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Statement of the U.S. Chamber of Commerce

ON: **Time Takes Its Toll: Delays in OSHA's Standard-Setting Process and the Impact on Worker Safety**

TO: **Senate Committee on Health, Education, Labor and Pensions**

BY: **David Sarvadi, Esq.**
Keller and Heckman

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More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

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

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

Testimony of David G. Sarvadi
Partner, Keller and Heckman LLP

Senate Committee on Health, Education, Labor and Pensions

Hearing on
"Time Takes Its Toll: Delays in OSHA's Standard-Setting Process and the Impact on Worker Safety"

April 19, 2012

Chairman Harkin, Ranking Member Enzi, and members of the Committee, thank you for the opportunity to testify today.

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

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

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

I have practiced in the area of workplace safety and health law for more than 20 years at Keller and Heckman LLP. As part of my practice, I taught week-long seminars on all of OSHA's general industry standards all around the country, covering essentially the same material included in OSHA's 30-hour training course. Over the years, I estimate that more than 1000 people participated in those classes. The attendees have been mostly the people who had to translate OSHA standards into actions, practices, and procedures in their companies, ranging in size from employers with fewer than 10 employees to those with hundreds of thousands of employees.

The Requirements Governing OSHA's Standard Setting Process Were Established by Congress and Reflect Important Public Policy Objectives

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

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

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

As the U.S. Supreme Court recognized in the *Benzene* case, it is not practical, much less feasible to achieve zero risk in any aspect of life. The scope of the OSH Act standards must necessarily be limited to addressing significant risks of material harm. There is no justification for expending resources on a rulemaking or compliance efforts in connection with a rule that does not offer a meaningful improvement in workplace safety.

Furthermore, in requiring OSHA to demonstrate that a rule was technically and economically feasible, Congress properly determined that an agency should not have the authority to effectively regulate an entire industrial sector or activity out of existence. As interpreted by the courts, OSHA's obligation is to demonstrate either that it has satisfied these criteria for each industrial segment or activity that would be covered by the standard, or that there is no material difference between the sectors or activities for purposes of applying the rule. Even so, Congress determined that the protections provided by the APA and the OSH Act were inadequate to provide small business with a meaningful opportunity to participate in OSHA

rulemakings and, for that reason, adopted the Small Business Regulatory Enforcement and Fairness Act which requires OSHA to conduct small business review panels when a proposed regulation is estimated to have a significant economic impact on a substantial number of small entities.

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

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

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

Recommendations

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

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

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

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

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

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

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

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

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

- Do Not Make "Perfect" The Enemy Of The "Good."

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

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

Part of the reason it took so long to complete was in the details: when does an "entry" occur, for example. Most people in the industries that had such spaces knew when those procedures were required. Similarly, the Lockout/Tagout Standard took twelve years (1977-1989). There are many other examples.

A more recent example is the revisions to the Hazard Communication Standard (HCS) to align it with the Globally Harmonized System of Classification and Labeling of Chemicals (GHS). Initially contemplated in 2002, OSHA finally issued an Advance Notice of Proposed Rulemaking regarding GHS on September 12, 2006. Three years later, on September 30, 2009 a proposed rule was issued. OSHA then held public hearings for six months and the record was closed on June 1, 2010.

Unfortunately, the proposed rule went beyond the concept that had been envisioned and supported by both political parties and employers. It included two provisions that were controversial and likely made the rule harder to finalize: unclassified hazards (now call Hazards Not Otherwise Classified) and coverage of combustible dust. Combustible dust is a complicated, multi-factorial hazard which has not been previously regulated by OSHA's HCS. As there is no OSHA developed definition for combustible dust, OSHA was unable to provide a definition of

combustible dust thereby leaving the regulation unclear and unexplained. OSHA's need to shoehorn combustible dust into the HCS regulation likely delayed the promulgation of the HCS regulation unnecessarily by almost two years, and more importantly, has created employer anxiety and uncertainty. I believe that some in OSHA management saw the GHS proposal as a shortcut way to incorporate a combustible dust standard. Unfortunately, the complex issues of how to define when the hazard exists and what should be done to mitigate a hazard that has varying degrees of severity – requiring less activity when risks are low – have now been left to the enforcement process. That is a recipe for litigation.

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

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

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

Assuming that the only acceptable level of risk is zero risk at zero exposure forces OSHA to lower and lower acceptable exposure levels, which in turn increases costs not only financially but in the additional time and management attention that restrictive rules require. This also makes finalizing such regulations increasingly difficult as justifying such increased compliance costs creates additional political difficulties. With silica, it cannot be that the only acceptable risk level is zero. Silica is ubiquitous, and we are exposed to it throughout our entire existence at some level. If OSHA accepts what some propose, every construction site in the country will become a regulated area, and many non-construction manufacturing facilities will as well. Lung

cancer is the signal risk most would seek to reduce with the standard. Yet, we attribute the bulk of U.S. lung cancer experience to tobacco, leaving little room for the conclusion that exposure to crystalline silica is causing large numbers of cases of lung cancer to occur. Indeed, incidences of silica related lung disease have been declining steadily.

Too many in the occupational health field are blinded by the passion they bring to the work, and push OSHA to ignore inconsistent observations like this and pursue unrealistic targets. The remedy is a culture change at OSHA, an acceptance to do what is achievable and widely supported rather than push the envelope beyond practicality.

- Take Into Account Advice Provided By OMB.

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

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

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

Another example of OSHA's inadequate economic analysis, and OIRA's involvement, was the ill-fated MSD column proposal under the OSHA recordkeeping standard. OSHA estimated it would take 15 minutes to train supervisors on how the change would be

implemented. In a meeting with OMB, I explained that this was unrealistic, because as part of its proposal, OSHA was abandoning an interpretation that allowed an employer to let an employee avoid activity that could aggravate muscular fatigue or minor discomfort without triggering a recordable case under the rules regarding transfer or change of jobs. The result would be that the number of incidences an employer would have to review to determine recordability would explode. I estimated it would take a retail store operator at least an hour of training of the store manager and assistant managers, who would be responsible for making these decisions. For an employer with 1500 stores, the time involved would cost an estimate $400,000 or more. There are 7 million workplaces in the U.S., and assuredly, not all would have such a cost associated with it. But it would not be the minimalist and dismissive cost OSHA predicted. In January 2011, OSHA withdrew this regulation from review by OIRA claiming that it needed more input from small businesses. We think problems like this explain the difficulty OSHA had finalizing this regulation and why it is now on the long term action list.

- <u>Accept The Results Of Negotiated Rulemaking.</u>

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

One example of OSHA's insistence on imposing its judgment over the people who work in the industry is the Cranes and Derricks standard promulgated in 2010. In 1971 OSHA issued the original C&D standard based largely on industry consensus standards. In the intervening decades those industry standards were updated leading, ultimately, to a request by the industry that OSHA update its standard. In response, OSHA's Advisory Committee for Construction Safety and Health established a workgroup to recommend changes to the C&D standard. The workgroup developed recommendations on some issues and, in particular, recommended that OSHA use a negotiated rulemaking process as the mechanism to update the C&D standard.

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

At its final meeting in 2004 the Committee reached consensus agreement on all issues. OSHA then proceeded to issue a proposed rule modifying the C&D standard. However, OSHA identified several problems in the Committee's report such as provisions that appeared inconsistent with the Committee's purpose, or that were worded in a manner that required clarification, causing OSHA's proposal to deviate from the Committee's report. The standard

finally was issued on August 9, 2010. Whether the extra time was worth the effort is a matter of debate.

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

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

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

- <u>Recognize That OSHA Standards Are More Effective The More People Volunteer To Adopt Them.</u>

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

employers see a decrease in their lost workday injuries, injury and illness rates, and workers' compensation costs.

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

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

OSHA should refrain from the following:

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

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

- Refrain From Regulating Through Interpretations.

Perhaps as way to get around the rulemaking process, OSHA tends to try to make changes in its rules via "re-interpretations" and enforcement rather than following the statutorily required rulemaking procedures. Agencies are making changes to existing rules, which have significant economic consequences and impose significant compliance costs without giving the public adequate notice, or informing them of the unintended consequences of the changes. OSHA should make a diligent effort to get away from the paradigm described in the following

excerpt from the a frequently quoted 2000 opinion issued by the D.C. Circuit[1] because, as long as OSHA continues down that path, industry will be understandably reluctant to support the agency's rulemaking efforts:

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

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

Yet OSHA did not take any of this into account when it announced that feasibility under the noise standard would now mean only if implementing an engineering or administrative control would put the employer out of business would it be considered infeasible. This would have required that employers spend excessive amounts of money on engineering and

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

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

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

Conclusion

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

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