Statement of the U.S. Chamber of Commerce

ON: **INVESTIGATING OSHA'S REGULATORY AGENDA AND JOB CREATION**

TO: **THE HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS OF THE COMMITTEE ON EDUCATION AND THE WORKFORCE**

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The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

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

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

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

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

Prepared Remarks of Jacqueline M. Holmes

Testimony before the
United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections
On behalf of the
U.S. Chamber of Commerce

February 15, 2011

Chairman Walberg, Ranking Member Woolsey, and Members of the Subcommittee, thank you for inviting me to testify today.

By way of background, I am an attorney with the Washington D.C. office of Jones Day, where I have practiced in the OSHA area, among other areas, since 1994.

I am pleased to be here today on behalf of the United States Chamber of Commerce, representing the interests of more than three million businesses and organizations or every size, sector, and region which are directly affected by OSHA regulations. Over 96 percent of the Chamber's members are small businesses employing 100 or fewer employees. For this reason, the Chamber is particularly sensitive to the difficulties faced by small businesses in their efforts to interpret and comply with OSHA standards and is particularly concerned that OSHA consider the costs and burdens it imposes on American businesses, especially those too small to lobby on their own behalf.

OSHA's temporarily withdrawn so-called "interpretation" of its Occupational Noise Exposure standard[1] is the most recent example of actions that OSHA has proposed without consideration – or, it seems, recognition – of the costs they would impose on American business and the consequent impact on job creation. I will also briefly discuss OSHA's attempt last year to impose new recordkeeping requirements for musculoskeletal disorders – or MSDs – which suffered from the same problem. It may seem unusual, even surprising, to be testifying about proposals that have been pulled back, but the importance of doing so is predicated on the firm belief that OSHA's conduct with respect to these proposals reflects a process that is as flawed as the substance of the proposals themselves. In particular, OSHA's decision to impose substantial burdens on employers without adhering to the substantive standards and procedural protections

[1] *See* 29 C.F.R. § 1910.95; 75 Fed. Reg. 64,216 (Oct. 19, 2010).

mandated by OSHA's own interpretation of the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act") is completely at odds with the Agency's statutory obligations.

OSHA's statement announcing the withdrawal of its proposed reinterpretation of the noise standard demonstrates that it still does not understand the fundamental problem with its actions. OSHA did commit to several important steps: reviewing the comments that have been submitted; holding a stakeholder meeting to elicit the views of employers, workers, and noise control and public health professionals; consulting with appropriate experts; and initiating an outreach and compliance program to provide guidance on inexpensive, effective engineering controls for excessive noise levels.[2] While these steps are commendable, they suggest that this ill-considered proposal is not gone for good, and, more importantly, fail to recognize that a lack of outreach was not the problem with this initiative. This was not a messaging problem, it was a policy problem; no amount of clever messaging could cure this bad policy.

Instead, OSHA's central mistake was in adopting a policy that ignored the practical impact, including massive compliance costs, of its action. Moreover, OSHA proposed that policy without any indication that the existing approach – settled for more than 25 years – was failing to protect American workers. "If it ain't broke, don't fix it" may not be an enforceable requirement of administrative law, but it's certainly a good place to start. At a minimum, OSHA must, consistent with its own interpretation of the OSH Act, select the most cost effective way to achieve a safety and health standard's objectives. It failed even to consider that here.

OSHA's action on musculoskeletal disorders or MSDs reflects the same flawed regulatory approach. Procedurally, the action was different. Rather than reinterpret an established rule, OSHA formally proposed a new one. But in that case too, OSHA failed to consider, and even seemed to deny, the serious costs that its proposal would impose, choosing instead to put forth absurdly low cost estimates based on a decade-old analysis. To justify these estimates, OSHA characterized the MSD rule as a simple recordkeeping change, when in fact it drastically expanded the numbers and types of cases employers had to consider, and did so without a clear definition, much less understanding, of what MSDs were covered.

The interests of both American workers and American businesses would be better served if OSHA candidly and publicly assessed the impact of its proposed actions, carefully weighed

[2] U.S. Department of Labor's OSHA Withdraws Proposed Reinterpretation on Occupational Noise, Release No. 11-74-NAT (Jan. 19, 2011).

the costs, and thereby empowered American business to find the best and most efficient means to achieve the shared goal of worker safety. Both the letter of the law and the spirit of effective public policy require OSHA to take these steps.

I. The Occupational Safety & Health Act: A Brief Overview

First, let me provide a brief overview of the OSH Act, which Congress enacted in 1970. It authorizes the Secretary of Labor, through OSHA, to establish national standards governing health and safety in the workplace, subject to certain procedures. *See* 29 U.S.C. §§ 655 (a), (b). Section 6(a) of the Act provided a two-year window for OSHA to promulgate binding standards for occupational health and safety where those standards were based on "established Federal standard[s]" and/or prevailing "national consensus standard[s]." 29 U.S.C. § 655(a). The Occupational Noise Exposure standard that was the subject of OSHA's recent proposed reinterpretation is one of these consensus standards. *See* 75 Fed. Reg. 64,217. Because they reflected a presumptive national consensus or other existing standards, the OSH Act did not impose additional procedural requirements on OSHA to promulgate them.

By contrast, Section 6(b) of the Act sets out a series of procedural requirements that OSHA must satisfy in promulgating new occupational safety and health standards outside that initial two-year window. *See* 29 U.S.C. § 655(b). The Act first defines such standards in § 3(8) to be those "reasonably necessary or appropriate to provide safe or healthful employment."[3] Both the courts and OSHA itself have read that provision to impose independent, substantive restrictions on the health and safety standards OSHA issues.

In promulgating such standards, the OSH Act requires OSHA to employ a hybrid form of rulemaking that is in key respects more rigorous than the typical notice-and-comment rulemaking under the Administrative Procedure Act. For example, after providing for publication in the Federal Register and the opportunity for written comment, the Act specifically permits "any interested person" to "file with the Secretary written objections to the proposed rule" and to "request[] a public hearing on such objections." 29 U.S.C. § 655(b)(2), (3). If a public hearing is requested, the Act requires the Agency to respond by "specifying a time and place for such hearing." 29 U.S.C. § 655(b)(3). OSHA's regulations implementing these provisions recognize that it should "provide more than the bare essentials of informal rulemaking," 29

[3] 29 U.S.C. § 652(8).

C.F.R. § 1911.15(b), and that, in particular, because "fairness may require an opportunity for cross-examination on crucial issues," 29 C.F.R. § 1911.15(a)(3), "[t]he presiding officer shall provide an opportunity for cross-examination" on such issues. 29 C.F.R. § 1911.15(b)(2). As OSHA itself has acknowledged, these procedures are designed to "to provide an opportunity for the public to cross-examine the agency on its scientific and economic assumptions and to build a record for court review."[4]

The OSH Act's substantive standards give OSHA significantly less discretion than many agencies enjoy under the APA.[5] For certain types of regulations – those "dealing with toxic materials or harmful physical agents" under § 6(b)(5) – the Act requires OSHA to use the "best available evidence" to "show, on the basis of substantial evidence, the need for the challenged regulation."[6] In addition, the courts have held that OSHA must establish a record showing that:

(1) There is a "significant risk of material harm" in the workplace;[7]

(2) The proposed standard substantially reduces or eliminates that risk;[8]

(3) The proposed standard is both technologically and economically feasible;[9] and

(4) The proposed standard is the most cost-effective means to substantially reduce or eliminate the risk.[10]

The Act also mandates that "[d]evelopment of standards under this subsection *shall be* based upon research, demonstrations, experiments, and such other information as may be appropriate,"

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[4] Letter from Assistant Secretary of Labor Charles Jeffress to Sen. Mike Enzi, reprinted in Inside OSHA, Vol. 7, No. 15 (July 24, 2000) at 2.

[5] *See AFL-CIO v. OSHA*, 965 F.2d 962, 970 (11th Cir. 1992) (courts "take a 'harder look' at OSHA's action than [they] would if [they] were reviewing the action under the more deferential arbitrary and capricious standard applicable to agencies governed by the Administrative Procedure Act").

[6] 29 U.S.C. § 655(b)(5); *Asbestos Info. Ass'n/N. Am. v. Reich*, 117 F.3d 891, 893 (5th Cir. 1997) (citing *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 653 (1980) ("*Benzene*")).

[7] *Benzene*, 448 U.S. at 641-42; *see also* 29 U.S.C. § 655(b)(5) (limiting standards to those that assure that no employee "will suffer material impairment of health or functional capacity even if such employee has regular exposure").

[8] *See Benzene*, 448 U.S. at 641-42.

[9] *See Am. Textile Mfgs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 n.31 ("*Cotton Dust*").

[10] *See id.* at 514 n.32.

as well as "the latest available scientific data in the field."[11] Were OSHA starting from scratch regulating occupational noise, these requirements would presumably govern its efforts.

However, even in addressing a standard issued under § 6(a), OSHA is bound by the limitations of § 3(8), as well as other restrictions that it recognizes are necessary to avoid a constitutional problem of excessive delegation. Having failed to convince federal courts that it could impose any restrictions it deemed appropriate,[12] in 1993 OSHA acknowledged that whether § 6(b)(5) applies or not, OSHA must choose a standard that "will substantially reduce a significant risk of material harm," one that is both economically and technologically feasible, and which "employs the most cost-effective protective measures."[13] In addition, OSHA must support its choice of standard with evidence in the rulemaking record and explain any inconsistency with prior agency practice.[14] Section 3(8) does not mandate "formal cost-benefit analysis," but OSHA itself has asserted that the Act requires OSHA to promulgate standards that "employ[] the most cost-effective protective measures."[15] This requirement, focused on the cost of implementing particular protective measures that the Agency proposes, as contrasted with other measures that may prove as effective, cannot be met without careful study and analysis, both of the asserted problem that the proposed measure seeks to address and of how effectively the proposed measure is tailored to address that problem.

II. "Reinterpreting" the Noise Standard

As the Subcommittee is doubtless aware, however, OSHA did not follow any of these procedures in proposing its enforcement policy change on occupational noise. Instead, OSHA promulgated for notice and comment what it called an interpretative rule addressing the existing noise standard. This so-called change in enforcement policy, however, would have reversed a fundamental aspect of the rule as it had been enforced for 25 years, and dramatically increased

[11] 29 U.S.C. § 655(b)(5) (emphasis added).

[12] *See Int'l Union, UAW v. OSHA*, 938 F.2d 1310, 1316-21 (D.C. Cir. 1991) ("*Int'l Union I*"). The D.C. Circuit held that OSHA's construction was so broad as to effect an unconstitutional delegation of legislative power to the Agency. *Id*. at 1321.

[13] *Int'l Union, UAW v. OSHA*, 37 F.3d 665, 668 (D.C. Cir. 1994) ("*Int'l Union II*") (quoting 58 Fed. Reg. 16612, 16614 (Mar. 30, 1993)).

[14] *See Int'l Union II*, 37 F.3d at 668.

[15] *Id.* at 668, 669 (quoting 58 Fed. Reg. 16,614, 16,621 (Mar. 30, 1993)).

employers' burdens under the standard, all without any consideration of what the change would cost, whether it was needed, or whether it would actually benefit worker health.

OSHA's noise standard requires that, where noise levels exceed certain thresholds, noise exposure be reduced to specified levels by using "feasible administrative or engineering controls," such as soundproofing machines and the like, or if such controls do not sufficiently reduce exposure, by the use of "personal protective equipment" such as earplugs. For over 25 years, OSHA acknowledges that it has enforced this provision by requiring use of engineering and administrative controls *only* if available personal protective equipment was ineffective in reducing workplace noise to acceptable levels, or if such controls could be implemented for a lower cost than personal protective equipment.[16] On October 19, 2010, however, OSHA proposed to reverse that settled interpretation. Purporting to reinterpret the phrase "*feasible* administrative or engineering controls," OSHA announced that it would require employers to implement any administrative or engineering controls that were technically possible, regardless of the cost. Only if doing so would essentially bankrupt the employer could the company resort to PPE to achieve the same reduction in exposure.

The impact of the change was breathtaking. Employers who had previously relied on earplugs and similar devices to reduce employees' exposure to OSHA-mandated levels would now be required to install new machines and equipment or alter its employee work schedules and positions, just to achieve *the same level* of noise exposure. Cost would be irrelevant unless it were so great as to literally put the company out of business. OSHA's primary legal justification for this shift is a 30-year-old Supreme Court decision addressing "feasibility" in the context of regulations promulgated under § 6(b)(5). In that case, *American Textile Manufacturing Institute, Inc. v. Donovan*, 452 U.S. 490 (1981), often referred to as the *Cotton Dust* case, the Supreme Court addressed § 6(b)(5)'s requirement that OSHA set standards to achieve *exposure levels* that prevent "material impairment" to worker health "to the extent feasible." In that context, the Court concluded that "to the extent feasible" meant "capable of being done." The Supreme Court was careful to note that its reasoning was limited to § 6(b)(5), which imposed a set of "separate and additional requirements" not applicable to standards issued under other sections of

[16] 75 Fed. Reg. 64,216, 64,217 (Oct. 19, 2010) (noting that since 1983 OSHA has "allowed employers to rely on a hearing conservation program based on PPE if such a program reduces noise exposures to acceptable levels and is less costly than administrative or engineering controls.").

the Act. More importantly, the Court's analysis addressed how far OSHA is required to reduce *exposure levels* under § 6(b)(5), not how OSHA requires employers to choose among various "feasible" means to reach a particular level of noise exposure.

Unlike § 6(b)(5), which requires standards stringent enough to ensure that "no employee will suffer material impairment,"[17] Section 3(8) authorizes standards "reasonably necessary or appropriate to provide safe or healthful employment."[18] The procedural safeguards written into § 6(b)(5) provide employers with some assurance that § 6(b)(5) standards, even if onerous, are based on sound science and otherwise justified. It does not follow that because standards promulgated under § 3(8) may permit a lower standard of protection, OSHA can create such standards without meeting any standards at all.

Notably, OSHA's reinterpretation of the noise standard flatly contradicted its prior understanding of its authority under the OSH Act. Defining the noise standard to require any engineering controls that are "capable of being done" eliminates any real concept of economic feasibility and disregards any need to show that the action will either "substantially reduce a significant risk of material harm" or "employ[] the most cost-effective protective measures" – both requirements that OSHA has asserted apply to all standards that it promulgates.[19]

III. A Solution in Search of a Problem

More fundamentally, OSHA's action on the noise standard was not based on any analysis – at least none shared publicly – showing a problem with the existing noise policy. As I have explained, § 6(b)(5) of the OSH Act, addressing standards for exposure to "harmful physical agents,"[20] requires OSHA to use the "best available evidence"[21] to "show, on the basis of substantial evidence, the need for the challenged regulation."[22] Section 3(8), defining health and safety standards generally, requires the standard to be "reasonably necessary or appropriate to

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[17] 29 U.S.C.§ 655(b).

[18] 29 U.S.C. § 652(8).

[19] 58 Fed. Reg. 16,612, 16,614 (Mar. 30, 1993); *see also Int'l Union II*, 37 F.3d at 668 (quoting 58 Fed. Reg. 16,614).

[20] 29 U.S.C. § 655(b)(5).

[21] *Id.*

[22] *Asbestos Info. Ass'n/N. Am.*, 117 F.3d at 893.

provide safe or healthful employment"[23] and the Supreme Court has read this to require that "the standard will substantially reduce a significant risk of material harm."[24] In the case of the new noise policy, OSHA addressed none of that. It made no effort at all to identify any existing problem that the new policy would solve. Instead, it reasoned that its 25-year-old policy was "clearly" inconsistent with a 30-year-old Supreme Court decision addressing a different issue.

To be sure, OSHA did speculate that engineering controls are more effective than PPE, but it offered no analysis, no data, no empirical evidence to support that or document any likely improvement to worker health, much less balance any hypothetical benefit against the new policy's very real costs to determine which approach is more cost-effective. OSHA's proposed reinterpretation did not suggest that workplace hearing loss cases have increased, either in number or severity, and OSHA did not provide any other information from which one could conclude that its longstanding approach has proven ineffective. To the contrary, hearing loss injuries have been decreasing—both in number and in incidence—since OSHA began requiring employers to keep records of them, as shown in Figures 1 and 2 below.

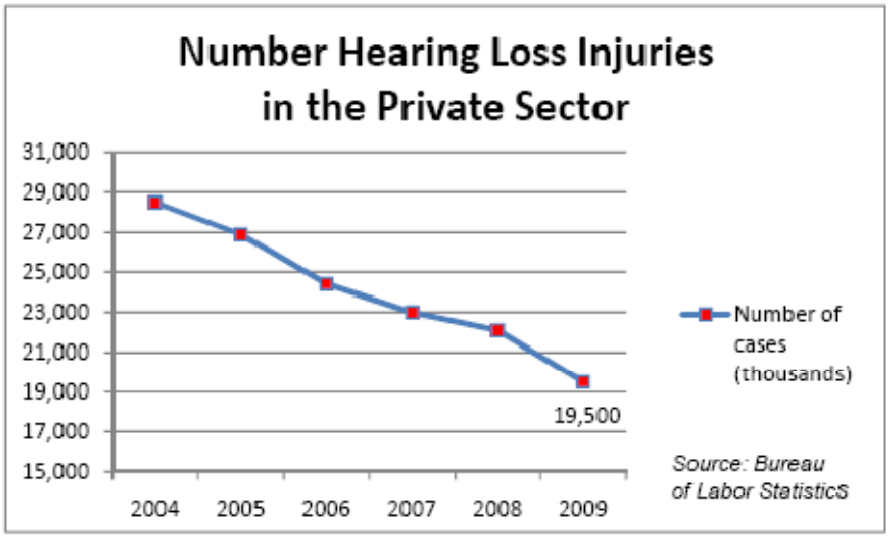

Figure 1—Hearing Loss Injuries have been declining steadily since being added to OSHA 300 Log form.

[23] 29 U.S.C. § 652(8).

[24] *See Benzene*, 448 U.S. at 641-42.

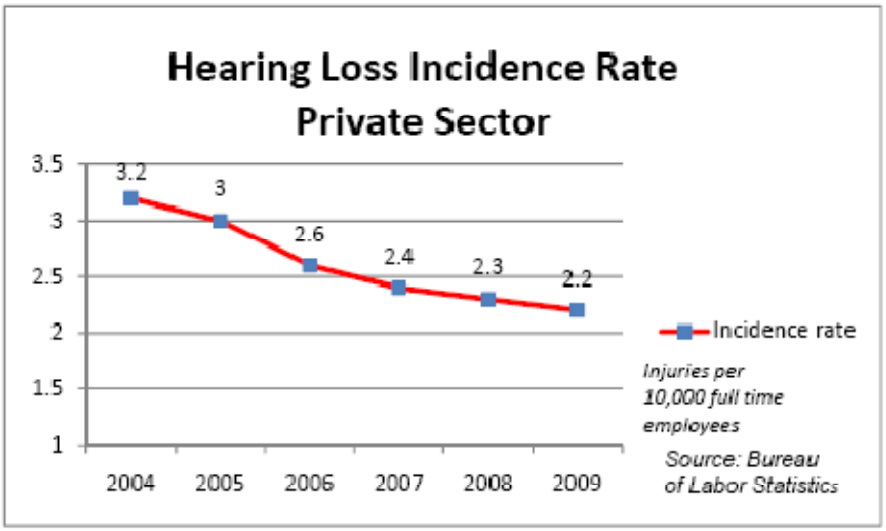

Figure 2—Hearing Loss Injury Incidence Rates have been declining steadily since being added to the OSHA 300 Log form.

These declines are particularly significant because non-work-related noise exposures have increased substantially over the same period that work-related hearing loss cases have declined. Bluetooth headsets and iPods have become so popular over the last decade that large numbers of Americans spend hours each day wired for sound. The increase in non-occupational exposure combined with the decrease in hearing loss cases suggests that employer efforts to control workplace noise exposure are particularly effective. Despite these apparent trends, OSHA's proposed reinterpretation of the Occupational Noise Exposure standard cited no data at all to justify a reinterpretation that would have imposed massive compliance costs.

Moreover, OSHA's cavalier approach to the cost of the noise standard violated its own policies, proposed and embraced by the D.C. Circuit to avoid a constitutional "non-delegation" problem from the absence of sufficient limits on agency discretion.[25] OSHA itself has recognized that it should, under the Act, choose the "most cost effective protective measures" to achieve the Act's goals.[26] Although OSHA has been unclear on whether this tenet flows from § 3(8) or other broader concepts in the Act,[27] regardless OSHA adopted it to avoid a constitutional defect under the non-delegation doctrine, which, as the Subcommittee knows, limits the degree to which Congress may delegate its lawmaking power to Executive Branch

[25] *See generally Int'l Union II*, 37 F.3d at 665.

[26] *Id.* at 668 (quoting 58 Fed. Reg. 16,614).

[27] *See Int'l Union II*, 37 F.3d at 668-69.

agencies. The "cost effective" limitation was not sufficient on its own to avoid that problem, but the D.C. Circuit did find it an important constraint on the agency by requiring the cheapest method to achieve a certain standard, or a more protective measure over an equally costly but less effective one.[28]

OSHA's proposed change to its noise policy, however, turned that straightforward and common-sense limitation on its head. Without any record to document the existence, scope, and severity of a problem with the existing noise problem, OSHA could make no assessment of whether a change was a cost-effective means to achieve its aims. To the contrary, OSHA disclaimed any intention to consider the cost of compliance, except to provide the meager concession that they would stop short – just short – of any engineering controls that would put the employer out of business. It simply announced that "engaging in cost-benefit analysis . . . thwarts the safety and health purposes of the OSH Act and the [Occupational Noise Exposure] standard."[29] This would be news to the D.C. Circuit panel that considered the cost-effectiveness constraint an important piece of OSHA's argument for the statute's constitutionality. That court decision demonstrates that the absence of formal cost-benefit analysis does not mean that OSHA may completely disregard compliance costs. Indeed, the limitations on OSHA's rulemaking adopted by the D.C. Circuit to avoid constitutional defects expressly require OSHA to tailor its choice of compliance measures in a cost-effective way.

Instead, OSHA's noise proposal would have required businesses to adopt every possible engineering control to reduce noise to the specified level, regardless of the cost and regardless of personal protective equipment's ability to achieve the same reduction far more cheaply, with the only defense that would justify non-compliance being that doing so would threaten an employer's very "ability to remain in business."[30] That is an astonishing proposal—all the more so coming in the form of an interpretation and not a proposed regulation. In the case of a large company, for example, OSHA's proposed reinterpretation could conceivably have forced the company to expend tens or hundreds of millions of dollars to upgrade machinery in a factory, or even to close the factory altogether, as long as the company itself would survive. In its proposed reinterpretation, OSHA offered no justification for, nor even revealed an awareness of, these

[28] *Id.* at 668.

[29] 75 Fed. Reg. 64,216, 64,219 (Oct. 19, 2010).

[30] 75 Fed. Reg. 64,216, 64,217 (Oct. 19, 2010).

potential consequences. OSHA's proposed reinterpretation sought to impose a dramatic regulatory change with potentially massive and far-reaching compliance costs, but OSHA neither considered those costs nor even provided evidence that the existing Occupational Noise Exposure standard fails to protect worker safety adequately.

OSHA's consideration of compliance costs as they compare to any benefits the change might have is all the more critical since the President issued Executive Order 13563 last month. That order sets the worthy goal of, among other things, "identify[ing] and us[ing] the best, most innovative, and least burdensome tools for achieving regulatory ends."[31] Moreover, the Administration has expressly recognized the importance and value of cost-benefit analysis in reaching that objective.[32] OSHA's disregard of compliance costs in interpreting the noise standard would flout these salutary and common-sense directives.

Any future effort OSHA may undertake to amend or replace the Occupational Noise Exposure standard must, at minimum, begin by demonstrating that the current standard is somehow inadequate and then analyze several regulatory approaches tailored to the specific dangers OSHA has documented, considering carefully the cost and efficacy of each approach. OSHA's now-withdrawn effort to reinterpret the Occupational Noise Exposure standard without taking these most basic steps ignored OSHA's own interpretation of its mandate, and represented an abdication of the Agency's fundamental obligation to protect American workers through prudent, reasonable regulation.

IV. MSDs: Another Example of Ill-Considered Regulation

OSHA's proposed rule regarding musculoskeletal disorders provides another example of imposing serious burdens on employers without an adequate consideration of their costs and other impacts. There, OSHA imposed what it tried to characterize as a simple recordkeeping change. It proposed to add an additional column on the OSHA Form 300 Log, used to report work-related injuries and illness, in order to record MSDs. To OSHA, this was an unobjectionable matter of requiring employers merely to check a box. In reality, OSHA defined MSDs so broadly that it encompassed any disorder of any tissue in the musculoskeletal system,

[31] Exec. Order No. 13,563, §1(a), 76 Fed. Reg. 3,821 (Jan. 18, 2011).

[32] *See* Memorandum from Cass R. Sunstein, Administrator, Office of Mgmt. & Budget, to Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, Re. Executive Order 13563, "Improving Regulation and Regulatory Review" at 5 (Feb. 2, 2011).

which includes numerous unrelated conditions many of which might be based entirely on subjective symptoms that cannot be verified medically, and significantly influenced by non-work related activities. Thus OSHA proposed to force employers to identify and report numerous conditions for which there are no objective criteria, no medically supportable basis for diagnosis, and no scientific consensus. Its action thus would have gone far beyond anything supportable under current scientific knowledge or capable of being justified by any meaningful criteria. Employers would have been responsible for reviewing even minor musculoskeletal discomforts to determine if they qualified to be reported, thus falling far short of OSHA's statutory mandate to require reporting of "deaths, injuries and illnesses….."[33]

Moreover, although in the case of MSDs OSHA at least attempted to analyze the cost of its proposal, it did so in a perfunctory and astoundingly unrealistic way, concluding that it would take the average employer only five minutes to read, understand, and implement the proposal, and an additional minute to navigate its complex and confusing definition of MSDs to determine whether any particular case qualified as such.[34] I have practiced law in this area for over 15 years, and I can assure the Subcommittee that it would take me longer than five minutes to read the proposal, understand it, and advise my clients as to how to comply with it. A small business owner, who does not employ legions of lawyers, would surely require substantially more time to understand and comply with the proposal, if he or she could do so at all.

Perhaps because it knew its estimates were facially unrealistic, OSHA also failed to consult with small business prior to promulgating its proposal, concluding, instead, that the proposal would have no "significant impact on a substantial number of small entities."[35] Its recent decision to pull back this proposal to seek greater input from small business is a tacit admission that its original assessment of the proposals impact was incorrect.

These are but two examples of regulatory action that should be of concern to the Subcommittee. In each of these cases, OSHA all but ignored the very real costs of its actions, and their potential impact on American business. It also attempted to impose additional requirements without any consideration whatsoever as to whether they were the least burdensome means to achieving their ends – or, indeed, to whether they would improve

[33] 29 U.S.C. § 657(c)(2).

[34] 75 Fed. Reg. 4,728, 4,736-37 (Jan. 29, 2010).

[35] 5 U.S.C. § 605(b).

employee health or safety in the first place. And, particularly in the case of the noise standard's reinterpretation, OSHA took these actions without even attempting to follow most of the substantive and procedural protections that the OSH Act mandates. If OSHA is correct that the law gives it the right to engage in these activities, the law should be changed. And, at a minimum, if misguided efforts such as these illustrate how OSHA intends to utilize its statutory authority, the Subcommittee should do all that it can to prevent OSHA from obtaining any additional regulatory authority.