Statement of the U.S. Chamber of Commerce

ON: OSHA's Regulatory Agenda: Changing Long-Standing Policies Outside the Public Rulemaking Process

TO: House Committee on Education and the Workforce, Subcommittee on Workforce Protections

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

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.