the rulemaking process undermines this administration's claims of transparency and openness in its policy setting.

We understand the letter of interpretation was not reviewed by the Secretary's office, which also raises questions about whether any office outside of OSHA had an opportunity to review this and to consider the problems it will create and the overt bias it exposes. In addition, this letter was issued (but not made public) barely two months after the request was submitted. For OSHA to respond so quickly raises questions about whether the agency knew in advance the request was being submitted.

Accordingly, rather than inappropriately attempting to amend by interpretation a final rule to create new rights that are inconsistent with the emphasis on workplace safety that should characterize OSHA inspections, and the way the rule has been interpreted and implemented by OSHA in the well over a million inspections it has conducted over the past 42 years, the letter should be withdrawn. If OSHA believes this approach is worth pursuing, the only way for the agency to proceed is to engage in a full rulemaking process to modify 29 CFR 1903.8(c). To discuss this further please contact any of the names listed on the first page of this letter.

Sincerely,

American Bakers Association
American Beverage Association
American Chemistry Council
American Composites Manufacturers Association
American Council of Engineering Companies
American Feed Industry Association
American Foundry Society
American Petroleum Institute
American Trucking Associations
Associated Builders and Contractors
Associated General Contractors
Associated Wire Rope Fabricators
California Cotton Ginners Association
California Cotton Growers Association
Can Manufacturers Institute
Corn Refiners Association
Flexible Packaging Association
Food Marketing Institute
Forging Industry Association
Heating, Air-Conditioning & Refrigeration Distributors International
Hilex Poly
Independent Electrical Contractors
Industrial Fasteners Institute
Industrial Minerals Association – North America
Institute of Makers of Explosives
International Foodservice Distributors Association
International Franchise Association
International Liquid Terminals Association (ILTA)
LeadingAge
Motor & Equipment Manufacturers Association
National Association for Surface Finishing
National Association of Chemical Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Chicken Council
National Council of Chain Restaurants
National Grain and Feed Association
National Oilseed Processors Association
National Retail Federation
National Roofing Contractors Association
National Stone, Sand & Gravel Association
National Systems Contractors Association
National Tooling and Machining Association

National Turkey Federation
National Utility Contractors Association
NFIB
Non-Ferrous Founders' Society
North American Die Casting Association
Precision Machined Products Association
Precision Metalforming Association
Retail Industry Leaders Association
Texas Cotton Ginners Association
Textile Rental Services Association
U.S. Chamber of Commerce
U.S. Poultry & Egg Association
Western Agricultural Processors Association

CC: Dominic Mancini, Acting Administrator, Office of Information and Regulatory Affairs
Rep. John Kline, Chairman, House Committee on Education and the Workforce
Rep. Tim Walberg, Chairman, Subcommittee on Workforce Protections, House Committee on Education and the Workforce
Sen. Lamar Alexander, Ranking Member, Senate Committee on Health, Education, Labor and Pensions
Sen. Johnny Isakson, Ranking Member, Subcommittee on Employment and Workplace Safety, Senate Committee on Health, Education, Labor and Pensions

UNITED STATES DEPARTMENT OF LABOR

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OSHA

Standard Interpretations - Table of Contents

• **Standard Number:** 1910.1200(d); 1910.1200

December 27, 2013

MEMORANDUM TO: REGIONAL ADMINISTRATORS

THROUGH: Dorothy Dougherty
Acting Deputy Assistant Secretary

FROM: Thomas Galassi, Director
Directorate of Enforcement Programs

SUBJECT: Classification of Combustible Dusts under the Revised Hazard Communication Standard

This memorandum provides guidance for compliance safety and health officers (CSHOs) to use in determining whether manufacturers or importers have properly classified their products[1] for combustible dust hazards under the revised Hazard Communication Standard (HCS). This guidance shall be used when inspecting manufacturers and importers, usually from referrals concerning inadequate or inappropriate labels or SDSs are conducted, not inspections of downstream users. Until OSHA addresses these issues through rulemaking, CSHOs shall use this document to determine if manufacturers and importers (from now on "classifier") are in compliance with the obligations of 1910.1200(d) for combustible dust. CSHOs may direct any questions that arise in applying this guidance to the Directorate of Enforcement Programs or the Salt Lake Technical Center (SLTC).

Background

On March 26, 2012, OSHA amended the HCS to align with the Globally Harmonized System for the Classification and Labelling of Chemicals (GHS). However, the GHS does not contain a classification for combustible dust hazards, and to maintain coverage of this hazard under the HCS, OSHA amended the standard's definition of "hazardous chemical" to include "combustible dust[2]." Noting ongoing efforts at the United Nations (UN) and in the Agency's own combustible dust rulemaking, OSHA did not adopt a definition of the term combustible dust in the final rule. Rather, as an interim measure, OSHA stated that it had already provided guidance on combustible dust, including the Combustible Dust National Emphasis Program (NEP), which "includes an operative definition." 77 FR 17705. OSHA also noted that a number of voluntary consensus standards exist, "particularly those of the NFPA," which provide further guidance. *Id.*

Compliance Guidance

Under the HCS, classifiers are required to "evaluate chemicals produced in their workplaces or imported by them to classify the chemicals in accordance with this section." 29 CFR 1910.1200(d)(1). Any such classification must "identify and consider the full range of available scientific literature and other evidence concerning the potential hazards." 1910.1200(d)(2). However, there "**is no requirement to test the chemical to determine how to classify its hazards.**" *Id.* The classifier must consider not only the hazards of the chemical in the form it is shipped, but also consider the hazards that arise under normal conditions of use and foreseeable emergencies. When performing inspections of classifiers, CSHOs must ensure that the requirement to consider normal conditions of use and foreseeable emergencies is followed by the classifier.

The combustible dust NEP defines combustible dust as a solid combustible material, composed of distinct pieces or particles, that "presents a fire or deflagration hazard when suspended in air or some other oxidizing medium over a range of concentrations, regardless of particle size or shape." A number of voluntary standards prepared by the National Fire Protection Association (NFPA), FM-Global, and ASTM International suggest various tests, data, and criteria that may be used to determine whether a material presents a combustible dust hazard.

As noted above, classifiers must consider any hazards posed by the product in normal conditions of use and foreseeable emergencies, and must consider the full range of available information about those hazards. For combustible dusts, often the best information is actual experience with the product. If the classifier knows that its product has been involved in a deflagration or dust explosion event, the classifier should classify the product as a combustible dust unless the classifier can show that the conditions surrounding the event are not expected in normal conditions of use or foreseeable emergencies. In the absence of information on a deflagration or dust explosion event, classifiers may use one or more of the following approaches in determining whether such hazards exist, depending on the information that is available.

1. **Laboratory Testing.**

   All of the voluntary standards recognize that reliable test data for a material, based on scientifically validated tests, is strong evidence for determining whether a material presents a combustible dust hazard and should be used for classification if available. Reliable screening tests, such as that described in ASTM E1226[3], showing a positive normalized rate of pressure rise (Kst), and tests for Class II dusts may be used to determine whether a material presents a combustible dust hazard, and classification should be based on such data if it is available. Many voluntary standards recognize the ASTM E1226 and E1515[4]

methods as reliable means to establish a combustible dust hazard. When performing inspections of classifiers CSHOs must obtain and evaluate any appropriate and available test results for the product to ensure the classification accurately reflects the hazards of the chemical.

OSHA's combustible dust NEP describes its own test method for determining the Kst, and the NEP treats a dust as presenting the hazard when the Kst is greater than zero. In addition, the NEP describes OSHA's method for determining whether a dust is a Class II dust for purposes of the electrical standard, which is also an indication that a dust presents a combustible dust hazard. If laboratory data (e.g., company-generated data or regulatory body test results for the product) are available and the classifier chooses not to classify based on this data, the CSHO must ensure that classifier can adequately explain why this data was not used in the classification.

2. **Published Test Results.**

NFPA 61[5] , 68[6] , 484[7] , and 499[8] publish lists of test results for various materials. Though the NFPA documents caution care in the use of these results because the extent of explosibility can vary even for different dusts of the same solid material, they nonetheless can "aid in the determination of the potential for a dust hazard to be present in [an] enclosure." NFPA 61, A.6.2.1 (2013).

As a part of a poster about combustible dust hazards, OSHA has published a list of combustible materials based on the information provided in the NFPA standards (https://www.osha.gov/Publications/combustibledustposter.pdf). In addition, there are public databases of dust explosibility characteristics that may be consulted, such as the "Gestis-Dust-EX" database maintained by the Institute for Occupational Safety and Health of the German Social Accident Insurance (http://www.dguv.de/ifa/en/gestis/expl/index.jsp).

In the absence of any test data for a particular product, the classifier may rely on published test data for the classification of dusts if the data is for a material that is substantially similar to the product under review. Where the classifier has not classified its product as presenting a combustible dust hazard and the CSHO finds positive published data for a material that appears similar, the CSHO must ensure that the classifier has an adequate explanation for discounting the data.

3. **Dust Particle Size.**

For many years, NFPA 654[9] defined combustible dust as a "finely divided solid material 420 microns or smaller in diameter (material passing a U.S. No. 40 Standard Sieve) that presents a fire or explosion hazard when dispersed and ignited in air." OSHA used this definition in earlier combustible dust guidance, such as its 2005 safety and health information bulletin, and uses a similar criterion in defining "fugitive grain dust" in its Grain Handling Facilities Standard (see 29 CFR 1910.272(c)). Some NFPA standards still use a size criterion in defining combustible dust, such as NFPA 61 (2013) and NFPA 704 (2012)[10] .

Other NFPA standards, however, have changed their combustible dust definition to remove the size criterion, but discuss size in their explanatory notes. In general the notes concerning particle size state that dusts of combustible material with a particle size of less than 420 microns can be presumed to be combustible dusts. However, certain particles, such as fibers, flakes, and agglomerations of smaller particles, may not pass a No. 40 sieve but still have a surface-area-to-volume ratio sufficient to pose a deflagration hazard. In the most recent revisions, the explanatory notes in many of the NFPA standards have moved from a 420 to 500 micron size threshold. *See* NFPA 484 (2013), NFPA 654 (2013), NFPA 664[11] (2012) and FM Global Data Sheet 7-76 (2013)[12] .

Where there is no test data, or if the testing is inconclusive, classification may be based on particle size, if particle size information is available. If the material will burn and contains a sufficient concentration of particles 420 microns or smaller to create a fire or deflagration hazard, it should be classified as a combustible dust. A classifier may, if desired, instead use the 500 micron particle size (U.S. Sieve No. 35) threshold contained in more recent NFPA standards. Care must be used with this approach where the particles are fibers or flakes, or where agglomerations of smaller particles may be held together by static charges or by other means that would prevent the dust from passing through respective sieves No. 40 and 35, but would still present a fire or deflagration hazard.

Summary

In summary, when conducting inspections of classifiers, CSHOs should determine how classifiers have handled the available evidence about a product's explosibility. Where there is evidence that the product has actually been involved in a deflagration or dust explosion event, it should be classified as a combustible dust. Similarly, where results of accepted tests on the product are available, the dust should be classified in accordance with those results. Finally, in the absence of actual events or test data on the product, the classifier may either rely on the published test data on similar materials or use the available information about particle size to determine the combustible dust hazard of the product.

This guidance is not intended to be exclusive, and classifiers may have other reliable methods to establish whether their product does or does not present a combustible dust hazard in normal conditions of use and foreseeable emergencies. CSHOs should consider such claims carefully, and in such cases consultation with the Directorate of Enforcement Programs and/or the SLTC is strongly encouraged.

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1 The Hazard Communication Standard's classification requirements apply to "chemicals," 29 CFR 1910.1200(d)(1), which is defined as "any substance or mixture of substances," 1910.1200(c). The word "product" in this memorandum is intended to be understood as a synonym of "chemical" as defined in the standard.

2 While the GHS requires dust explosion hazards to be noted on the safety data sheet, it does not include a chapter or classification criteria for combustible dusts.

3 ASTM E1226: Standard Test Method for Explosibility of Dust Clouds.

4 ASTM E1515: Standard Test Method for Minimum Explosible Concentration of Combustible Dusts.

5 NFPA 61: Standard for the Prevention of Fires and Dust Explosions in Agricultural and Food Processing Facilities.

6 NFPA 68: Standard on Explosion Protection by Deflagration Venting.

7 NFPA 484: Standard for Combustible Metals.

8 NFPA 499: Recommended Practice for the Classification of Combustible Dusts and of Hazardous (Classified) Locations for Electrical Installations in Chemical Process Areas.

9 NFPA 654: Standard for the Prevention of Fire and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids.

10 NFPA 704: Standard System for the Identification of Hazardous Materials for Emergency Response.

11 NFPA 664: Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities.

12 FM Global Property Loss Prevention Data Sheet 7-76: Prevention and Mitigation of Combustible Dust Explosion and Fire.

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Chairman WALBERG. I thank the gentleman.

Now I recognize Mr. VanderWal for your 5 minutes of testimony.

STATEMENT OF SCOTT VANDERWAL, PRESIDENT, SOUTH DAKOTA FARM BUREAU

Mr. VANDERWAL. Mr. Chairman, members of the committee, thank you very much for the invitation, and I appreciate the opportunity to provide testimony on a matter of great importance this morning to family farms—small family farms.

My name is Scott VanderWal. I am a third-generation corn and soybean farmer at Volga, South Dakota. Our state office is here, Mr. Chairman, so that is where you got that information.

We also operate a beef, cattle feedlot where most of our corn is fed to the cattle. We ourselves have storage facilities for corn and soybeans for later feeding and later sale.

I am pleased to offer this testimony on my own behalf this morning as well as that of the American Farm Bureau, where I sit on the board of directors.

Throughout history Congress has worked to preserve and protect the unique nature of the ag sector and family farming operations. They have done this in a number of instances, but one in particular has been consistently assuring that OSHA does not spend time, energy, and public resources investigating routine activities on small family farms.

Specifically, since 1976 in every appropriations bill Congress has exempted small farming operations that did not maintain a temporary labor camp and that employ 10 or fewer employees from OSHA enforcement regulations.

Despite this clear direction from Congress, OSHA has drafted investigator guidance, conducted investigations, and penalized farming operations in complete disregard for a law that has been on the books for nearly 4 decades.

In a June 2011 memo OSHA declares that post-harvest activities, including drying and fumigating grain, are subject to all OSHA requirements. OSHA goes further to say that small farm employers

mistakenly assume that the appropriations rider applies regardless of the type of operations performed on the farm.

Farm Bureau agrees that there is a mistake here, but it is not with the small farm employers. Instead, OSHA mistakenly assumes what is integral to a farming operation and has thereby circumvented clear congressional direction.

OSHA appears to take the position that any activity that takes place after a kernel is severed from a stalk is subject to OSHA regulation and enforcement. To anyone familiar with agriculture, this is simply an illogical position. Post-harvest activities, like drying, are necessary to prepare crops for sale and are fundamental in any farming operation.

The purpose in planting, cultivating, and harvesting the crop is to sell the crop. Farmers are not merchandisers, dealers, or grain warehousers. Drying and storage facilities are part of our marketing programs.

If we were to sell all of our grain at harvest when prices are generally at the low for the year we would be missing out on profit opportunities. That is not good stewardship. To be totally honest with you, I simply cannot wrap my mind around the concept that grain bins are not a vital part of a farm operation.

Now, it is important to note that OSHA's jurisdiction is over the safety of employees. That has to be job number one. OSHA's authority only stems from the number of employees a farm has and whether there is a labor camp on the farm. The amount of grain stored is unrelated to the authority over small farming operations.

Congressional intent is clear, and Congress has again reiterated the small farm exemption in the fiscal year 2013 Appropriations Act report. The report reinforces the small farm exemption and suggests that OSHA should work with USDA before moving forward with any attempts to redefine and regulate post-harvest activities.

Additionally, both the Senate and the House, including members of this subcommittee, sent letters to OSHA directing the agency to stop enforcement under the 2011 memo. We are grateful that Congress included the report language and sent these letters, and to any persons in here who were involved in that, we certainly appreciate that and want to thank you.

We also encourage OSHA to meet and discuss potential safety alternatives with Farm Bureau and the industry at large.

Farm Bureau remains committed to grain bin and farm safety in general. We work every day to ensure that everyone who is working on our farms is trained and safe, and in most of these cases they are family members, so obviously family farmers are going to make sure that their children are trained and safe.

In South Dakota Farm Bureau our women's leadership team had a scale-model grain bin built, and it is about this high off the floor, and they cut it in half and put Plexiglas on one side so they can fill it with corn and then they put little plastic figures to represent people in there, and as the grain flows out of the bin it shows how those plastic figures are pulled down into the grain and suffocated. And it is quite an eye-opening experience when you actually see it.

Had OSHA reached out to Farm Bureau and others in the industry we would have been eager to work with them to develop addi-

tional safety training programs if necessary to prevent injury. However, rather than working cooperatively with industry, OSHA apparently reached the conclusion that it was preferable to penalize small farmers through enforcement.

Circumventing a clear legislative directive is not an acceptable solution. We remain committed to working with OSHA, USDA, and the industry as a whole in doing the utmost to ensure worker safety on all farms.

At the same time, we urge Congress to take action that prevents this type of regulatory overreach. Safety is priority number one, but this is not the way to achieve it.

Thank you for the opportunity to testify today, and I would be glad to take any questions.

[The statement of Mr. VanderWal follows:]

Prepared Statement of Scott VanderWal, President, South Dakota Farm Bureau Federation

Mr. Chairman and members of the committee, thank you for this opportunity to provide testimony to the subcommittee on a matter of great importance to small family farms. My name is Scott VanderWal. I am a third-generation corn and soybean farmer in Volga, South Dakota. I am pleased to offer this testimony on my own behalf, as well as that of the American Farm Bureau Federation (AFBF), where I sit on the board of Directors. We appreciate the subcommittee's interest in overreaching enforcement activity of the Department of Labor (DOL) Occupational Safety and Health Administration (OSHA) against agricultural producers. From increased delays in the H-2A visa program and the withdrawn overreaching child labor proposal, agriculture has seen an increase in the amount of DOL investigation in recent years. We believe many of these investigations are in areas where agency authority is limited, if not entirely restricted, by Congress.

Congress has historically worked to preserve and protect the unique nature of the agricultural sector and family farming operations. They have done this in a number of instances, but one in particular has been in consistently assuring that OSHA does not spend time, energy and public resources investigating routine activities on small family farms. Specifically, in the 1976 Labor-HHS Appropriations bill—and in every appropriations bill thereafter—Congress has exempted small farming operations from OSHA enforcement actions that do not maintain a temporary labor camp and that employ 10 or fewer employees. Despite this clear direction from Congress, OSHA has drafted investigator guidance, conducted investigations and penalized farming operations in complete disregard of a law that has been on the books for nearly four decades.

A June 2011 Memorandum by OSHA Director of Enforcement Programs declares that all activities under SIC 072—including drying and fumigating grain—are subject to all OSHA requirements. OSHA goes further to say: "Many of these small farm employers mistakenly assume that the Appropriations Rider precludes OSHA from conducting enforcement activities regardless of the type of operations performed on the farm." Farm Bureau agrees that there is a mistake here, but it does not lie with small farm employers. Instead, OSHA "mistakenly assumes" what is integral to a farming operation and has thereby circumvented clear congressional direction.

OSHA appears to take the position that any activity that takes place after a kernel is severed from the stalk would be considered post-harvest activities, such as storing and drying grain for market, and thus placing those activities under OSHA regulation. This is an illogical position. Post-harvest activities are necessary to prepare crops for sale and are fundamental in any farming operation. Merely possessing storage capacity for grain and utilizing that storage capacity does not create a separate and distinct operation from the farming operation itself. The purpose in planting, cultivating and harvesting the crop is to sell the crop. Practically speaking, it is necessary to store and prepare the grain for sale. Most farming operations, if not all, have to store—even if for short periods of time—the commodity in order to get it to market. Thus, if the operation has fewer than 10 employees and does not have a labor camp it is covered by the small farm operation exemption designated by Congress.

Congressional intent is clear that this language was adopted to protect small farms and should be interpreted broadly to protect farms with fewer than 10 em-

ployees and no labor camp. In fact, Congress feels so strongly that the fiscal year 2013 Appropriations Act report contains language that reinforces the small farm exemption and suggests that OSHA should work with USDA before moving forward with any attempts to redefine and regulate post-harvest activities in relation to the exemption. We hope that this language will forestall any further enforcement actions by OSHA and encourage that office to re-evaluate its interpretation of farming operations as they relate to post-harvest activity.

Farm Bureau understands OSHA's concern with grain bin safety. In fact, Farm Bureau remains committed to grain bin and farm safety generally. Throughout the country, state and county Farm Bureaus have safety training programs, including grain bin safety. We work to ensure everyone who is working on our farms is trained and safe. Prior to instituting the June 2011 memo, had OSHA reached out to Farm Bureau and others in the industry, we would have been eager to work with them to develop additional safety training programs if necessary to prevent injury. This preventative action would have better served OSHA's mission and the shared goal of farm safety.

However, rather than working cooperatively with industry, OSHA apparently reached the conclusion that it was preferable to penalize small farmers through enforcement. Utilizing the 2011 memo, a Nebraska farming operation, with one non-family employee, was fined approximately $130,000 for allegedly not following OSHA regulations related to storage of grain grown and harvested by the farmer. An Ohio farmer had a strikingly similar situation, but was relieved when fines were withdrawn after Congress began to raise awareness of the agency's overreach. Unfortunately, the Nebraska farmer is now tied up in litigation. The fact is that both of these farms fall under the farmer exception and these enforcement actions never should have taken place. It is clear that OSHA is ignoring congressional intent and the agency should withdraw the 2011 memo entirely.

Regulation, guidance and enforcement that circumvent a clear legislative directive are not an acceptable solution. We remain committed to working with OSHA, USDA and the industry as a whole in doing the utmost to ensure worker safety on all farms. At the same time, we urge Congress to take action that prevents this type of regulatory overreach.

I appreciate this opportunity to testify and I will be pleased to answer any questions the members of the committee might have.

Chairman WALBERG. Thank you.

Ms. Rabinowitz, we now recognize you for your 5 minutes of testimony.

STATEMENT OF RANDY RABINOWITZ, ATTORNEY AT LAW

Ms. RABINOWITZ. Thank you, Mr. Chairman and members of the subcommittee, for the opportunity to testify here today.

My name is Randy Rabinowitz. I appear here this morning as an expert on occupational safety and health law and not on behalf of any client.

Passage of the OSH Act in 1970 has improved workplace safety and health significantly over the past 40 years. Unfortunately, too many workers still die on the job or are made ill by work. OSHA's rulemaking process is now saddled by so many procedural requirements that the agency is incapable of issuing standards to protect workers in a timely manner.

These facts leave me dismayed that the focus of this hearing is on placing even more procedural burdens on OSHA.

Business can already hold OSHA accountable for policy guidance it thinks goes too far by contesting OSHA citations. Employees have no similar right to challenge OSHA's actions when it fails to enforce the law.

The premise of this hearing, that OSHA has changed longstanding policies and that it may do so only after notice and comment rulemaking, has no basis either in law or in fact. The policies

being complained about today impose no new legal burdens. There is no legal requirement for notice and comment rulemaking.

The issuance of each policy is consistent with the requirements of the Administrative Procedure Act and the OSH Act, and I suggest if it wasn't, the witnesses we have spoken to would be in court challenging it.

Employers routinely request interpretations clarifying OSHA regulations. OSHA issues about 100 such interpretations each year. Business would be hurt far more than labor if OSHA were not permitted to issue these types of clarifications without notice and comment.

I would like to discuss several of the specific policies mentioned in the Chamber's testimony.

With regard to the general duty clause, most observers agree that OSHA toxic exposure limits are woefully out of date. OSHA recently published a Web tool listing exposure limits recommended by NIOSH and ACGIH or required by Cal/OSHA.

This tool makes already public information more easily accessible to employers and employees. It encourages but does not require reductions in toxic exposures. OSHA should be complimented for this effort.

Instead, business criticizes the agency, suggesting that OSHA is somehow trying to expand the reach of the general duty clause by publishing this tool. There is no legal basis for this claim.

Ever since 1987, the rule in a case called UAW v. General Dynamics has allowed OSHA to cite the general duty clause when an employer has actual knowledge that an OSHA standard leaves its employees at risk. This rule has been included in OSHA's field operations manual since 1994.

The rule in General Dynamics is a narrow one and OSHA relies on it sparingly. OSHA cannot rely on either NIOSH, ACGIH, or California exposure limits standing alone without other evidence of actual employer knowledge of a hazard to prove a general duty clause violation.

Posting the NIOSH, ACGIH, and Cal/OSHA limits on its Web site does not change OSHA's burden under the general duty clause. In my opinion, the tool has no legal effect on an employer's obligation to protect workers from recognized hazards.

With respect to walk-around rights, business claims that OSHA's walk-around regulations bar nonemployees from serving as a walk-around representative and that this has been OSHA's consistent practice. But OSHA has never said anything of the sort. Its consistent policy has been to permit nonemployee representatives in limited circumstances.

For example, in organized workplaces the union always selects the walk-around rep. The union does not have to select an industrial hygienist or an engineer to be its walk-around rep; it can suggest—it can select a business agent.

In nonunion workplaces OSHA's Field Operations Manual instructs its inspectors to determine whether somebody is a bona fide representative of employees. If the inspector can find a bona fide representative of employees—and in nonunion workplaces often they cannot—the inspector has the discretion to permit that person to be a walk-around representative, unless the inspector concludes

that that person might be disruptive to the inspection. But it is up to the inspector to make that choice.

The recent letter that OSHA published just continues its longstanding policy that allows nonemployees who will make a positive contribution to a thorough and effective inspection to accompany OSHA as an employee walk-around representative.

Unlike in 1970, when the world was divided into union and nonunion workplaces, today a mix of nontraditional advocacy groups may represent the interests of workers who do not belong to unions. Usually these groups are not organizing for collective bargaining purposes. If employees choose these groups to represent them, OSHA often honors that choice. It is an employee's statutory right to select their own representative.

OSHA inspectors can refuse to allow the individual to serve as the employee representative if it would not further the inspection. MSHA follows a similar policy without any problems.

I had some notes on farms, but I see my time is expiring so I will wrap up.

Congress should not interfere with Congress' longstanding practice of issuing interpretive letters and policy statements that conform to the requirements of the Administrative Procedure Act and the Occupational Safety and Health Act. The interpretive letters and policy documents benefit business more often than they benefit labor. They are a necessary and useful administrative tool.

This committee should strive to identify more effective ways that OSHA can meet its statutory responsibility to protect workers. Increasing the procedural burdens OSHA must bear to do its job will not improve worker safety and health.

Thank you very much.

[The statement of Ms. Rabinowitz follows:]

Prepared Statement of Randy S. Rabinowitz, Attorney at Law

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: Thank you for the opportunity to testify on "OSHA's Regulatory Agenda: Changing Long-Standing Policies Outside the Public Rulemaking Process." My name is Randy Rabinowitz. I appear here this morning as an expert on Occupational Safety and Health law and not on behalf of any client. I have practiced OSHA law, representing the interests of workers, for several decades. I have served as co-chair of the ABA's OSH Law Committee; as the Editor-in-Chief of the American Bar Association's (ABA) 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, served as counsel to this Committee, and have worked for or advised OSHA and state health and safety agencies on regulatory issues. Shortly, I expect to be named the founding Co-Director of a new public interest organization called the Occupational Safety and Health Law Project. I have also served as Director of Regulatory Policy for the Center for Effective Government formerly OMB Watch.

Passage of the Occupational Safety & Health Act in 1970 has improved workplace safety and health significantly over the past 40 years. Unfortunately, too many workers still die on the job or are made ill by work. Federal and state OSHA programs have approximately 2000 inspectors to monitor the health and safety performance of more than 7-8 million workplaces. With these resources, federal OSHA can only inspect each workplace once every 131 years.

OSHA's rulemaking process is now saddled by so many procedural requirements that OSHA is incapable of issuing standards to protect workers in a timely manner. Requiring OSHA to also conduct notice and comment rulemaking for every policy statement or enforcement directive would make an already slow process grind to a halt. Contrary to industry rhetoric, the problem is not that OSHA regulates too much, but that it regulates too few health and safety hazards. Between 1981-2010, OSHA issued 58 health and safety standards, only 16 of which regulate health hazards, according to GAO.[1] It took OSHA an average of more than 7 years to complete

each rulemaking. These facts leave me dismayed that the focus of this hearing is on placing even more procedural burdens on OSHA before it can issue either letters of interpretation or policy guidance. Such a requirement would do nothing to protect workers and would make an already slow regulatory process even slower.

OSHA Policies Meet the Requirements of the Administrative Procedure Act

The premise of this hearing—that OSHA has changed long standing policies and that it may do so only after notice and comment rulemaking -has no basis in law. OSHA routinely issues interpretations of its regulations. In addition, it often issues policy statements to alert its inspectors and others about enforcement policies. Many are requested and applauded by business. None are the subject of rulemaking. If rulemaking were required for every interpretation, OSHA would lose the ability to clarify its rules.

My testimony this morning addresses three OSHA policies that members of the business community claim OSHA has recently changed. They include:

• A web "tool" published by OSHA listing exposure limits recommended by the National Institute for Occupational Safety and Health (NIOSH), the American Conference of Government Industrial Hygienists (ACGIH) or the California OSH Program;

• A letter responding to Steve Sallman of the Steelworkers (the "Sallman letter") dated February 21, 2013 reaffirming OSHA's policy that an employee walk-around representative need not be an employee of the employer whose facility is being inspected;

• A memo to OSHA's field staff from Thomas Galassi dated June 28, 2011 entitled "OSHA's Authority to Perform Enforcement Activities at Small Farms with Grain Storage Structures Involved in Postharvest Crop Activities."

These policies either represent long-standing interpretations by OSHA of statutory language, clarify ambiguous regulatory provisions, or announce how OSHA will exercise its enforcement discretion. The policies impose no new legal burdens. There is no legal requirement for notice and comment rulemaking. The issuance of each policy is consistent with the requirements of the Administrative Procedure Act (APA). Any employer who believes otherwise can challenge the policies before the Occupational Review Commission or the courts.

The APA exempts "interpretive rules" and "general statements of policy" from the requirement for notice and comment rulemaking. "An interpretive rule interprets or clarifies the nature of the duties previously established by the OSH Act or by an OSHA rule."[2] The interpretation is not binding and litigants may challenge it. OSHA's interpretive rule is likely to be upheld if "OSHA is describing with greater clarity or precision a duty that the OSH Act or an OSHA rule has already established."[3] A policy statement, does not interpret existing duties. Instead, OSHA uses policy statements to "alert employers and employees (or others) prospectively of its future plans regarding some new duty that it would like to see established."[4] The duty only becomes binding if the Occupational Safety and Health Review Commission affirms OSHA's citations. In both cases, notice and comment rulemaking is not required. Indeed, the D.C. Circuit recently reaffirmed that OSHA may revise its interpretation of the OSH Act without notice and comment rulemaking in a case challenging OSHA's Hazard Communication standard.[5]

In limited instances, when an agency changes a long-standing, definitive interpretation, notice and comment may be required.[6] But, even this rule would allow OSHA to publish one interpretation without notice and comment. "Any second interpretative rule that significantly changes the first interpretation would be invalid if the first interpretation is definitive."[7] In none of the instances discussed at this hearing has OSHA tried to replace one definitive interpretation with another, so the rule in Alaska Hunters requiring notice and comment for a second interpretation would not apply.

Usually, "[t]here is general agreement that the public interest is served by prompt dissemination of agency interpretations and policy statements. Moreover, such statements often are indispensable to agency administration because they guide the staff in its day-to-day tasks and structure the exercise of agency discretion."[8]

OSHA issues more than 100 interpretations each year. Most are requested by, and benefit, business. If, as a result of this hearing, OSHA must employ procedures beyond those already required by the APA and the OSH Act before adopting an interpretation, this informal process of clarifying OSHA rules would grind to a halt.

Reliance on the General Duty Clause To Protect Workers From Toxic Exposures

OSHA permissible exposure limits (PELs) for toxic substances are widely recognized by both labor and industry to be woefully out of date. Hundreds were adopted in the early 1970s based on consensus standards first published in the 1960s or ear-

lier. OSHA's efforts to update these exposure limits have been stymied for decades. Fewer workers would get sick or die if OSHA could snap its fingers, adopt a new "interpretation," and rely on the general duty clause to mandate reductions in toxic exposures. It cannot. There is simply no legal basis for industry's concern that OSHA is trying to expand the reach of the general duty clause by posting public information about recommended exposure limits on its website.

OSHA's interpretation of the general duty clause has not changed in more than 20 years. After a UAW member died in 1983 while cleaning the inside of a tank with Freon, OSHA cited General Dynamics for a violation of the general duty clause. General Dynamics objected, claiming that it could not be cited under the general duty clause when it was in compliance with OSHA's Freon standard.

The D.C. Circuit rejected this claim. The court held that "if an employer knows that a specific standard will not protect his workers against a particular hazard, his duty under section 5(a)(1) will not be discharged no matter how faithfully he observes that standard. " UAW v. General Dynamics, 815 F.2d 1570 (D.C. Cir. 1987). OSHA changed its Field Operations Manual in 1994 to instruct its staff to cite a general duty clause violation under the circumstances described in the General Dynamics case. This has been OSHA's consistent policy for more than 20 years.

The rule announced in General Dynamics is a narrow one. OSHA has relied on it only sparingly. It permits OSHA to cite an employer for a violation of the general duty clause, even though the employer has complied with an OSHA exposure limit, when the employer has actual knowledge that OSHA's standard does not protect employees from hazards in the workplace. OSHA's burden to demonstrate a violation of the general duty clause remains high under this standard. It must show that an employer knew either that "a particular safety standard is inadequate to protect his workers against the specific hazard it is intended to address, or that the conditions in his place of employment are such that the safety standard will not adequately deal with the hazards to which is employees are exposed." [9]

Against this background, business representatives complain that a new "tool" published on OSHA's website somehow expands the general duty clause. This concern has no legal basis. The "tool" about which business complains compiles, in one place, chemical exposure limits recommended by the National Institute for Occupational Safety and Health and the American Conference of Government Industrial Hygienists and adopted by the California OSHA program. These exposure limits, some of which are recommended, but not required, are already public information. OSHA has a statutory responsibility to advise employers and employees about effective methods of preventing occupational injuries and illnesses.[10] It has done so in an easy to understand, readily accessible format. The information included in the "tool" will help workers and others bargain for better working conditions and help employers understand the wide range of recommended exposures to toxins. The "tool" in many instances illustrates how out-of-date OSHA's exposure limits are. OSHA should be applauded for this effort.

The "tool" does not in any way expand or limit the circumstances under which an employer can be cited for a violation of the general duty clause. OSHA cannot meet its burden of showing that employees are exposed to a recognized hazard solely by pointing to a recommended exposure limit—whether or not that limit is on OSHA's website—without some other evidence of employer or industry awareness of the hazard. I know of no instance where OSHA has tried to do so. The "tool" has no legal effect on an employers' obligation to protect workers from recognized hazards.

Employee Representatives Who May Accompany OSHA Inspectors

Section 8(e) of the OSH Act provides that a "representative of the employer and a representative authorized by his employees" shall have a right to accompany OSHA during a workplace inspection. OSHA's regulations provide that the employee representative shall be an employee of the employer but also authorize others to serve as an employee representative if, in the opinion of the OSHA inspector, that individual is "reasonably necessary to the conduct of an effective and thorough physical inspection." [11]s

This regulation has always been understood to permit non-employee representatives to accompany an inspector and to act on behalf of employees for other purposes. OSHA's Field Operations Manual (FOM) has two sections addressing who may represent employees during a walk around inspection. In facilities with a certified bargaining representative (and it does not matter whether the union has a collective bargaining agreement or not) the union selects the employee walk—around representative. Sometimes the union selects an employee as the walk-around representative. Other times, the union designates a member of the international union's staff as the walk-around representative. Sometimes, the union rep-

resentative is an industrial hygienist or safety engineer; other times the union representative is a business agent. The important point here is that the employees' representative is selected by the employees—not by the employer. That is the employees' statutory right.

OSHA's long-standing practice in non-union facilities has been to determine whether the employees have selected someone to represent their interests in an OSHA inspection.

Often, the employees have not done so. But, if they have, OSHA honors that choice. The FOM recognizes that when there is no union, employees may nevertheless have selected somebody to represent their interests. In facilities where there is a safety committee—and many states require such committees -a member of the safety committee may serve as the employees' walk-around representative. But, the FOM also recognizes that employees may have "chosen or agreed to an employee representative for OSHA inspection purposes" in some other manner. Only when no employee walk-around representative can be identified by OSHA using either of these methods, is an OSHA inspector instructed to proceed without an employee walk-around representative and interview a "reasonable number of employees."

OSHA's policy on who may represent employees during an inspection is similar to its policy on who may file a complaint on an employee's behalf. OSHA's Field Operations Manual has authorized non-employee representatives to file formal complaints seeking an inspection. The FOM defines the term "representative of employees" as either: (1) an authorized representative of the employee bargaining representative; (2) an attorney representing an employee; and (3) [any] other person acting in a bona fide representative capacity including, but not limited to, members of the clergy, social workers, spouses and other family members, and government officials or nonprofit group and organizations.

The "Sallman letter" simply clarifies this long-standing policy. It makes clear that individual who is authorized to represent employees and who "will make a positive contribution to a thorough and effective inspection" may serve as a walk-around representative. " In 1970, when OSHA's inspection regulations were first published, employer -employee relations were much different than they are today. Then, a workplace either was unionized or it was not. There were few other options. Today, a mix of non-traditional advocacy groups may represent the interest of workers who do not belong to unions. More often than not, these groups are not seeking to become the workers collective bargaining representative, at least as that term is understood under the National Labor Relations Act. Non-employee representatives can often help OSHA understand the complex employment relationships between staffing agencies, subcontractors and employers. They can help OSHA identify past accidents and common safety hazards. And, they can help workers who do not speak English effectively or who are wary of government inspectors to communicate their concerns to OSHA. OSHA should be complimented on recognizing that the structure of the economy and the forms of workers representation have changed over the years, even though the importance of a worker's right to participate in an OSHA inspection has not. Unions are no longer the only voice that speaks on behalf of workers.

A recent example, one that occurred prior to OSHA's letter to Mr. Sallman, illustrates the point. During a 2011 inspection of the Exel/Hershey warehouse in Hershey, PA, the National Guestworkers' Alliance (NGA) served as the walk-around representative for employees. The employees represented by NGA were young foreign exchange students participating in a summer work program and subject to abusive working conditions. NGA aided OSHA in identifying many instances of unrecorded injuries among temporary workers at the facility and other safety and health violations. The foreign students could not have effectively identied health and safety hazards to OSHA without NGA's help.

Even under the "Sallman" letter the right of employees to select a non-employee as their walk-around representative is narrow. First, the person who serves as a walk around representative must have been selected by employees to serve in that role. Second, the representative must aid in the conduct of the inspection. OSHA inspectors can refuse to allow an individual to serve as an employee representative when, in the OSHA inspector's opinion, it would not further the inspection. And, an employer who believes that a non-employee has been improperly selected as the walk-around representative can refuse voluntarily to permit the inspection and insist that OSHA obtain a warrant before proceeding.

OSHA's long-standing policy permitting non-employees to serve as an employee representative during a walk-around inspection when doing so will aid OSHA in identifying health and safety hazards is consistent with the OSH Act, its legislative history and the few court cases to look at this issue. Senator Harrison Williams (D-NJ), the Senate sponsor of the OSH Act, made clear that "the opportunity to have

the working man himself and a representative of other working men accompany inspectors is manifestly wise and fair." The Mine Safety and Health Administration has for years allowed non-employee representatives of miners to accompany its inspectors, even in non-union mines. Courts have approved this policy.[12] The Seventh Circuit has recognized the right of a union representative to accompany an OSHA inspector even when the union's members were on strike and had been temporarily replaced by other workers.[13] In a related context, the First Circuit recognized that a union organizer who was not an employee of the employer could serve as the representative of employees before OSHRC, holding that "any outside union activity [by the organizer] is absolutely irrelevant to his ability to represent the employees."[14] Nothing in the legislative history of the OSH Act or any court decisions suggests that statutory right of employees to accompany OSHA during a workplace inspection is confined to unions certified as the employees' bargaining representative under the National Labor Relations Act.

OSHA Inspections of Farming Operations

Too many employees die in grain handling facilities. When grain dust becomes airborne, it often explodes killing workers inside. When employees walk on moving grain in an attempt to clear grain built up on a bin, they may get buried in it. Too often those killed or injured are teenagers working at their first job. These injuries occur at grain facilities owned by agribusinesses and by those owned by small farmers. After a series of deadly explosions, and more than 10 years of public debate, in 1987, OSHA adopted a standard regulating grain handling facilities.[15] An analysis shows the grain standard has been remarkably effective in reducing explosions and deaths in the industry.[16]

Unfortunately, in 2010 there were a series of fatalities at grain handling facilities. For example, two workers—one 19 and the other 14—were engulfed in corn at an Illinois grain bin owned by Haasbach, LLC. The tragedy occurred when one worker fell into the bin and four went in to rescue him.

OSHA responded to this and other incidents with an outreach, compliance assistance, and education program. It sent a letter to all grain handling facilities urging them to comply with the standard.[17] One part of its effort was a local emphasis program focusing on enforcement. The program has been effective. In 2010, there were 57 entrapments and 31 fatalities at grain facilities. In 2012, there were only 19 entrapments and 8 fatalities. While that is still too many fatalities, it represents a 74% reduction in fatalities. OSHA's ability to further reduce fatalities from entrapments in grain handling facilities is limited because, historically, 70% of entrapments occur on farms exempt from OSHA's grain handling standard.[18]

OSHA selects workplaces for inspection by relying on the SIC or NAIC code for that workplace. Beginning in FY 1977, when OSHA's annual appropriations first included a rider prohibiting the agency from enforcing any standard "which is applicable to any person who is engaged in a farming operation and employs 10 or fewer employees," OSHA has instructed its staff not to inspect certain farming operations with 10 or fewer employees. It identifies the farming operations exempted from inspection according to the businesses' self-reported SIC or NAIC code; certain codes fall under the rider and others do not. Since 1977, OSHA has implemented the rider in the exact same way and exempted the same SIC codes from inspection. The memo that has been characterized as a policy change merely reiterates to the field, in advance of beginning the emphasis program, which facilities OSHA can inspect and which it is prohibited from inspecting under the rider.

OSHA has indicated a willingness to clear up any confusion among farmers created by the memo.

OSHA does not schedule small facilities within the SIC codes covered by the rider for inspections. But, SIC code designations do not always accurately describe the operations at a facility and the size of the facility's workforce may vary. If OSHA arrives at a small facility with farming operations either because it had inaccurate information, because it receives a complaint about conditions at that facility, or because a death or serious injury occurred, its' inspector should leave upon learning that the facility is covered by the rider. OSHA depends on farmers to provide the information needed to make that determination. In some cases, OSHA has left without inspecting the facility even though a fatality had occurred. If a facility is covered by the rider, and OSHA nevertheless insists on an inspection, the owner has a legal right to refuse OSHA entry and insist that OSHA get a warrant to conduct the inspection. To obtain that warrant, OSHA would have to convince a federal magistrate that the facility was not covered by the rider. If an inspection occurs, and OSHA issues citations, an employer can request an informal conference with OSHA to present evidence that the citations were issued improperly. OSHA often withdraws the citations under such circumstances. Finally, citations will be vacated by OSHRC

if an employer demonstrates that OSHA was not authorized to inspect and cite its facility. In such a case, OSHA can be ordered to pay the small farmer's attorney fees under the Equal Access to Justice Act. Farmers thus have several opportunities to ensure that OSHA does not inadvertently inspect or cite facilities covered by the rider.

The memo reflects OSHA's consistent, 20 year old interpretation of the rider. Until recently, OSHA has gotten no complaints about how it has implemented the rider. Nothing has changed. OSHA issues and revises inspection instructions to its staff regularly. OSHA does not conduct public rulemaking on enforcement directives. Public rulemaking is not required. Here, OSHA is implementing an appropriations rider renewed annually by Congress. If Congress disagrees with OSHA' s interpretation of the rider, Congress can make its intention clear. If OSHA made a factual error in citing a farm it should not have inspected—and that question is currently being litigated—those employers have adequate legal redress if they were cited improperly.

Conclusion

Congress should not interfere with OSHA's long-standing practice of issuing interpretive letters and policy statements that conform to the requirements of the APA. The interpretive letters and policy documents benefit business more often than they benefit labor. They are a necessary and useful administrative tool. The process OSHA follows conforms to the requirements of the APA. Any business who believes otherwise has the right to challenge OSHA's policies if they are applied to it. This Committee should strive to identify more effective ways that OSHA can meet its statutory responsibility to protect workers. Increasing the procedural burdens OSHA must meet to do its job will not improve worker safety and health.

Thank you for the opportunity to testify.

ENDNOTES

[1] *http://www.gao.gov/products/GAO-12-330*
[2] Dale and Schudtz, OCCUPATIONAL SAFETY & HEALTH LAW 3rd Edition (BNA 2014) at 603.
[3] Id.
[4] Id. At 606.
[5] American Tort Reform Ass'n v. OSHA, No. 12-1229 (D.C. Cir Dec. 27, 2013).
[6] Alaska Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999).
[7] OCCUPATIONAL SAFETY & HEALTH LAW 3rd Edition at 605.
[8] Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING (ABA 2006) at 74.
[9] 815 F.2d at 1577.
[10] 29 U.S.C. §670.
[11] 29 C.F.R. §1903.8
[12] See 30 U.S.C. §813(f); Thunder Basin Coal Co. v. FMSHRC, 56 F.3d 1275, 1277 (10th Cir. 1995).
[13] In re: Establishment Inspection of Caterpillar, 55 F.3d 334 (7th Cir. 1995).
[14] In re: Perry, 859 F.2d 1043 (1st Cir. 1988).
[15] 29 C.F.R. §1910.272
[16] *https://www.osha.gov/dea/lookback/grainhandlingfinalreport.html*
[17] *https://www.osha.gov/asst-sec/Grain—letter.html*
[18] *http://extension.entm.purdue.edu/grainlab/content/pdf/2012GrainEntrapments.pdf*

Chairman WALBERG. Thank you.

Mr. Baskin, recognize you for your 5 minutes of testimony.

STATEMENT OF MAURY BASKIN, SHAREHOLDER, LITTLER MENDELSON, P.C., TESTIFYING ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE ASSOCIATED BUILDERS AND CONTRACTORS

Mr. BASKIN. Thank you, Chairman Walberg and Ranking Member Courtney and members of the committee. Thanks for the opportunity to testify today.

My name is Maury Baskin. I am a shareholder in the Washington, D.C., office of Littler Mendelson.

Today I am testifying on behalf of two business organizations who are also strong advocates of workplace safety—the National Association of Manufacturers, which is the nation's largest manu-

facturing association; and Associated Builders and Contractors, representing thousands of merit-shop construction contractors around the country.

I am here to talk solely about OSHA's 2013 letter of interpretation allowing union agents into nonunion workplaces. Contrary to what you just heard from Ms. Rabinowitz, OSHA's 2013 letter constituted a significant change in longstanding agency policy.

This was the first time that OSHA declared that nonunion employers could be compelled to allow outside union agents or community representatives to accompany OSHA inspectors onto the employer's premises without any showing that the union or community organizer represented a majority of the employer's employees.

According to the letter, any number of employees in a nonunion workplace, no matter how few, can now designate an outside union or community organization as their representative for safety inspection purposes even though a majority of the workers have failed to authorize the union as their representative for any purpose. Neither the OSHA Act, the regulations, nor the field manual make any provision for a walk-around union representative in a nonunion workplace.

And that is not just me talking; that is a direct quote from OSHA itself in the letter that it issued in 2003, which the new letter has now withdrawn while saying it is not a change in policy. The Administrative Procedure Act clearly says that an agency seeking to change one of its rules must first provide the public with notice and opportunity to comment on the change.

The judicial standard is that when an agency has given its regulation a definitive interpretation and later significantly revises that interpretation the agency has, in effect, amended its rule. So this is not about whether OSHA can issue letters. It is the change that they made from longstanding policy, and this is something that it cannot accomplish under the APA without notice and comment.

Reviewing OSHA's response to this committee's letter and listening to Ms. Rabinowitz's testimony just now, I did not see or hear one instance in which OSHA has forced an employer to allow a union agent into a nonunion facility before last year's letter in the 40 years of the act. Not one.

And there are 30,000 to 40,000 inspections per year, so we are talking over a million inspections, not one instance. So how can they say this is not a change of policy? It was clear until last year that OSHA gave its inspection regulation a definitive interpretation limiting union access under these circumstances, and they have changed it without notice and comment.

It is also bad policy for several reasons. First, it undermines the rule of law for OSHA to ignore the Administrative Procedure Act and it is supposed to be an agency enforcing the law.

Second, allowing the union agents from the outside and community organizers access to the nonunion employers' private property—by doing that OSHA is injecting itself into labor management disputes. It is casting doubt on its status as a neutral enforcer of the law.

The union agents we are talking about, they are engaged—and the community representatives, too—are engaged in organizing activity and they often have a biased agenda. They want to find prob-

lems. They range from environmental disputes to wage claims—frankly, any problem that they can exploit for their own ends. They are not there to—very often, they are not there to improve worker safety.

There has been a lot written about these so-called community organizations and their close collaboration with the unions. Many call them union front organizations. And so to pretend that they are some sort of independent entities, well, it is wrong according to a lot of literature on this subject.

Unlike the situation where a union does represent a majority of the workers, as was alluded to, and they have a collective bargaining relationship, outside union agents and organizers have no duty to represent the interests of the nonunion employees in that workplace, nor do they have any special expertise on the nonunion workplace. In the incidents that have come to our attention since this letter has come out, there has been no claim that the union agent had any special expertise except as an organizer.

And there are other issues dealing with third-party liability and safety training and trade secret exposure. We don't have time.

But the NLRB has struck a careful balance between labor, management, and employee rights. OSHA's new letter runs roughshod over the rights of employers but it also ignores the rights of the majority of the employees in that workplace who did not ask for this so-called representative to come marching in with the government's arm around their backs.

So for each of these reasons and the others mentioned in my written testimony, Congress should call upon OSHA to withdraw the 2013 letter, return to the previous longstanding policy.

Thank you for the opportunity to testify today.

[The statement of Mr. Baskin follows:]

Prepared Statement of Maury Baskin, Esq. Shareholder, Littler Mendelson, PC, on Behalf of the National Association of Manufacturers and Associated Builders and Contractors, Inc.

Chairman Walberg, Ranking Member Courtney, and members of the U.S. House Committee on Education and the Workforce, thank you for the opportunity to testify before you at today's hearing.

My name is Maury Baskin and I am a Shareholder in the Washington, D.C. office of Littler Mendelson, P.C. Today, I am testifying on behalf of The National Association of Manufacturers (The NAM) and Associated Builders and Contractors (ABC). We appreciate the opportunity to testify before the Committee today on the issue of the Occupational Safety and Health Administration (OSHA)'s Letter of Interpretation allowing union agents and community organizers for the first time to accompany safety inspectors into non-union facilities, issued on February 21, 2013.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, provides the largest economic impact of any major sector, and accounts for two-thirds of private sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and creates jobs across the United States.

Associated Builders and Contractors (ABC) is a national construction industry trade association representing 22,000 chapter members. Founded on the merit shop philosophy, ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically, profitably and for the betterment of the communities in which ABC and its members work.

How OSHA's New Letter of Interpretation (LOI) Changed the Rules

On February 21, 2013, without any prior public notice, OSHA for the first time issued a Letter of Interpretation (LOI) declaring that non-union employers may be compelled to allow outside union agents and/or community representatives to accompany OSHA inspectors onto the employers' premises, without any showing that the union or community organizer represents a majority of the employer's employees. According to the letter, an unspecified (non-majority) number of employees in the non-union workplace may designate an outside union or community organization as their representative for safety inspection purposes, even though a majority of the workers have failed to authorize the union as their representative for any purpose. The LOI was issued by Richard Fairfax, then Deputy Assistant Secretary of OSHA and addressed to Steve Sallman, Health and Safety Specialist with the United Steelworkers Union. The new LOI was not publicly released until April 5, 2013.

The LOI contradicts the plain language of OSHA's governing statute ("the OSH Act") and the National Labor Relations Act (the "NLRA"). Section 8 of the OSH Act provides:

Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace. * * *

Section 9 of the NLRA makes clear that only a union that has been chosen by a majority of employees in an appropriate bargaining unit can claim to be an "authorized representative." OSHA's published regulation implementing the OSH Act, 29 C.F.R. 1903.8(c), states:

The representative authorized by employees shall be an employee of the employer. However if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection.

The OSHA Review Commission's regulation, 29 C.F.R. 2200.1(g), defines an "authorized employee representative" to mean, "a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees." The Commission has limited such status to unions recognized through the NLRB process.[1]

Consistent with these regulations, OSHA's Field Operations Manual (FOM) and its predecessor the Field Inspection Reference Manual (FIRM) have long titled the section on inspection accompaniment: "Employees represented by a certified or authorized bargaining agent." Another section of the FOM addresses what an OSHA inspector should do where there is "No Certified or Recognized Bargaining Agent." The FOM directs OSHA inspectors to determine if other employees of the employer would suitably represent the interests of co-workers in the walk-around. If selection of an employee is impractical, inspectors are directed to conduct interviews with a reasonable number of employees during the walk-around.

OSHA has for decades consistently interpreted the law, the regulations and the Field Operations Manual to allow a safety inspector to be accompanied by a labor union only where such a union has been certified or recognized as representing the employees of the employer under procedures established by the National Labor Relations Board (NLRB)—until the LOI issued last year.

The new LOI states for the first time that an unspecified number of employees in a "non-union workplace" (a workplace where no union has been certified or recognized as the representative of a majority of employees), may nevertheless designate an outside union, or even a "community organization" whose focus is anything but the safety or health of a workplace, as their representative for safety inspection purposes. The new LOI contradicts the foregoing law and regulations and past OSHA guidance.

By issuing the new LOI, OSHA reversed its long-standing interpretation of the Act, without providing any prior opportunity for the public to comment on the new policy, OSHA has left manufacturers and employers as a whole with no administrative remedy and has opened up employers to harassment from outside organizations. This is neither the intent of an OSHA inspection, nor is it appropriate under the previous interpretations of the regulations and the law. As a result of the new

[1] These OSHA regulations are quite different from the regulation promulgated by MSHA, reflecting differences between mining and other industries. MSHA's regulation, published after notice and comment, defined representatives of miners to include "any person or organization which represents two or more miners." No similar definition appears in any OSHA regulation.

LOI, the possibilities for disruption in the workplace by any group who may have a gripe with an employer are limitless.

The NAM and ABC believe OSHA's new LOI constitutes a significant and potentially unlawful change in agency policy that does nothing to promote workplace safety and has a substantial negative impact on the rights of employers and their employees.

The New OSHA LOI Violates The Administrative Procedure Act

As explained above, OSHA chose to issue the LOI without any advance public notice or opportunity for comment. By acting in this unilateral way, OSHA changed substantive, longstanding policy without any opportunity for employers to challenge the LOI within OSHA itself, either through rulemaking or at the OSHA Review Commission. Most importantly, by failing to go through the required notice and comment procedure, OSHA violated the Administrative Procedure Act (APA).

The APA clearly states that an agency seeking to change one of its rules must first provide the public with notice and opportunity to comment upon it. The only relevant exceptions to this notice and comment requirement arise when an agency acts through an "interpretive" (as opposed to legislative) rule, or a statement of general policy that is not deemed to be a rule at all.

The D.C. Circuit has struck down many other agency changes that were held out as merely interpretive. The judicial standard is that when an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has, in effect, amended its rule, something it may not accomplish [under the APA] without notice and comment.

It is clear that OSHA gave its inspection regulation a definitive interpretation limiting union access to those facilities where the union has been authorized by a majority of employees. It is equally clear that the new LOI significantly revised that interpretation and that the agency has in effect substantially changed its published rule. For each of these reasons, we believe that if and when a court is asked to review OSHA's LOI, it will find that OSHA has violated the APA.

The New OSHA LOI Is Bad Policy

This is bad policy for several reasons. First, it undermines the rule of law, which is improper for any government agency charged with enforcing the law. Second, by allowing outside union agents and community organizers access to non-union employers' private property, OSHA is injecting itself into labor management disputes and casting doubt on its status as a neutral enforcer of the law.

In our experience, union agents and community representatives who are engaged in organizing activity frequently use the OSHA complaint process as a weapon against employers, particularly in so-called corporate campaigns. The outside union agents have a biased agenda, which is to find problems in the employer's workplace that can be exploited, not to improve worker safety. OSHA should not take sides in promoting union organizing agendas to the detriment of management.

Unlike the situation where a union does represent a majority of the workers and has a collective bargaining relationship, outside union agents and community organizers have no duty to represent the interests of non-union employees nor do they have any special expertise in the non-union workplace. In the incidents that have come to our attention where the new LOI has been applied, there was certainly no claim that the union agent had any special expertise except as an organizer. This is a totally improper reason for allowing outside agents to accompany OSHA safety inspectors.

In addition, the NLRB processes of authorizing majority representation by unions have been developed over the past 80 years for good reasons, in order to strike the right balance between labor, management and employee rights. OSHA's new LOI runs roughshod over the rights of employers and also ignores the rights of the majority of employees who have not authorized any union to represent them.

Likewise, by allowing a non-majority community organization to participate in a walk-around, the new LOI could distract the OSHA inspector from his primary purpose—workplace safety. Many community organizations, like the union organizers with whom they often collaborate, have their own biased agendas that are not focused on safety or health. These outside agendas include environmental disputes, wage claims, and many other causes.

Involvement of such organizations in a safety inspection could lead to significant disruption of the workplace for reasons having nothing to do OSHA's inspection objectives.

Employers who are confronted with an OSHA inspector accompanied by an outside union agent or community organization are faced with a Hobson's choice. If they object to allowing the third party agent into their facility, they may rightly fear

retaliation by the OSHA inspector. If they allow the third party outsider into the workplace, then they are giving up their private property rights and allowing someone into their premises who does not have the company's best interests at heart and who may actually want to do harm to the company. The company may also be exposing trade secrets, and at a minimum the employer's privacy rights are being infringed. Finally, there are some unsettled liability issues connected with allowing a third party into a private workspace, if there is in fact a safety hazard on the premises.

Conclusion

For each of the reasons set forth above, Congress should take appropriate action to require OSHA to withdraw the LOI and return to the previous longstanding policy. Regardless of any additional Congressional action, OSHA should voluntarily withdraw the LOI in order to avoid needless infringement on the rights of employers and the majority of their workers who have NOT chosen the outside third party as their authorized representative. Thank you for the opportunity to testify today, and I look forward to your questions.

Chairman WALBERG. Thank you.

And I thank each of the witnesses for your testimony as well as the full written testimony that we have for our records.

And now I turn to my colleagues. Appreciate the attention to this meeting today.

And I will recognize the chairman of Education and Workforce Committee, Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman. I appreciate the courtesy of recognizing me—doesn't get you anything. You understand that. But I do appreciate the courtesy.

I want to thank the witnesses for being here today.

And once again, as is so often the case, there is some difference of opinion that we have heard, and I expect we are going to explore that some. I just have a couple of questions, because it seems like we have got a lot of information, guidance that is coming from OSHA, and I am not sure how that word is getting out.

So let me start with the man who has traveled the furthest, I suppose, from South Dakota.

How did farmers in general, how did you specifically, learn about OSHA's issuance of its 2011 guidance relating to the post-harvest activities?

Mr. VANDERWAL. Thank you, sir. I appreciate that question.

First of all, I believe it started in—there were a couple cases, one in Nebraska, one in Ohio, where OSHA showed up and looked at the operation—I am not sure what you would call it, walk-around, whatever it would be—and identified what they perceived as violations of the regulations. In our view, it was in violation of congressional intent because they were both farms that were under—had 10 employees or fewer and they were small family farm operations.

So when those—I am not familiar exactly with the case in Nebraska, but I believe it is in litigation so I shouldn't say too much more about it. But they contacted their attorney right away when they were threatened with fines and things—and the regulatory things that OSHA does.

Mr. KLINE. So in this case, the farmers learned about this when the OSHA inspector showed up. They had no other indication that this was going to happen. Is that what I am hearing from you?

Mr. VANDERWAL. I can't say for sure whether they just showed up out of the blue or if they sent a letter ahead of time.

Mr. KLINE. And so then you learned about it—you are on the Farm Bureau board and active in the South Dakota part—you learned about it after these instances had occurred in Nebraska?

Mr. VANDERWAL. That is correct.

Mr. KLINE. Okay.

Mr. Hammock, in OSHA's letters of interpretation they contain language stating the letters, quote—"do not create new or additional requirements but rather explain these, OSHA's, requirements," close quote. In your opinion—you have already testified to this, we are just trying to hammer it down here—have OSHA's most recent actions clarified policies or overturned existing policies?

Mr. HAMMOCK. Thank you. In my view they have overturned previous policies or set out new policies that are really not tied directly to underlying requirements or statutory provisions, in a sense, going beyond what they say in a standard disclaimer in those letters of interpretation.

And I would like to say, if I could, one thing in response to your previous question, and that is oftentimes these things will just appear on OSHA's Web site, and unless you are a businessman out there who spends every day and gets on OSHA's Web site and looks at the letters of interpretation, you are not going to really know what OSHA is saying or what things are coming out there that are going beyond the disclaimer on the letters of interpretation. It is a very challenging thing for people who have got a lot of stuff to do during the day rather than just sit around and look at OSHA's Web site.

Mr. KLINE. Thank you.

Sorry. I was trying to think how much time I spend sitting around looking at OSHA's Web site or anybody else's site. Not very much.

I don't know how much time I have got left here, but only a couple of minutes so I want to go into this combustible dust issue, which you got at, and it—I am very confused by it because it seems to me that without a definition I don't know how somebody is supposed to comply or determine what the limits are or if they even have the equipment to determine what the—can you take the minute or so we have got left here and talk about this global harmonization standard and what that impact is when you don't have a definition?

Mr. HAMMOCK. Yes, absolutely. And obviously the GHS standard and the hazard communication standard generally is one of OSHA's most far-reaching regulations. I mean, the reality is it deals with notifying folks of the hazards of chemicals. And so it has wide applicability.

But the key to the working of the GHS or the HCS is understanding what the substances are that you are producing and whether they are a hazard and in what types of environments they are a hazard. And if you don't know some of that basic information, if you don't know the downstream use of your products, it is almost impossible for you to actually comply with that underlying requirement.

So if you are a manufacturer out there now you are trying to think, "Is this soybean that I am producing, is this going to be com-

bustible down the road?" The reality is it is very, very difficult for folks to get their heads around that given the lack of a definition.

Mr. KLINE. Okay.

I see my time is expired, Mr. Chairman. Thank you.

Chairman WALBERG. Thank the gentleman.

Now I——

Ms. RABINOWITZ. Excuse me. May I just add an additional comment?

Chairman WALBERG. You will probably have your opportunity at some point I would guess, but we need to move on.

And so I will recognize my friend from Connecticut, Ranking Member Joe Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman. Ms. Rabinowitz, again, I just want to first of all thank you for at least laying out there that employer inquiries are a large part of OSHA's day-to-day business of communication in terms of interpretation and clarification. And I would just say maybe people don't read the Web site every day, but Connecticut homebuilders have regularly meetings with NIOSH representatives to get updates not because they want to sort of, you know, avoid the law; they actually want to learn about new products, substances to make sure that their workforce is safe.

So the notion that somehow, you know, what OSHA is doing in terms of getting information out there through the Web site is somehow, you know, an act of, you know adversarial government heavy-handedness, I—that is not my experience talking to employers and people who are out there dealing every day with, again, you know, the world changes in terms of stuff that you buy for building things and producing things.

So, you know, again, I guess I would just want to go back to a point you made in your testimony, Ms. Rabinowitz, that merely posting information, I mean, that doesn't trigger liability by itself. I mean, is that—and I just wonder if you, again, you could just sort of reiterate what the standard is for enforcement against an employer, and just merely posting information doesn't satisfy any kind of burden.

Ms. RABINOWITZ. In order to be able to cite an employer under the general duty clause where there is an established permissible exposure limit, OSHA has to show that the employer had actual knowledge that the existing standard was causing the workers harm. In the General Dynamics case that I cited, several employees at a Chrysler tank manufacturing plant had passed out based on exposure to Freon and the UAW had complained to Chrysler repeatedly and they had done nothing to—the Freon exposures were within OSHA's permissible exposure limit and Chrysler had done nothing to protect the workers.

Another gentleman named Harvey Lee went into a tank to clean it out using Freon. He passed out and died. He was about the fourth or fifth person who had been exposed to these exposures.

OSHA cited the employer under the general duty clause. The employer argued that OSHA was trying to unfairly expand the scope of the general duty clause without amending the standards—the same criticism that Mr. Hammock has leveled. A.nd the D.C. Circuit rejected that employer argument and said that the statute, as

it was written by Congress in 1970, imposes an independent duty on employers to protect workers from recognized hazards when they have actual knowledge that an employee is in harm's way even after they have complied with the standard.

It is a very narrow court decision. It has been on the books for 25 years. There is nothing new about it. Posting these exposure limits on the Web site does not provide evidence of actual employer knowledge that people are in harm's way.

Mr. COURTNEY. Thank you.

And as far as the inspection issue, which Mr. Baskin testified regarding, again, the actual OSHA law, I mean the statute, provided for employee participation in inspections, whether it is, you know, injuries or fatalities or complaints about what is going on at a workplace. And again, it—there was nothing in it that limited who those representatives would be; it would just—it basically gave—it is like a "may" language, in terms of who can accompany on behalf of employees. Isn't that correct?

Ms. RABINOWITZ. It is correct. Not only that, but if you look at the NLRA, there—if Congress wanted to limit the walk-around right only to certified bargaining representatives, that is a well-known term in labor law and it could have done so. Congress did not say "certified bargaining representative," it said "authorized employee representative."

And Mr. Baskin himself cites the fact that the Occupational Safety and Health Review Commission also is allowed to have authorized employee representatives participate, and at one point a number of years ago a union organizer tried to exercise that right and, taking the same position that Mr. Baskin took, the Review Commission refused to let this organizer participate because he didn't represent a majority of employees. That case went to the First Circuit Court of Appeals and the First Circuit Court of Appeals held that authorized employee representative could be anybody who had been authorized by a group of workers; it did not have to be a certified bargaining representative.

Mr. COURTNEY. And just again, most of these inspections, I mean, it is not like you can get inside there and start leafleting, you know, people or, you know, getting captive audiences for organizing. I mean, the fact of the matter is these are very focused visits in terms of what the inspection is trying to achieve, which is to find out whether or not, again, there was some violation of law. Isn't that correct? I mean, it is not like an opportunity to go out there and be Joe Hill.

Ms. RABINOWITZ. If an employee tried to leaflet—a walk-around rep tried to leaflet during an OSHA inspection the OSHA inspector would be justified in excluding that person. And I imagine that an employer would ask the OSHA inspector to exclude that person.

The employee rep is there to aid the inspection, and it is the OSHA inspector's discretion as to whether that rep is being helpful. And if they are not being helpful or they are being disruptive the OSHA Field Operations Manual instructs the OSHA inspectors not to have them continue in that capacity. So I think it is a host of horribles that hasn't come to pass that is being imagined and may not be real.

Mr. BASKIN. Mr. Chairman——

Chairman WALBERG. Gentleman's time is expired, and I am sure we will have opportunities for further comment, but we need to move on in the process.

And so I recognize my friend from Indiana, Mr. Rokita.

Mr. ROKITA. I thank the chair.

Good morning, everybody. Appreciate your testimony. I wanted to start with Mr. Hammock.

These letters of interpretation, that is what you are talking about being put on the Website, do they have the weight of law, right, at the time they go on the Web site, or is there a formal publication process that must be gone through first?

Mr. HAMMOCK. There is not a formal publication process, as you would think, in terms of a rule that needs to be published in the Federal Register. They are made publicly available usually a few months after they are sent to the requester. So the information is out there for a period of time before they turn up on OSHA's Web site.

You know, with respect to whether they have the force and effect of law, OSHA's position is that, as was discussed earlier, is that they don't, but the reality is some of these letters of interpretation do go quite far in setting out employer obligations. And I have certainly been involved in cases where a compliance officer has showed up on a site and handed a letter of interpretation to an employer and said, "Are you familiar with this new position that OSHA has taken," and it has gone from there.

Mr. ROKITA. Yes, but I thought the testimony and maybe it was an amalgamation of everyone's testimony—show that the trend is different. For example, in the past letters of interpretation were intended to be clarifications of existing policies, and that wouldn't require any specialized legal notice; but now, if I understand Mr. Baskin's testimony correctly, these quote-unquote letters of interpretation suggest more than a simple clarification, and that is what you are describing right?

So now——

Mr. HAMMOCK. Correct.

Mr. ROKITA [continuing]. We do have a different situation that could have the force and effect of law, yet we are giving notice by Web site and maybe soon by Facebook. You know, who knows?

And that is where we have some problems not only for industry and businesses but for the agency itself. You worked at the agency correctly, right, correct?

Mr. HAMMOCK. That is correct, yes.

Mr. ROKITA. Ms. Rabinowitz's testimony laments the length of time—on average, 7 years—that it takes for OSHA to promulgate a regulation. Are the requirements OSHA must follow in place for specific reasons and that is the reason it is taking this long, or what is the situation?

Mr. HAMMOCK. Yes. There are some procedural requirements that OSHA needs to follow to promulgate rules, and those are for good reason to get input from a number of stakeholders as early in the process as possible. Those requirements in and of themselves are there for good reason but they don't cause an undue delay, in my experience—there are a number of reasons why OSHA may take a long period of time, and I have been a part of some of those

experiences when I was with OSHA. But they are really outside of those regulatory procedural things that OSHA has to do, which, as I said, are really to provide additional input from the agency, which can be real value added for the policymakers there.

Mr. ROKITA. Thank you.

And turning my attention to Mr. Baskin, Ms. Rabinowitz's testimony highlights that employers can refuse OSHA access to a job site and require the agency to seek a warrant, and we have been touching on that. You, however, note that employers might be reluctant to do this because it could engender animosity with the inspector—not hard to imagine.

At issue, though, is that OSHA would be seeking a warrant to allow participation by a third party who is not a designated representative of the secretary. Do you believe OSHA will be successful in obtaining a warrant that allows a third party to accompany an inspector?

Mr. BASKIN. Well, I am always reluctant to predict what judges will do, but the law seems pretty clear in this situation. Because of the violation of the Administrative Procedure Act, if it is contested OSHA should not be successful.

And I would add to the problems that employers face, first is lack of knowledge of what is going on. Chairman Kline asked about the Web site. This letter that we have been talking about on the union access was issued in February; it was not even posted—it was not made public anywhere until April. Months went by while there was nothing on any Web site for anyone to turn to.

And now, even after it has been published, there has been extreme difficulty in making the employers aware of what is going on because they are not all sitting by their computers watching the OSHA Web site; they are actually engaged in business, trying to do what businesspeople do and succeed and survive in this economy. And so they are taken totally by surprise when this happens.

Then if they have the wherewithal and are willing to stand up to the OSHA investigators they have got to call a lawyer—not something they are all fond of doing. That lawyer has to be familiar with this issue. It is a fairly narrow thing so not many lawyers are. OSHA has the ability to go in to get the warrant ex parte unless the employer and the lawyer make special efforts to show up and contest it with the judge.

So these are all reasons why this is just not the way to do business. This is why you have an Administrative Procedure Act and this is why they should not be making these kind of changes without going through the public notice and comment.

Mr. ROKITA. My time is expired.

Chairman WALBERG. Gentleman's time is expired. I thank the gentleman.

And now I recognize gentleman from Wisconsin, Mr. Pocan.

Mr. POCAN. Thank you, Mr. Chairman.

Well, you know, listening to the hearing kind of makes me think of the bigger, broader issue maybe that we should be discussing, which is just the fact that we have got an agency that is in many ways handcuffed from doing much of what has to happen. And, you know, I have been a small business owner for 26 years in a specialty printing business, so in my industry we have volatile organic

components and other things that, you know, we have had to deal with and understand how that works.

While I agree with Mr. Hammock that I don't check the OSHA Web site on a regular basis—and no one really does—I also, though, do know that I have to deal with things like volatile organic compounds and some of the chemicals I use in my industry so I have switched to soy base, promoting the farming industry, because I found that to be a much cleaner alternative. But I know my industry area.

But when I don't have updated standards it is really difficult to then exactly know where you are going. Part of the problem is it is Congress and the courts that have somewhat handcuffed OSHA from getting done what it wants to.

Mr. Baskin, just one quick comment: I think when you said some of the outside people who come in have no expertise in nonunion workplace, to me it doesn't matter if it is a union workplace or a nonunion workplace—if someone is an expert in some of these areas they are an expert in some of these areas. I think we are just coming at it from different approaches. You are looking at it from a union person coming in—union versus nonunion; I am looking at it as someone who has expertise so that there is that certainty for both the employer and the employees that you have got safety.

You know, I think the issue that really comes out of this to me is the fact that there is only about 2,000 inspectors for 8 million workplaces. I think they could expect one—on average, one every 131 years, if I understand right by the math and how it works, with regulations that largely haven't changed since the decade I was born in the 1960s and some going back to the 1940s.

So I guess the first question I have would be for Ms. Rabinowitz. I mean, specifically when you look at the standards that need to be changed to update the 400-plus standards, you know, under the current rules we have on rulemaking how long would that take, and what tools does OSHA need, really, to get that done so that employers and employees alike can move in a direction we would much rather move but right now are handcuffed by.

Ms. RABINOWITZ. OSHA has approximately 400 out-of-date exposure limits that were adopted in 1970—between 1970 and 1972 based on science from the 1940s or 1950s or 1960s. The courts have ruled that OSHA has to do those one by one. And based on the GAO study, which suggested the average amount of time would be about 7 years—I am not that good with math, but you can multiply out, it would be decades and decades and decades.

And they have really thrown their hands up. They can't figure out a way to do this. They don't have the resources and so they have almost stopped trying.

There have been proposals in the past, two of which—one of which was reported out of this committee in what I believe was the 102nd and 103rd Congress to create a system of periodically updating these basic exposure limits, let's say every 5 or 10 years, so that they corresponded with the recommended limits by other organizations. That went nowhere.

EPA has a similar process where they update Clean Air Act standards on a periodic basis. I am not as familiar with those proposals.

But there have been a series of proposals. I think there have been a series of working groups with business and labor trying to figure out a way to fix this problem. It would probably require action by Congress because the statute has currently been interpreted to require OSHA to go one by one.

Mr. POCAN. And let me just ask one other slightly different question on, you know, it has been implied that somehow something has changed recently with how OSHA operates. You know, the letters of interpretation have been used consistently as a core agency function, as I understand it regardless of party in charge. Is that——

Ms. RABINOWITZ. Regardless of party in charge. I would like to just cite two examples.

Mr. Hammock cited this globally harmonized hazard communication system and was critical of a interpretation that OSHA issued that defined combustible dust, but the American Petroleum Institute and the American Chemistry Council have sought interpretations from OSHA without notice and comment to clarify how the rule would apply to them, and they are both seeking those interpretations and potentially willing to withdraw from litigation if they get them.

There won't be any notice and comment on the ones they are asking for, either. It is the way OSHA does business when it has to go into the specifics.

And with respect to the memo that the gentleman from the Farm Bureau has talked about, I went and looked at the definition in the 2011 memo of where OSHA can inspect. It is verbatim the same as the definition of where OSHA can inspect in the 1998 directive. And so OSHA, as I understand it, has not changed what it views is covered by the farming rider—the small farm rider—and what isn't.

Whether there has been a factual error that this facility in Nebraska was inspected when it shouldn't have been, I don't know the answer to that question. I understand it is currently in litigation. But when I did some research for this hearing, the statement that OSHA uses, and it defines who is covered and who is not covered by SIC code, the exact same SIC codes have been listed for more than 15 years, so there hasn't been, in my mind, any change.

Mr. POCAN. Thank you.

Chairman WALBERG. Thank you. The gentleman's time is expired.

I now recognize my colleague and friend from North Carolina, Mr. Hudson.

Mr. HUDSON. Thank you, Mr. Chairman.

And thank all of our witnesses for being here today.

Mr. Hammock, I have talked to business owners every day who are overwhelmed by the magnitude of the federal government, how present it is while they try to run their business day to day. With the new health care law, confusing tax code, anemic economy, there is no doubt that we—there is no reason that we should force our businesses to comply with impossibly excessive regulation.

I don't see how companies can comply with the regulations in the face of such enormous cost. The American Foundry Society has said that the new silica regulation will cost their industry $2 billion an-

nually if implemented. The feasibility to comply with these regulations also concerns me greatly when as much as 40 percent of the OSHA-collected silica samples exceed the current standards in the construction industry. We need to make sure the industry is not burdened with unnecessary regulations that are impossible to comply with.

Is it true that your testimony that when OSHA undertakes changes to existing guidance documents stakeholders are not provided any notice, any advance communication or notification of these changes. Is that correct?

Mr. HAMMOCK. Yes, that is correct. And, you know, as we talked about also, just the difficulty for folks really knowing what is out there without having, you know, called their OSHA lawyer every once in a while to find out when is the last time you, you know, read something on OSHA's Web site.

Mr. HUDSON. Thank you. Now, there is considerable evidence that many of the commercial labs can't accurately and consistently measure silica samples and the proposed PEL, or permissible exposure limit, which is 50 percent of the current limit, let alone the proposed action level, which is half of the proposed PEL, or 25 percent of the current limit. OSHA seems to acknowledge this problem by providing commercial labs 2 years in which to improve the quality of their silica analysis, yet would still hold employers accountable for complying during that same 2-year period.

How can OSHA demand compliance for employers who depend on the labs for accurate silica analysis when the agency apparently believes that many labs aren't completely up to that standard anyway?

Mr. HAMMOCK. Yes, and you bring up a very good point with respect to OSHA's current proposed rule related to crystalline silicone. One of the major issues that has been raised in the course of that rule is the extent to which samples can be read at those types of levels, and it is of significant concern to folks that have silica exposures in their work environments.

Mr. HUDSON. Well, don't you think OSHA should give employees the same 2-year catch-up it gave the labs?

Mr. HAMMOCK. Yes. And one thing that I will emphasize, in this situation that is something that stakeholders should comment to the agency on. OSHA has sought comment on that issue, and I think it is important for everyone, employers and employees, to comment on those very issues during the rulemaking.

Mr. HUDSON. I agree.

Well, OSHA estimates that the average very small business owner will spend about $1,100 on compliance with the proposed standard each year, yet the cost of hiring someone just to sample and analyze a set of silica examples of the two to four sets that could be required annually could exceed $1,000—for example, $2,000 to $4,000 a year.

Medical surveillance costs can run $150 per employee every 3 years, so an employer with 20 employees on medical surveillance could pay $1,000 a year just in medical costs. Engineering controls and respirants could cost many thousands of dollars. How did OSHA derive their value and how does OSHA square the reality

of expected costs with these estimates that seem to be way off to me?

Mr. HAMMOCK. Yes, they have a methodology—OSHA does—that, you know, essentially they find unit costs for various types of things that would be required and then they multiply that in sort of a crude analysis of it by number of exposed employees or number of establishments affected, and that is how they reach those numbers. And I think a lot of folks have raised concerns that those numbers are under what they really should be, and I expect that OSHA will get a robust record to look at as they go forward with that rulemaking as to whether those costs are accurate.

Mr. HUDSON. Thank you.

Switching gears quickly—I have got about a minute left—Mr. VanderWal, your testimony discusses OSHA's attempt to redefine certain aspects of farming post-harvest, therefore not covered under the longstanding appropriations language. Do you believe the activities described are integral to farming operations?

Mr. VANDERWAL. Thank you. Yes, I do.

The storage and conditioning of grain is an absolute integral part of a farming operation because we spend all the time planting, doing the crop protection chemicals, harvesting, doing all the things that it takes to produce a great crop, and the ultimate goal, like I said, is to sell it. Well, what you have to do is you have to dry the corn first if it doesn't dry down properly in the field; you have to finish it all the way to 15 percent.

And then the prices at harvest are typically lower than the rest of the year so we store it for anywhere from 1 to 6 or 8 months to try to get a better price. That is part of the farming operation; it is not a sideline.

Mr. HUDSON. Thank you.

And, Mr. Chairman, my time is expired.

Chairman WALBERG. Thank the gentleman. His time has expired.

I recognize myself now for cleanup, 5 minutes of questioning.

Mr. Baskin, the walk-around letter of interpretation appears to create a conflict between the National Labor Relations Act and the Occupational Safety and Health Act. What could be the impact of this conflict on employers and how should they navigate this apparent conflict?

Mr. BASKIN. Well, there really is no way for them—for employers to navigate it because they are just simply being told that their rights under the National Labor Relations Act—their rights of private property, protect those—to protect their property against outsiders—are lost. The statement was made earlier that, well, if they start leafleting or start disrupting the employer or the safety inspector can step in, but the damage is done when they cross the threshold. This is supposed to be private property. The inspector has the right to come in; these outside union organizers who do not represent the employers in the workplace do not have that right.

This is not something where the employer can go file charges or do anything.

Chairman WALBERG. This goes beyond leafleting.

Mr. BASKIN. Absolutely. It is a protected employer right and it is the right of the majority of the employees in that workplace to

designate who their representatives are going to be. The statement was made earlier that there is nothing in the act or in the regulation that makes reference to that, but the act says that it is supposed to be a representative authorized by the employees who is doing the walk-around. The regulation says it is a representative authorized by employees, shall be an employee of the employer.

And from that we first went to certain people like safety engineers and hygienists, and now, after a million inspections over 40 years—a million inspections with no outside union agent allowed into a nonunion workplace—suddenly in 2013 OSHA declared, "Absolutely, let them in." That is wrong without going through the notice and comment. It is unquestionably a change in their longstanding policy.

Chairman WALBERG. So let me follow that to a question, does the walk-around letter of interpretation serve the best interest of the majority of employees in the workplace?

Mr. BASKIN. Well, absolutely not. They haven't asked for these outsiders to come in. They have as much at stake as anyone in that workplace who made the—had the concern about the inspection in the first place. They are the ones who are working there, and if they want a representative there are procedures in place for them to properly designate such a representative.

Chairman WALBERG. And they are the ones most concerned with the safety of their own workplace.

Mr. BASKIN. I would think so.

Chairman WALBERG. Thank you, Mr. Baskin.

Mr. VanderWal, with respect to grain bins, are you aware of any efforts by OSHA to engage the Farm Bureau or individual family farmers in order to gather information related to best practices in this area?

Mr. VANDERWAL. I am not aware of any such effort.

Chairman WALBERG. No efforts undertaken?

Mr. VANDERWAL. As far as being part of the Farm Bureau, I don't believe we have been contacted by OSHA to do a cooperative program of any kind.

Chairman WALBERG. A large and respected entity in the agriculture community with best interests and best practices that they share regularly with their membership and generally with agriculture.

You note two situations where OSHA issued citations to family farmers in your testimony. In one instance the citations were withdrawn after a reporter made an inquiry about the agency's citations. Have you heard of other farmers in similar situations that have gone unreported?

Mr. VANDERWAL. We haven't at this point. As you say, there can be cases where people have had those situations arise and haven't said anything. Some may just pay it and try to make it go away.

But this is a situation where we believe it is a camel's nose under the tent and if we let it get started, and say we get 4 years down the road and it starts happening more, then if we start complaining people would say, well, why didn't you say something 3 or 4 years ago when this started? We just want to stick up for ourselves and head it off at the pass.

Chairman WALBERG. Mr. Hammock, OSHA created a chemical exposure toolkit with sources other than OSHA's own regulations for exposure limits, as I understand it. OSHA press rollout of the toolkit was critical of the agency's inability to update its own permissible exposure limits.

Is it appropriate for an agency to undermine its own standards through guidance? And then secondly, do you believe the toolkit creates certainty and confidence for the regulated community?

Mr. HAMMOCK. Thank you. I will answer the second question first, if I may.

I think it does create a lot of uncertainty and confusion out there, and, you know, for the small business person or even the larger business person, as to what they need to drive their certain operations to comply with. I think it does create quite a bit of uncertainty.

And then to your first question, absolutely. Look, it is dismissive of their own permissible exposure limits. I mean, I don't think there is any dispute, and the Chamber would agree that the PELs that are on the books need to be reexamined and reevaluated. But this action is highly dismissive of the existing limits and I do think will create a lot of uncertainty for employers out there.

Chairman WALBERG. Well, I thank the gentleman.

And I thank the whole witness panel for your time and attention to this issue. This is a start of discussion and a continued discussion that ought to go on, and so I thank you for participating with us today.

I would like to recognize the ranking member, Mr. Courtney, for any closing comments that he would like to make.

Mr. COURTNEY. Thank you, Mr. Chairman, again for your, you know, wonderful conduct in terms of this hearing and making sure all members have a chance to ask questions and all witnesses have a chance to answer them.

I want to just sort of do a little bit of housekeeping before doing the final closeout, which is, again, that the opening statement by my friend and colleague sort of began with the catechism of folks on the other side that this administration is somehow, you know, overreaching in terms of its use of executive power. Again, the Brookings Institute did an analysis of the Obama administration, the Bush II administration, and the Clinton administration in terms of the issuance of executive orders.

On average, over the terms of these Presidents, President Obama has issued 33 executive orders, President Bush 35, and President Clinton 45. So again, I just want to, you know, at least try to point out that the narrative, which again, we are hearing and we are going to continue to hear, when you exactly—when you examine it through the facts of actual actions by this executive branch, it in fact is more modest than the preceding two administrations.

Secondly, you know, Mr. Baskin, your comment that the law requires that only employees be participating in the walk-around, again, I would just read to you the 1973 regulation from OSHA, which states that "the representatives authorized by employees shall be an employee of the employer," period, but it doesn't stop there. It states, "However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accom-

paniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer)"—and that is just examples—"is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection."

Again, Ms. Rabinowitz cited court cases that have shown that even in nonunion workforces or places where there is a strike and replacement workers are present, union representatives, again, and in the opinion of the compliance officer makes sense to be the person representing the employees during inspections, that is perfectly legal, and these cases go back long before this administration.

And lastly, it may be true that the South Dakota Farm Bureau has not participated with OSHA, and that is unfortunate and I hope that that would change, because I think that as in my state, you know, in fact, there is collaboration of employer groups with OSHA to try and, again, get best practices out there in an informational, consensus-building, non-confrontational, non-adversarial setting.

However, I would point out that after the settlement that OSHA had in South Dakota with the Wheat Growers, where again, it was a $1.6 million fine assessed, they cut it in half because the Wheat Growers agreed to basically coordinate training exercises with local fire departments and five rescue tubes were installed, which saved the life, by the way, of a worker who was engulfed. And again, that is an example of collaboration which has actually happened in South Dakota in this very terrible, you know, difficult area of work, which again, I know you care about and I know you want to be part of the solution to those situations.

And there I just would begin by saying that as we review OSHA's efforts to protect workers we should remember the voices of workers' families whose loved ones died in preventable accidents.

Catherine Rylatt sent us a statement about her nephew, Alex Pacas, age 19, who suffocated from walking the corn on his second day of work at the Haasbach grain storage facility in Illinois back in 2010.

She wrote: On July 28, 2010 in Mt. Carroll, Illinois around 7 a.m. my nephew Alex, age 19, reported to his second day of work with his best friend, Will Piper, then age 20, and coworkers Wyatt Whitebread, age 14, and Chris Lawton, age 15. The four young men were sent to bin number 9 to knock down corn that had built up on the interior walls and shovel grain towards the open sump, situated over the operating unloading conveyer below.

A 911 call was received at 9:56 a.m. that said people were trapped in a grain bin. Word spread quickly through the small community and soon family, friends, and townspeople gathered at the site in the scorching July heat.

The families did not know when they arrived the most horrific of events had already taken place. Shortly before 10 a.m. Wyatt, the 14-year-old, became caught in moving grain. Terrified, he screamed for help as he started sinking.

When a rescue attempt by three other boys was futile, Chris escaped to get help. Alex and Will continued pulling on Wyatt, determined to save him. Wyatt was almost freed from the flowing corn

when the surface shifted, trapping Will and Alex. Now helpless, they witnessed Wyatt, still screaming, sink beneath them and become completely covered.

One shudders to think what the last thoughts of this frightened child—he was a baby in my book—were as he became entombed alone in the darkness before his life was snuffed out by millions of corn kernels. Wyatt was dead before the 911 call was even made.

Holding each other's hands, Will and Alex clung to hopes of rescue as the grain flowed higher around them. Alex strained to keep his face free while Will franticly kept brushing grain away. Will was in a desperate frenzy, attempting to keep Alex alive even when Alex's hand stopped squeezing his beneath the dried kernels.

These tragedies are completely preventable. In this case, the employer had purchased harnesses which could have prevented the disaster, but never provided the necessary training or equipment.

Mr. Chairman, I respectfully request that the statement of Catherine Rylatt be included in the hearing record.

[The information follows:]

Prepared Statement of Catherine A. Rylatt, MPA

My name is Catherine A. Rylatt. I am the maternal aunt of Alex Pacas, a grain bin fatality victim. I am respectfully writing on behalf of my family.

On July 28, 2010 in Mt. Carroll, Illinois around 7:00 AM my nephew Alex, age 19, reported to his second day of work with best friend Will Piper (then age 20) and co-workers Wyatt Whitebread, age 14, and Chris Lawton age 15. The four young men were sent to Bin # 9 to knock down cornthat had built up on the interior walls and shovel grain toward the open sumps situated over the operating unloading conveyor below.

A 911 call received at 9:56 AM said people were trapped in a grain bin. Word spread quickly through the small community and soon family, friends, and townspeople gathered at the site in the scorching July heat. They were told rescuers were in contact with one of the 3 boys trapped. The area filled rapidly with an assortment of vehicles as over 200 rescuers arrived from other locations. Farmers and truckers lined the highway for miles to haul off grain emptied from the bin.

The families did not know when they arrived, the most horrific of events had already taken place. Shortly before 10 AM, Wyatt became caught in moving grain. Terrified, he screamed for help as he started sinking. When a rescue attempt by the 3 other boys was futile, Chris escaped to get help. Alex and Will continued pulling on Wyatt, determined to save him. Wyatt was almost freed from the flowing corn when the surface shifted, trapping Will and Alex. Now helpless they witnessed Wyatt, still screaming, sink beneath them and become completely covered. One shudders to think what the last thoughts of this frightened child were as he became entombed alone in the darkness before his life was snuffed out by millions of corn kernels. Wyatt was dead before the 911 call was made.

Holding each other's hands, Will and Alex clung to hopes of rescue as the grain flowed higher around them. Alex strained to keep his face free while Will frantically kept brushing grain away. Alex realized he was going to die. He sought God's forgiveness for his sins and begged Will to pray the Lord's Prayer with him. Frightened, hands still clasped together and covered by corn, the two prayed. Will in desperate frenzy attempting to keep Alex alive even when Alex's hand stopped squeezing his beneath the dried kernels. Rescuers arrived and surrounded Will with a grain tube, enclosing him with Alex's body. In and out of consciousness, Will braced himself against the body of his best friend to keep himself above the surface until he was finally freed at 3:15 PM and air lifted to a trauma center. The three mothers, watching the helicopter leave, remained hopeful.

Around 3:30 PM, officials met individually with the families. My sister, Annette Pacas, was informed Alex, her eldest child and brother to 6 siblings, mischievous and energetic since birth, dreaming of becoming a robotics engineer and designing prosthetics, would not return home again. His body was recovered at 10:15 PM. Seeing him, my sister spit on her dusty blouse and began wiping the dust from her child's face.

Dr. and Mrs. Whitebread's son, Wyatt, was recovered at 10:30 PM. Their youngest child, a beautiful, exuberant, full-of life, contagiously smiling 14 year old would

never again make them laugh. They had talked to the manager and had been assured Wyatt would not be inside a bin with grain.

On this fateful day, Haasbach, LLC, the owners of Bin #9, called their attorney first; they never called OSHA. The father of one of the Haasbach partners alerted the media—then called OSHA. OSHA arrived on the scene in the late afternoon and began an investigation. During the days that followed OSHA investigators discovered safety harnesses, still in original wrappings, hanging in a shed—the purchase resulting from an insurance risk report. The boys never knew the harnesses were there.

With recently publicized cases of engulfment in the background—one involving the death of 17 year old Cody Rigsby in Colorado—the Mt. Carroll incident took on even greater significance. OSHA issued an advisory letter to the grain industry on August 4, 2010 reminding them of the hazards of bin entry and the standards to follow. Yet within 3 weeks another Illinois man was fatally engulfed. More engulfments continued, prompting OSHA to resend the warning letter to over 10,000 registered grain operations on February 1, 2011.

OSHA issued 25 citations, including 12 willful violations, and proposed fines of $550,000. Haasbach argued throughout the investigation and appeal process OSHA had no jurisdiction. They claimed theirs was a small farming operation exempt under the appropriations rider from OSHA enforcement. However, this facility was not physically connected to a farm. On December 6, 2011, Haasbach settled the proposed fines for $200,000 with OSHA, along with $68,125 in civil monetary penalties assessed by the Department of Labor's Wage and Hour Division for violaitons of child labor laws.

While blames OSHA for its greater scrutiny and farmers rally against anything perceived as a regulation, people continue to die and be injured in farm and commercial grain storage facilities. In case after case after case, whether it is on a farm or at a commercial elevator, the reasons people are killed and injured are repeated over and over. The prevention methods, around for 30 some years, are not just OSHA regulations, but also "Best Practices" put forth by a variety of agricultural sources including the USDA and the farm bureau associations.

In the 3½ years since the death of my nephew, I have seen a concerted effort by OSHA and others to try and address hazards associated with grain handling and storage at commercial facilities and on farms through a combination of enforcement, outreach, and training/education efforts for both their staff and the grain & farm industry. They all understand and respect the vital role the farmers and grain industry play in our nation. Their work produces food, feed for livestock, fuel, plastics, medicine, and so much more. Yet, as the demand for these products increases so will the yield and the need for storage—safe storage.

The efforts OSHA has taken alongside others were not born out of a political desire to over extend their authority as many have suggested. Instead, we are seeing something we don't often experience with our government—HUMANENESS. The deaths of Wyatt and Alex, coming so closely on the heels of Cody Rigsby, deeply touched many people. These were followed by Tommy Osier's death, Memorial Day 2011 (Michigan). Tommy had just turned 18 when he was engulfed in a silo on a farm. August 2011 Oklahoma teenagers, Tyler Zander and Bryce Gannon, each lost a leg when they got caught in an unguarded auger while working in a grain bin.

An area OSHA and this Committee can address is how far "farms" can stretch the definitions and intent of the appropriations rider—like Haasbach attempted. The boundaries that once separated farms and farm storage from commercial operations have become increasingly blurred. Farms incorporate to achieve tax breaks, obtain grain storage and/or merchandising licenses, enter into contractual relationships with commercial facilities and with each other. Yet, when convenient, they want to be treated as though they are simply small family farms. Farms are building more bins, and bigger bins, with on-site storage rivaling the local commercial elevator.[1] The business has changed and yet our definition of "small farm" has remained the same for nearly 40 years.

When taken out of context, the assertions of farms being inspected and Congressional letters asserting OSHA is circumventing the law have sparked a needless debate—A debate that needs to end now. Making the issue of safety in grain operations a political, partisan, volleyball; casting OSHA as a power hungry villain, and perpetuating exaggerated claims is NOT helpful or conducive to finding a solution.

[1] Capacity of off-farm commercial grain storage in the United States totaled 10.4 billion bushels on December 1, 2013 up from 8.5 billion bushels in 2003. By contrast, United States on-farm storage capacity totaled 13.0 billion bushels in 2013 up from 11.0 billion bushels December 1, 2003. USDA, National Agricultural Statistics Services, Grain Stock reports.

It would serve the citizens of this country better if energies (and monies) were spent working together to craft a creative and meaningful solution to worker safety—whether on a "small farm" or a commercial grain facility.

We need a solution that takes into account the changing role of farms; the changes and growth in production, processing, storage, movement, and transportation of grain; and the changing relationships between farms and "commercial" entities. We need a solution based on protecting workers' lives no matter where he/she is employed. We need a solution that transcends our normal politics and is not dictated by partisanship and money. We need a solution that recognizes whether the worker is a farmer's son, a young man trying to earn money for college, a 20 year veteran at a commercial grain facility, his (or her) life is equally IMPORTANT and should be PROTECTED—especially when we know what the hazards are and we know how to prevent them.

Chairman WALBERG. Without objection, and hearing none, it will be included.

Mr. COURTNEY. As we conclude this hearing, Mr. Chairman, I hope that we keep in mind the important role that OSHA fills in improving accountability and preventing future tragedies. After a grain entrapment in South Dakota, which I mentioned earlier, the Wheat Growers were assessed $1.6 million in fines but cut them in half as part of a settlement which required the employer to purchase five Liberty Rescue Tubes and to coordinate training exercises with local fire departments.

As a result of this training and equipment, firefighters were able to save the life of a worker who was engulfed in a gulf bin at the Watertown Co-op.

I want to thank you again for holding this hearing, Mr. Chairman, and I want to thank all of our witnesses for being here today.

I yield back the balance of my time.

Chairman WALBERG. I thank the gentleman, and I thank you for the reminder of a reality of the issue we are dealing with, that sad illustration of people trapped in that type of accident. And it is certainly all the desire of the communities represented here today at the witness table, in the room, and certainly at the dais here on both sides of the aisle that those accidents be prevented.

But I think there is the challenge that we wrestle with today that as we want to prevent them and take precautions in the future and work in a regulatory relationship—regulators, employers, industry personnel, employees, and members of Congress—that it be done in a partnership fashion.

We certainly appreciate the fact that this is to be a year of action and moving forward in positive ways for our country. But we also

want to make sure that as the President uses executive order and other approaches to dealing with concerns that he has and this administration has, and rightfully, that other administrations have used as well, that we certainly don't overstep the bounds of the responsibility that Congress has.

I must admit, as I listened to the State of the Union address last week, when this statement was made that the President was willing and was going to move forward, if Congress wouldn't act, he would, and to see the response of a good number of my colleagues who stood to applaud the President stepping in an area that was our authority, our responsibility under the Constitution—to wrestle with the concerns of both our employee constituents and our employer constituents, to wrestle with issues of safety and security, but wrestle with issues as well of moving this country forward and remaining the leader in the world for production and employment and provision, in certain cases, as we are talking about today, provision of food sources for the entire world and not just our nation—that we proceed with due process but with caution, as well.

There are reasons why we are in a situation we are in, and having that continuing creative tension between the bureaucracy and between the elected representatives of the people to make sure that all best interests are served with liberty still assured.

I remember a recent trip to Uganda, and going on a peace and reconciliation effort, non-congressional, up to the north of Uganda, where we had the atrocities with Kony and the Lord's Liberation Army and the child soldiers and all of that, and to see that area of Uganda attempting to make a rebound and reconciliation but also in its agricultural economy, and something coming from the agriculture community of the Seventh District of Michigan, that I am privileged to represent, I wouldn't even contemplate that one of the reasons why the farmers in that area weren't able to benefit from all of their labor done by the sweat of their brow in just sustenance-type farming was because they didn't understand the concept or have the ability to store their grain. And so I saw a community there working together to produce and build a granary.

Now, I am sure that we could help them in making sure that they have harnesses and all of the rest available to them. At this point it wasn't going to be a tall granary, but it was going to be a granary nonetheless so that they could save and store their crops until the appropriate time to sell it, which would provide resources for their families way beyond what they were able to at this present time and ultimately produce an economy that was sustainable beyond just eating what they took from the fields that day.

Now, that is what I see here, and I would say that we must proceed cautiously when we move into regulation that we highlight today in a specific way related to our farmers, our family farm. We want our kids to be safe on the farm.

My son works at a granary, works at a major granary in Southeast Michigan, and uses the harnesses that are available and lives under OSHA requirements because it is an actual elevator operation. I know that the farmers in my area have concerns and try to address that to the best of their ability.

And so this is an issue that I am concerned that we address and we as members of Congress take the position that we will push

back when necessary and support when necessary bureaucratic regulation that goes on, but it must make sense.

And so that also goes in the walk-around issues, to make sure that our employees are truly represented and that we don't have people on site that have one interest in mind potentially, because we can't determine for certain what they are thinking if they come on with the potential of organizing. That hasn't been the process in the past and I think it is appropriate that we consider that today.

One other point I will mention to make it clear, that in relationship to organizing issues, it is in direct contravention of OSHA's field operations manual—let me make it clear—that the interpretive guide for OSHA inspectors states this, and it has stated this: Under no circumstances are inspectors, CSHOs, to become involved in an onsite dispute involving labor management issues or interpretation of collective bargaining agreements.

This is the wording, the language presently in place: During an inspection the CSHOS, inspectors, will make every effort to ensure that their actions are not interpreted as supporting either party to the labor dispute. This is a concern and another reason for the hearing that we have had today.

And I appreciate the witness testimony from both sides of the spectrum. I appreciate the attention of the subcommittee members and the staff in putting this together.

And we will continue looking at it aggressively, pushing back, asking questions of OSHA related to this as we move forward, but again, all with the effort to make sure that safety and security goes along with success and opportunity in the workplace for both employer and employee.

There being no further business to come before the subcommittee today, the subcommittee stands adjourned.

[Additional submission of Hon. George Miller, senior Democratic member, Committee on Education and the Workforce, follows:]

Prepared Statement of Hon. David Michaels, Ph.D., MPH, Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor

Thank you for this opportunity to submit a statement for the record of the February 4, 2014, hearing entitled, "OSHA's Regulatory Agenda: Changing Long-Standing Policies Outside the Public Rulemaking Process." I hope this statement provides additional information and context with respect to some of the issues raised during the hearing, particularly in regard to safety concerns with certain OSHA incentive programs, the permissible use of walk-around representatives during OSHA inspections, OSHA's online posting of annotations related to permissible exposure limits, and OSHA's policies concerning small farms and outreach to the agricultural industry.

At the outset, let me note that OSHA has a robust rulemaking process that allows for and encourages extensive stakeholder involvement through public comment periods and public hearings during rulemaking. While the Occupational Safety and Health Act of 1970 (OSH Act) is clear when rulemaking procedures are required, the OSH Act also encourages OSHA to "develop innovative methods, techniques, and approaches for dealing with occupational safety and health problems." OSHA values an open and transparent process that provides all interested stakeholders with the opportunity to be informed about and meaningfully participate in DOL's rulemaking efforts. The OSH Act, section 21(c)(2), also directs OSHA to consult with and advise employers and employees, and organizations representing employers and employees as to effective means of preventing occupational injuries and illnesses. OSHA's significant public outreach and education efforts were established over 40 years ago to carry out this function.

Incentive Programs

Effective safety programs rely on accurate injury reporting. We know that most employers want to comply with the law and accurately report their employees' injuries. Unfortunately, some employers, particularly in high-hazard industries, have implemented programs that, inadvertently or by design, discourage injury reporting. Depending on the environment, workers may fear retaliation from their employer, such as being disciplined or fired if they report an injury; or may be pressured by co-workers not to report an injury in order not to jeopardize a group reward. If accurate injury records are not compiled because workers believe they will be fired or lose a benefit for reporting an injury, or supervisors fear they will lose their bonuses or even their jobs if workers report injuries, real safety cannot be achieved.

On March 12, 2012, OSHA issued a memo, "Employer Safety Incentive and Disincentive Policies and Practices," to address problems with these policies. This memo states that, since section 11(c) prohibits an employer from discriminating against an employee because the employee reports an injury or illness, "[i]ncentive programs that discourage employees from reporting their injuries" may violate the OSH Act's antidiscrimination language if they result in employees being disciplined or otherwise treated less favorably than they would have been otherwise. And, only "if the incentive is great enough that its loss dissuades reasonable workers from reporting injuries," would there be a possible violation of OSHA's recordkeeping standard. The memo does not say that the mere existence of any incentive policy violates the law, only that the consequences of some policies may result in noncompliance if such policies deter employees from reporting injuries.

Walk-around Representatives

Section 8(e) of the OSH Act provides that, "[s]ubject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace * * * for the purpose of aiding such inspection."[1] These representatives are sometimes referred to as "walk-around representatives." OSHA's regulations implementing section 8(e) have always permitted non-employee third-party representatives designated by workers at the worksite to accompany OSHA inspectors on walk-around inspections—something that is fully consistent with the language and intent of this provision. Under OSHA's regulations, a Compliance Safety and Health Officer (CSHO) has significant discretion with regard to who may participate in inspections.[2] In particular, the CSHO may permit third parties to be walk-around representatives if the CSHO finds that the third party would make a positive contribution to a thorough and effective inspection.[3] Although the regulations state the general rule that walk-around representatives "shall be" employees of the employer, the regulations explicitly allow walk-around participation by a non-employee representative when, in the judgment of the CSHO, such a representative is "reasonably necessary to the conduct of an effective and thorough physical inspection."[4]

Allowing non-employee third-party representatives to accompany OSHA inspectors on walk-around inspections is, therefore, not a new OSHA policy. The OSH Act itself states that "a representative authorized by [the] employees" may accompany the inspector. OSHA has interpreted this language to mean that, subject to some limitations, it is up to the employees to choose a representative who will accompany the CSHO during a workplace inspection.

Annotated Permissible Exposure Limits (PELs) Website

There is broad consensus within the Nation's health and safety community that many of OSHA's PELs are based on half century-old science, and provide inadequate protection for today's workers. In fact, even the testimony presented on behalf of the U.S. Chamber of Commerce at this hearing agreed that many of OSHA's PELs are out of date and a number of stakeholders have urged OSHA to update these standards. The OSH Act mandates OSHA to "provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe or unhealthful working conditions in employments covered by this Act." Where there is scientific consensus that many of OSHA's PELs do not provide for safe or healthful working conditions, the OSH Act allows OSHA to state that fact, and, where necessary, to provide guidance and information to workers and employers on how to provide effective

[1] 29 U.S.C. § 657(e).
[2] 29 C.F.R. §§ 1903.8(a)-(d).
[3] Id.
[4] 29 C.F.R. § 1903.8(c).

protection. The information posted on OSHA's website regarding PELs is designed to fulfill this obligation.

Small Farms Policy and Agricultural Outreach

Fatalities can occur in grain storage facilities when workers become buried by grain as they walk on moving grain or attempt to clear grain built up on the inside of a grain bin. Moving grain acts like quick sand, entrapping and suffocating the worker. Since 1987, OSHA has had a standard that establishes common sense, effective, and safe practices that grain handling facilities must follow to prevent workers from becoming entrapped. In 2010, there was a dramatic increase in the number of workers entrapped and suffocated in grain storage structures while performing grain handling operations. During the same year, researchers affiliated with the Agricultural Safety and Health Program at Purdue University documented a series of cases in which a total of 57 workers were entrapped by grain. Thirty one of those workers lost their lives, the highest number of annual fatalities on record since 1964.

As a result of these tragedies, OSHA has focused its resources on preventing grain entrapment fatalities through industry outreach, education, technical assistance, and targeted enforcement. In 2011, OSHA sent a letter to approximately 13,000 grain facilities, describing safety measures and detailing how to comply with OSHA's standard. Since OSHA launched its prevention initiative, the number of documented annual grain entrapments for 2012 compared to 2010 decreased by 67 percent (from 57 in 2010 to 19 in 2012) and the number of workers killed in these entrapments decreased by 74 percent (from 31 in 2010 to eight in 2012).

OSHA is also well aware of the appropriations rider that prevents it from inspecting the vast majority of small family farms, and the agency strives to ensure full compliance with the small farming operations exemption. OSHA, in consultation with the U.S. Department of Agriculture, is currently working on revised guidance to clarify that rider for its field staff. In the interim, to ensure consistent and appropriate enforcement of OSHA standards, OSHA has instructed its Field Offices, in cases of uncertainty, to request clarification from the National Office when determining if farming operations are exempt.

Over the past several years, OSHA, at both the regional and national level, has engaged in extensive outreach to the agriculture community, including state Farm Bureaus. These efforts have included meetings, conferences, presentations, posters, brochures, websites, fact sheets, and Public Service Announcements to educate farm owners and employees about the hazards involved in grain handling and appropriate safety precautions. For instance, OSHA's Area Office in Aurora, Illinois, has worked closely with the Illinois Farm Bureau in its capacity as a member of the Grain Handling Safety Coalition (GHSC). The GHSC is a broad-based, diverse consortium of associations, agencies, and individuals with an interest in ensuring safe grain handling operations. In collaboration with this group, OSHA's Area Office has developed training modules and safety alerts, and has participated in multiple outreach sessions and conferences. In Wisconsin, OSHA has participated in multiple training and outreach sessions with the Wisconsin Farm Bureau since 2010. In addition, in November 2012, OSHA formed an alliance with the Wisconsin Agri-Business Association (WABA). WABA represents more than 320 members engaged in agricultural business across Wisconsin. This Alliance focuses on the hazards addressed by OSHA's Grain Handling Local Emphasis Program (LEP): engulfment, falls, auger entanglement, struck by hazards, combustible dust, and electrocution. As part of the Alliance, OSHA and WABA representatives meet quarterly to discuss projects to educate and inform employers on grain handling and other workplace safety topics. The Alliance participants held a series of webinars in 2012 on various topics, including confined space entry, fall hazards, engulfment hazards, combustible dust, electrical issues, sweep auger entanglement, and lockout. More than 60 sites participated in these webinars, which received excellent reviews. Future activities with this alliance, and the many more OSHA has throughout the country will continue. Finally, valuable information on grain handling can be found here: *http://www.osha.gov/SLTC/grainhandling/index.html.*

Thank you for this opportunity to submit this statement for the record. I look forward to continuing to work with this committee and welcome future opportunities to discuss how we can better protect workers.

[Whereupon, at 11:30 a.m., the subcommittee was adjourned.]

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